

# **LEGITIMACY:**

## **Why the Framers of the Constitution Chose to Create the Electoral College**

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A new nation was in crisis. Barely six years after winning independence from the British Empire, the United States was on the brink of collapse. The alliance of sovereign states under the Articles of Confederation, by 1787, was disintegrating due to an inability to pay the nation's debts, runaway inflation, and a money supply shortage. Lacking a strong central government prevented the enforcement of policies that could rectify these problems. Worse, citizens were occasionally engaging in violent rebellion against state governments unable to meet their needs. “[U]nless the Union be organized efficiently & on Republican Principles,” James Madison wrote to Edmund Randolph, Governor of Virginia, on April 8, 1787, “...the partition of the Empire into rival & hostile confederacies, will ensue.”<sup>1</sup>

The states, except for Rhode Island, agreed to a Convention in Philadelphia in May 1787 to work out the problems between the states. Soon after the delegates arrived, Randolph introduced “The Virginia Plan,” largely designed by Madison, which proposed a strong centralized government based on republican principles. The plan used the political theories of Machiavelli and Montesquieu who believed government was most successful when “power should be a check to power.”<sup>2</sup> Three branches of government—legislative, executive, and judiciary—were recommended, each with unique roles but also with checks against the power of the other branches.

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<sup>1</sup> James Madison to Edmund Randolph, April 8, 1787, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-09-02-0197>. [Original source: *The Papers of James Madison*, vol. 9, *9 April 1786–24 May 1787 and supplement 1781–1784*, ed. Robert A. Rutland and William M. E. Rachal. Chicago: The University of Chicago Press, 1975, pp.368-371.]

<sup>2</sup> Charles-Louis de Secondat, baron de Montesquieu, *The Spirit of Laws* Vol. 1, ed. and trans. Thomas Nugent (London: J. Nourse and P. Vaillant, 1750), 214, accessed March 16, 2022, HathiTrust, <https://hdl.handle.net/2027/mdp.39015073768148>.

Deciding how to choose the executive took twenty-two days of debate, nearly one-fifth of the entire Convention.<sup>3</sup> The Framers wrestled with how to make the president accountable, independent, and representative by searching for the right balance among the mode of election, term of the executive, and the executive's re-eligibility for office. "A good case can be made," noted Jack Rakove, "that the design of the presidency proved the single most difficult task the Framers faced at Philadelphia..."<sup>4</sup>

The Electoral College, which the presidential selection process became known as, tasked state legislatures with selecting electors who would choose the president. If, however, no candidate earned a majority of electoral votes, the House of Representatives, by state, would choose from the top five candidates (reduced to the top three candidates by the Twelfth Amendment). A quirk with this process was clearly evident because "a person having a very small number of votes may be elected."<sup>5</sup> Knowing this seemed not to trouble the Framers. The government they created was representative, not majoritarian, and a candidate with fewer votes but broader support could still achieve the legitimacy needed to govern successfully.

Historians, lawyers, and political scientists have debated the wisdom of the Electoral College perhaps more than any other section of the Constitution. Most have found the Electoral College to be unfair. Scholars, such as George Edwards III, have heavily criticized the Electoral

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<sup>3</sup> George C. Edwards III, *Why the Electoral College is Bad for America*, 3rd ed. (New Haven, CT: Yale University Press, 2019), 102, accessed March 17, 2022, Amazon, <https://amazon.com/Why-Electoral-College-Bad-America/dp/030024388X/>.

<sup>4</sup> Jack N. Rakove, "Presidential Selection: Electoral Fallacies," *Political Science Quarterly* 119, no. 1 (Spring 2004): 26, accessed March 17, 2022. <https://www.jstor.org/stable/20202303>.

<sup>5</sup> David Robertson, *Debates and Other Proceedings of the Convention of Virginia, Convened at Richmond, on Monday the Second Day of June, 1788, for the Purpose of Deliberating on the Constitution Recommended by the Grand Federal Convention*, 2nd ed. (Richmond: Enquirer-Press, for Ritchie & Worsley and Augustine Davis, 1805), 350, Google Books, accessed March 23, 2022. <https://books.google.com/books?id=API0AQAAIAAJ&pg=PR1#v=onepage&q&f=false>.

College as “one that clearly violates fundamental tenets of political equality and majority rule.”<sup>6</sup> He believed the delegates at the Convention did not trust the people to elect the president and landed on the Electoral College as a nominating process which would then go to the legislature, who the delegates preferred to elect the president.

Others have claimed the Electoral College was a short-sighted political compromise. “To the extent that the Founding Fathers attempted to anticipate how the electoral college would work,” Lawrence D. Longley wrote, “they failed.”<sup>7</sup> The layering compromises the Framers made to arrive at the Electoral College system, Rakove wrote, “was only persuasive at the original moment of the constitutional foundation, as a necessary cost of reaching agreement...”<sup>8</sup> Not only was the Electoral College short-sided in its political expediency, it was also careless, according to some. John Roche, in noting the Electoral College was not well-conceived and thrown together at the last minute, wrote, “The future was left to cope with the problem of what to do with this Rube Goldberg mechanism.”<sup>9</sup>

A few scholars have disagreed, arguing the design of the Electoral College was deliberate, intentional, and solved significant concerns. “The Framers wanted a president who could govern *precisely* because he would have a sufficiently broad, nonparochial, nonsectional

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<sup>6</sup> Edwards III, *Why the Electoral College is Bad for America*, 101.

<sup>7</sup> Lawrence D. Longley, “The Electoral College,” *Current History* (Pre-1986) 67, no. 000396 (August 1974): 65, accessed March 16, 2022, <https://search-proquest-com.ezproxy1.apus.edu/scholarly-journals/electoral-college/docview/202922415/se-2?accountid=8289>.

<sup>8</sup> Rakove, “Presidential Selection: Electoral Fallacies,” 34.

<sup>9</sup> John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” in *The American Scene: Varieties of American History* Vol. 1, eds. Robert D. Marcus and David Burner, 154-172 (New York: Meredith Corporation, 1971), 167, Google Books, accessed March 17, 2022, [https://www.google.com/books/edition/The\\_American\\_Scene/-w\\_xPy-S3aEC?hl=en&gbpv=1](https://www.google.com/books/edition/The_American_Scene/-w_xPy-S3aEC?hl=en&gbpv=1).

base,” explained Judith A. Best.<sup>10</sup> Considering the difficulties, Shlomo Slonim noted the Electoral College was “quite remarkable for having combined all the salient features of the numerous plans proposed during the debate while having overcome the deficiencies of each.”<sup>11</sup> From these perspectives, the Framers seemed aware a candidate with the most votes might not necessarily be the best candidate.

While Best and Slonim have found the Electoral College to be agreeable, they have failed to explain why a candidate with fewer votes for president could achieve legitimacy. Few scholars have recognized how the Electoral College ensured the president was accountable, independent, and representative, balanced power between majority and minority factions, and remained faithful to republican political theory. Even though the Electoral College has evolved some over time, the principles that guided its design largely remain as does the legitimacy of a candidate with fewer votes earning the presidency.

The Greeks are credited with inventing democracy and the Romans with transforming it into republicanism but Niccolò Machiavelli was the first of the Renaissance to develop the theory of a triumvirate government that balanced power among three competing groups. Machiavelli believed humans were helplessly self-interested. In *Discourses on the First Decade of Titus Livius*, he wrote, “all men are bad, and will always, when they have free field, give loose to their evil inclinations...”<sup>12</sup> Rather than attempt to prevent wicked men from serving in

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<sup>10</sup> Judith A. Best, “Presidential Selection: Complex Problems and Simple Solutions,” *Political Science Quarterly* 119, no. 1 (Spring 2004): 41, accessed March 17, 2022, <https://www.jstor.org/stable/20202304>.

<sup>11</sup> Shlomo Slonim, “The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President,” *The Journal of American History* 73, no. 1 (June 1986): 51, accessed March 16, 2022, <https://www.jstor.org/stable/1903605>.

<sup>12</sup> Niccolò Machiavelli, *Discourses on the First Decade of Titus Livius*, Book I, trans. Ninian Hill Thomson (London: Kegan Paul, Trench & Co., 1883), Chapter 3, accessed March 16, 2022, Project Gutenberg, <https://www.gutenberg.org/cache/epub/10827/pg10827.html>

government, Machiavelli believed in utilizing their wickedness. Like a game of rock-paper-scissors, each branch of government would over-rule one other branch to balance and check each other's self-interest thus arriving at better solutions for the common good.

Charles-Louis de Secondat, baron de Montesquieu borrowed heavily from Machiavelli and, as a near-contemporary to the Framers, became a more significant influence. Like Machiavelli, Montesquieu recognized the importance of balancing the powers of a government such that "by the very disposition of things power should be a check to power."<sup>13</sup> The public, he believed, "ought to have no hand in the government but for chusing (sic) of representatives" who have "a right to put a stop to the enterprizes (sic) of the people, as the people have a right to oppose any encroachment of theirs."<sup>14</sup>

James Madison of Virginia, perhaps more than any other delegate, studied Machiavelli, Montesquieu, and past forms of government to formulate his views on how to correct the Articles of Confederation. His conclusions were used to form the "Virginia Plan," introduced by Virginia Governor Edmund Randolph at the beginning of the Constitutional Convention in Philadelphia. The plan consisted of three branches of government—legislative, executive, and judicial—each with the power to negate the others, as described by Montesquieu's principle that "power should be a check to power." Madison's proposed government was, as Montesquieu prescribed, representative of the people, but not directly elected by the people, so as to be "checks angst. the popular intemperance."<sup>15</sup>

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<sup>13</sup> Montesquieu, *The Spirit of Laws* Vol. 1, 214.

<sup>14</sup> Montesquieu, *The Spirit of Laws* Vol. 1, 221.

<sup>15</sup> Max Farrand, ed. *The Records of the Federal Convention of 1787*, vol. 1 (New Haven: Yale University Press, 1911), 360, accessed March 20, 2022, HathiTrust, <https://hdl.handle.net/2027/pst.000009929227>,

Forming the legislature took up the majority of the first two months of the Convention but laid the foundation for the Electoral College. An effective balance of power for the federal government required the delegates to understand where the minority voices were and how to elevate them so they had opportunities to counteract oppression by a majority. In *Federalist No. 51*, Madison explained that "by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable."<sup>16</sup> A variety of grouping of states and their representatives provided the necessary "many separate descriptions of citizens."

Two minority factions were clear to the delegates: slave states and small states. While geographically slave states were among the largest, their populations of freemen who would be allowed to vote were generally smaller than other states. Furthermore, as Madison argued, the slave states were as economically productive as other states and should therefore have equal power within the Federal government.<sup>17</sup> The solution became known as the "Three-Fifths Compromise." For purposes of representation in the House of Representatives, every five slaves would count as three persons thereby granting slave states a greater number of representatives than their free population would otherwise allow, providing for a check against the more populated states.<sup>18</sup>

Small states, too, were a minority faction that needed a greater influence in the government so they could adequately check the power of the large states. The delegates settled

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<sup>16</sup> James Madison, *Federalist No. 51*, in *The Federalist*, ed. Robert A. Ferguson (New York: Barnes & Noble Books, 2006), 290.

<sup>17</sup> Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 188.

<sup>18</sup> Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *The William and Mary Quarterly* 28, no. 4 (1971): 567, accessed April 24, 2022, <https://www.jstor.org/stable/1922187>.

on the "Connecticut Compromise" which provided equal representation for each state in the Senate, the upper chamber of the legislature.<sup>19</sup> This provided small states with oversized power in one house of the legislature they could use to check the power large states would wield in the other house. The Three-Fifths and Connecticut compromises were "designed to produce many minority factions and to use them to check one another, making it less likely that a majority faction will form."<sup>20</sup>

Solving representation in the legislature, the delegates turned to the executive in earnest on July 19, 1787. Their goal was to make the president accountable, independent of the other branches, and representative of the people. To achieve these three objectives, the delegates sought to find the right combination of how the president was elected, the length of the executive's term, and the number of terms of eligibility. Furthermore, the selection process needed to include a multitude of factions so that the candidate chosen would attain the greatest legitimacy.

Most of the delegates were reluctant to allow the people to directly elect the president. However, allowing the legislature to elect the president appeared to prevent the president's independence. As Madison explained, if the legislature were to elect the president, nothing "would be more immediately & certainly dangerous to public liberty."<sup>21</sup> To satisfy Madison's objection, Elbridge Gerry of Massachusetts proposed "If the Executive is to be elected by the

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<sup>19</sup> Todd Estes, "The Connecticut Effect: The Great Compromise of 1787 and the History of Small State Impact on Electoral College Outcomes," *The Historian* 73, no. 2 (Summer 2011): 256, accessed March 16, 2022, <http://www.jstor.org/stable/24455090>.

<sup>20</sup> Best, "Presidential Selection: Complex Problems and Simple Solutions," 50.

<sup>21</sup> James Madison, *The Journal of the Debates in the Convention Which Framed The Constitution of the United States May-September, 1787*, vol. 1, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1908), 6, accessed April 16, 2022, Project Gutenberg, <http://www.gutenberg.org/files/41095/41095-h/41095-h.htm>.



Legislature he certainly ought not to be re-eligible."<sup>22</sup> By the end of the first day of debate, the delegates seemed to agree on an election by electors appointed by the state legislatures, a term of six years, and in-eligible for subsequent terms.

Despite seeming to be in agreement, five days later, the delegates chose to reconsider the matter. William Houston of New Jersey opposed electors based "on the improbability, that capable men would undertake the service of Electors from the more distant States."<sup>23</sup> Others, such as Oliver Ellsworth of Connecticut, believed "The Executive... should be reelected if his conduct proved him worth of it. And he will be more likely to render himself, worthy of it if he be rewardable with it."<sup>24</sup> As the debate continued, no solution seemed available that would provide an election process with accountability, independence, and representativeness for the executive. By August 24, the debate had stalled and on August 31 was moved to the "Committee of Eleven," also known as the "Committee on Postponed Parts," to devise a solution.<sup>25</sup>

The committee's report on September 4 returned to the idea of selecting the president by electors, chosen by state legislatures, and eligibility to be re-elected. The number of electors for each state would equal to that of the state's number of representatives and senators, maintaining the balance of power established in the legislature by the Three-Fifths and Connecticut compromises. The candidate needed to win a majority, not a plurality, of the electoral votes to become president. If no candidate achieved a majority, the Senate would choose the president from the top five candidates. Avoiding both the people and the federal legislature as the voters

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<sup>22</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press, 1911), 57, accessed April 20, 2022, HathiTrust, <https://hdl.handle.net/2027/mdp.39015059969033>.

<sup>23</sup> Madison, *The Journal of the Debates in the Convention*, vol. 2, 40.

<sup>24</sup> Madison, *The Journal of the Debates in the Convention*, vol. 2, 42.

<sup>25</sup> Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2, 473.

pleased most of the delegates, but allowing the Senate to choose the President if a candidate did not receive a majority of the electoral votes was undesirable. In the first place, "nineteen times in twenty the President would be chosen by the Senate," which would lead to "the danger of cabal and corruption" since the Senate would provide consent to treaties and Supreme Court Justice appointment made by the president.<sup>26</sup> Secondly, the Senate was tasked with trying a President on articles of impeachment brought by the House of Representatives and, if it had selected the President, could not be trusted to be impartially judges.

Finally, a solution emerged from Roger Sherman of Connecticut. Rather than the Senate choosing the president if none of the candidates gained a majority of electors, Sherman proposed that the House of Representatives, by state delegation, choose the President. This removed the presidential selection from the potential of corruption with the Senate, but, like the composition of the Senate, brought the small states into balance with the large states. Accordingly, a variety of factions would be part of selecting the president, providing greater assurance of the public's acceptance of the outcome.

George Mason, both during the Constitutional Convention and the Virginia Ratifying Convention, was one of the few who recognized that a candidate with fewer votes could be elevated to the presidency through the Electoral College process.<sup>27</sup> While it was possible few had as keen an eye as Mason, it was more likely that this curious quirk was not a problem at all. Republican principles of representative government and separation of powers were guidelines used in the formation of the three branches of government and the Electoral College. Multiple

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<sup>26</sup> Madison, *The Journal of the Debates in the Convention*, vol. 2, 301.

<sup>27</sup> Robertson, *Debates and Other Proceedings of the Convention of Virginia*, 350.

factions were created and pitted against each other throughout the steps of the process for selecting a president. If, as Mason claimed, "nineteen times in twenty the President" would not achieve a majority from the electors and then the legislature elected one of the candidates with fewer votes, almost none of the Constitution's opponents seemed troubled by the possibility.

The reason few were concerned by a candidate with few votes in the electoral college becoming president was the understanding that government legitimacy hinged on preventing minority oppression. Machiavelli believed man incapable of benevolence and so only the effect of wickedness could be contained, not its causes. Madison, in his study of governments, agreed. What must be done, then, was that "the majority... must be rendered, by their number and local situation, unable to connect and carry into effect schemes of oppression."<sup>28</sup> A democracy, he wrote, "can admit no cure for the mischiefs of faction."<sup>29</sup> A republic, however, with legislators representing large groups of citizens, "you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens..."<sup>30</sup>

In *Federalist No. 68*, Alexander Hamilton noted another problem the Electoral College solved which was the danger of plurality. The Framers could have simply provided that the candidate with the most electoral votes become president but Hamilton warned "it might be unsafe to permit less than a majority to be conclusive..."<sup>31</sup> The candidate with the most votes, but not a majority, might represent a faction that the majority had rejected and not viewed as

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<sup>28</sup> James Madison, *Federalist No. 10*, in *The Federalist*, ed. Robert A. Ferguson (New York: Barnes & Noble Books, 2006), 55.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, 57-58.

<sup>31</sup> Alexander Hamilton, *Federalist No. 68*, in *The Federalist*, ed. Robert A. Ferguson (New York: Barnes & Noble Books, 2006), 378.

legitimate. However, by having the House of Representatives, by state, which granted greater weight to minority factions (small states and slave states), provide the decisive vote, "affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in a eminent degree endowed with the requisite qualifications."<sup>32</sup> A candidate with fewer votes may be one who had greater acceptance by a majority of states and therefore, Hamilton contended, was "endowed with the requisite qualifications."

The Framers constructed the Electoral College without surrendering republican principles or their goals for electing a president who would be accountable, independent, and representative. Today, the process appears to be a cumbersome Rube Goldberg machine and, because a candidate with few votes could become president, undemocratic. Yet, despite historians panning the Framers for violating majority rule, failing to anticipate how the Electoral College would work, or giving up on a better solution, the Convention delegates created a successful institution for electing the president that has remained largely unchanged since its conception.

The Framers did not abandon fairness with the Electoral College. The Constitution created a republic, not a democracy. The federal government divided the country into factions that worked against each other but created greater liberty for all. Majorities in legislation and presidential elections were only achievable when diverse factions agreed which decreased the chances that minority factions could be oppressed. A presidential candidate with fewer electoral votes could therefore be preferred because what mattered for governing successfully was an

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<sup>32</sup> Ibid.

agreement by the public on the legitimacy of that president. That legitimacy was achieved when all factions believed they had a voice in the process.

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