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## Preface

I was primed to delve into electoral college problems when controversy started to swirl around the 2000 presidential election. Like many Americans I follow the world of political practice with substantial interest. No doubt in part because of that, my scholarly energies had migrated over the years from constitutional law and theory to the larger democratic setting of which constitutional law is a part. This had led to a book project in which I advanced an explanatory framework for understanding a number of “puzzles” of American democracy. That project was winding down as the election controversy was heating up. The electoral college played no particular role in that earlier scholarly effort, but the more public face of presidential “elections” did. As the election drama unfolded, it quickly became apparent that a host of electoral college issues were hiding in the shadows of the developing controversy, and that political insiders were paying attention to those issues, while most of the rest of us were not. I was ready for a new challenge, and the election seemed to serve one up that was at once close to my scholarly interests and brand new.

Actually more than one. Like many constitutional scholars, I was drawn as well to the role that the U.S. Supreme Court assumed in the 2000 election and began work on the possibility that the Supreme Court had gravitated to a new conception of its role in American government. I may well return to that effort one day. But it became increasingly apparent that the electoral college issues were fully as important and engaging as the role the Court had played, but considerably less attended to. This relative neglect of the electoral college is actually widespread and longstanding. Certainly in America’s law schools, judicial review takes center stage, while the electoral college barely surfaces. My hunch is

that students in most constitutional law courses never even hear the phrase “electoral college” uttered.

And once my attention was directed there, I found there was fertile ground for creative thinking, no doubt in good part because of the prior neglect. Jim Speta of the Northwestern Law School faculty came up with a suggestion for an academic conference on the election, and I eagerly joined with Jim and others on a planning committee, taking special interest in the electoral college. The conference was held at various locations at Northwestern University’s two campuses in January of 2001. Attention had been lavished on the fact that the “winner” of the nationwide popular vote had lost the election. In thinking about this, I formulated an idea for instituting a popular election for president without going through the difficult process of constitutional amendment to abolish the electoral college. I presented this novel (as far as I can tell) idea as part of a panel on the electoral college chaired by Patricia Conley of the Northwestern political science department, and consisting of electoral college scholars David Abbott, Judith Best, and Nelson Polsby. Anyone who knows that group will not be surprised that I had my idea sorely tested. I later published two articles about the idea, hopefully refined because of the conference discussions. And since that time, there have seemingly been few waking moments when I haven’t been thinking—and learning—about the electoral college.

My interest has certainly been fed by the fact that electoral college mysteries are so neglected. The field is not entirely unplowed, of course, but given the relative importance of the subject, the existing literature is astoundingly sparse. I found ample room for creativity. Thus the election’s close electoral college tally suggested the possibility of a tie vote, given that there is an even number of electors. The preexisting literature had basically ignored that possibility, and I published an article, and a subsequent oped piece, on the tie possibility—including a rather simple solution. In the several electoral college articles I published I presented nonconstitutional solutions to the problems I identified, and I found myself increasingly intrigued by the importance in the electoral college context of finessing the process of constitutional amendment. The possibilities in that realm had also been essentially ignored in the preexisting literature. Once I was thinking in that vein, yet other ideas for important reforms with nonconstitutional solutions occurred to me, and I easily concluded that there was a book to be written with nonconstitutional electoral college reform as its organizing theme.

Portions of this book have appeared (or will have appeared) in earlier articles, three in *The Green Bag*, 2d series (*Popular Election of the President Without a Constitutional Amendment*, 4 *The Green Bag*, 2d ser. 241 [2001]; *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 *The Green Bag*, 2d ser. 141 [2002]; and *The Peril that Lurks in Even Numbers: Selecting the President*, 7 *The Green Bag* 2d ser. 113 [2004]), and one in the *Northwestern Law Review* (tentatively titled “The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President,” which will be part of a 100th anniversary volume of the *Review*, coming out in late 2005 or early 2006). I am grateful to those publications for permission to adapt the content of those earlier articles.

Among the useful conversations (including by email) I have had on the electoral college with friends and colleagues at Northwestern, at Brooklyn Law School, where I spent the 2004–5 academic year as a visiting professor, and on the fly, I think particularly of those with Ronen Avraham, Steve Calabresi, Greg Caldeira, Bob Chira, Neil Cohen, Charlotte Crane, Shari Diamond, Paul Edelman, Dan Farber, Ken Manaster, Janice Nadler, Mike Paulsen, Rick Pildes, John McGinnis, Michel Rosenfeld, Stephen Siegel, Paul Sracic, Emerson Tiller, and Gordon Wood. In addition, I presented workshops on various aspects of the project at several law schools: Northwestern, Brooklyn, NYU, and Hofstra. The discussions at those events were uniformly stimulating and informative. My thanks also go to Jim McMaster of the Northwestern Law School Library staff who was very helpful in corralling obscurities for me. Student research assistants at Northwestern (the law school and the college) and Brooklyn have also been of great assistance. These include Ben Aderson, Tara Croft, Dylan Hendricks, Joo Hui Kim, Dietrich Knabe, Riya Angela Kuo, Stephanie Lackey, Erica Razook, Joe Russell, Jim Stein, and David Winters.

This is, in short, anything but a one-man effort. Still, the usual caveat about remaining errors being mine is especially required. I was initially surprised at the number of rather basic errors about the electoral college that appear in the existing literature, and I have pointed many of them out in the text and notes. As the project progressed, however, I became increasingly understanding of how those errors might have come about. The ins and outs of the electoral college are exceedingly complex. Obviously I have tried to avoid basic errors as I have probed more subtle dimensions of the college. But I do appreciate that opportunities for error abound.

Finally, my very great thanks go out to Brooklyn Law School, for the support given during my visit there, and to the Northwestern University School of Law and its Julius Rosenthal Fund. Northwestern has been my academic home not only during the years of this project, but for more than thirty-five years now. This effort is in a real sense the product of lessons learned over that entire span of time.