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# THIRD-PARTY AND INDEPENDENT PRESIDENTIAL CANDIDATES: THE NEED FOR A RUNOFF MECHANISM

Edward B. Foley\*

## INTRODUCTION

The 2016 presidential election has been like no other. However it ends up, it has been marked by the singularly dispiriting fact that the two major party nominees have the highest unfavorable ratings of any presidential candidates in history.<sup>1</sup> This environment, one would think, would be particularly auspicious for a third-party or independent candidate, but the electoral system is structured in a way that is so disadvantageous to any candidate other than the two major-party nominees that a serious third-party or independent challenger has yet to materialize.

To be sure, as of this writing, the Libertarian candidate Gary Johnson is polling significantly higher than any third-party or independent candidate since Ross Perot.<sup>2</sup> Jill Stein, the Green Party candidate, is also hovering

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1. See, e.g., Philip Rucker, *These 'Walmart Moms' Say They Feel 'Nauseated' by the Choice of Clinton or Trump*, WASH. POST (Aug. 10, 2016), [https://www.washingtonpost.com/politics/these-walmart-moms-say-they-feel-nauseated-by-the-choice-of-clinton-or-trump/2016/08/10/d475dc82-5eec-11e6-af8e-54aa2e849447\\_story.html](https://www.washingtonpost.com/politics/these-walmart-moms-say-they-feel-nauseated-by-the-choice-of-clinton-or-trump/2016/08/10/d475dc82-5eec-11e6-af8e-54aa2e849447_story.html) [https://perma.cc/VN3Y-6QC2]. One woman said, "It's like choosing which arm to cut off." *Id.*

2. RealClearPolitics aggregates the most recent polls. See *General Election: Trump vs. Clinton vs. Johnson vs. Stein*, REALCLEARPOLITICS, [http://www.realclearpolitics.com/epolls/2016/president/us/general\\_election\\_trump\\_vs\\_clinton\\_vs\\_johnson\\_vs\\_stein-5952.html](http://www.realclearpolitics.com/epolls/2016/president/us/general_election_trump_vs_clinton_vs_johnson_vs_stein-5952.html) (last visited Nov. 19, 2016) [https://perma.cc/9XFM-WPSA]. In early August, the Commission on Presidential Debates instructed venues to prepare for the possibility that a third candidate might reach the 15 percent threshold in polling that would trigger the inclusion of that candidate in the debates. See Hadas Gold, *Clinton-Trump Debate Sites Plan for a Third Podium*, POLITICO (Aug. 9, 2016), <http://www.politico.com/story/2016/08/debates-clinton-trump-johnson-stein-226806> [https://perma.cc/8WRS-FVRY]; see also Josh Katz, *Can Gary Johnson, the Libertarian Nominee, Swing the Election?*, N.Y. TIMES (Aug. 4, 2016), [http://www.nytimes.com/2016/08/04/upshot/can-gary-johnson-the-libertarian-nominee-swing-the-election.html?\\_r=2](http://www.nytimes.com/2016/08/04/upshot/can-gary-johnson-the-libertarian-nominee-swing-the-election.html?_r=2) [https://perma.cc/T8XT-LYNM].

around 5 percent in the polls<sup>3</sup>—which is roughly twice as much as the 2.7 percent of the national popular vote that Ralph Nader, the Green Party candidate in 2000, ended up getting.<sup>4</sup> In August, there was also the late entry of independent Evan McMullin, a former CIA officer, to be an alternative for Republicans who refuse to vote for Donald Trump but also could not bring themselves to cast a vote for Hillary Clinton.<sup>5</sup>

But no high-profile alternative to Trump and Clinton ever emerged, despite the persistent speculation throughout the spring and early summer that one would. Many in the “never Trump” movement urged Mitt Romney to run as an independent.<sup>6</sup> But he refused to do so, as did Condoleezza Rice and Senator Ben Sasse of Nebraska.<sup>7</sup>

It was widely reported that Michael Bloomberg seriously considered entering the presidential election as an independent, but he ultimately decided against doing so because the only realistic role he saw for himself was being a “spoiler” who siphoned votes away from Hillary Clinton, thus handing the White House to Donald Trump, a result Bloomberg very much wished to

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3. Bill Scher, *Can the Green Party Win with ‘Jill, Not Hill’?*, POLITICO (Aug. 6, 2016), <http://www.politico.com/magazine/story/2016/08/jill-stein-2016-hillary-clinton-republicans-214146> [https://perma.cc/RCA5-JQB7].

4. 1 CQ PRESS, GUIDE TO U.S. ELECTIONS 347 (6th ed. 2010).

5. See Jamie Lovegrove, *Ex-CIA Officer Running for President Will Sue Texas to Get on Ballot*, DALL. MORNING NEWS (Aug. 16, 2016), <http://www.dallasnews.com/news/2016-presidential-election/2016/08/16/months-deadline-independent-presidential-hopeful-willsue-texas-ballot-access> [https://perma.cc/C2VP-ESU5]; Julian Routh, *Independent Evan McMullin Plots His Long-Shot Strategy*, WALL ST. J. (Aug. 16, 2016), <http://www.wsj.com/articles/independent-evan-mcmullin-plots-his-course-against-the-odds-1471382783> [https://perma.cc/EVV2-8ZB6].

6. See Robert Costa, *Mitt Romney Met Privately with William Kristol, Who Is Leading the Effort to Draft an Independent Candidate*, WASH. POST (May 6, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/05/06/mitt-romney-met-privately-with-william-kristol-who-is-leading-the-effort-to-draft-an-independent-bid/> [https://perma.cc/L4AS-H2MM]; Reihan Salam, *Mitt Romney Should Run for President as a Third-Party Candidate*, SLATE (Mar. 11, 2016), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/03/mitt\\_romney\\_should\\_run\\_for\\_president\\_as\\_a\\_third\\_party\\_candidate\\_seriously.html](http://www.slate.com/articles/news_and_politics/politics/2016/03/mitt_romney_should_run_for_president_as_a_third_party_candidate_seriously.html) [https://perma.cc/K923-WD6Z]; see also Philip Bump, *Here’s Who Would Support Mitt Romney over Donald Trump and Hillary Clinton*, WASH. POST (May 23, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/23/heres-who-would-support-mitt-romney-over-donald-trump-and-hillary-clinton/> [https://perma.cc/X8ML-HKXX].

7. See Philip Rucker & Robert Costa, *Inside the GOP Effort to Draft an Independent Candidate to Derail Trump*, WASH. POST (May 14, 2016), [https://www.washingtonpost.com/politics/inside-the-gop-effort-to-draft-an-independent-candidate-to-derail-trump/2016/05/14/1b04682e-1877-11e6-924d-838753295f9a\\_story.html](https://www.washingtonpost.com/politics/inside-the-gop-effort-to-draft-an-independent-candidate-to-derail-trump/2016/05/14/1b04682e-1877-11e6-924d-838753295f9a_story.html) [https://perma.cc/MT8D-FC38]; see also Matt Dixon, *GOP Donors Pushing Condoleezza Rice to Run Independent Campaign*, POLITICO (Mar. 10, 2016), <http://www.politico.com/states/florida/story/2016/03/gop-donors-pushing-condoleezza-rice-to-run-independent-campaign-032234> [https://perma.cc/8UAL-T9BH]; Joseph Morton, *Action Group Wants Sasse to Launch Third-Party Challenge*, OMAHA WORLD-HERALD (May 11, 2016), [http://www.omaha.com/edition/sunrise/articles/action-group-wants-sasse-to-launch-third-party-challenge/article\\_050e913c-2b4e-54ee-b8dd-2dc72112cd71.html](http://www.omaha.com/edition/sunrise/articles/action-group-wants-sasse-to-launch-third-party-challenge/article_050e913c-2b4e-54ee-b8dd-2dc72112cd71.html) [https://perma.cc/C9YL-S6YP].

avoid.<sup>8</sup> Bloomberg ended up endorsing Clinton, and eviscerating Trump, in a much-heralded speech at the Democratic National Convention.<sup>9</sup>

Bloomberg would have been an interesting and serious candidate. A former mayor of New York City, with a reputation as a successful administrator, Bloomberg would have presented himself as a middle-of-the-road alternative without the negative baggage that weighed down both Trump and Clinton. This Article is, emphatically, not arguing that Bloomberg would have been a preferable alternative to the two major-party nominees. Rather, the argument here is that the electoral system is defective insofar as a serious candidate like Bloomberg cannot enter the race without the risk of becoming a spoiler.<sup>10</sup> Instead, the system should be designed so that the American electorate can take a close and careful look at a Bloomberg-like candidate and decide whether that candidate deserves a shot at beating the two major-party nominees. If not, then the race can go back to a head-to-head matchup between the Democrat and Republican, without any spoiler situation having occurred. By contrast, however, if the American electorate actually thinks the Bloomberg-like independent is preferable to either of the two major-party candidates, then the Bloomberg-like independent should be able to displace the inferior major-party candidate and have a head-to-head matchup against the remaining major-party candidate.

Consider what 2016 might have looked like if this better electoral system had been in place. Bloomberg then could have entered the race without risking being a spoiler. In a three-way race—Bloomberg, Clinton, and Trump—Bloomberg might have fizzled out, leaving a two-way race between Clinton and Trump. Since that is essentially how the election ended up

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8. Maggie Haberman & Alexander Burns, *Michael Bloomberg Says He Won't Run for President*, N.Y. TIMES (Mar. 7, 2016), <http://www.nytimes.com/2016/03/08/us/politics/michael-bloomberg-not-running-for-president.html> [https://perma.cc/A2HA-QY9P]. Bloomberg explained his decision in a comment on his own website. Michael R. Bloomberg, *The Risk I Will Not Take*, BLOOMBERG VIEW (Mar. 7, 2016), <https://origin-www.bloombergview.com/articles/2016-03-07/the-2016-election-risk-that-michael-bloomberg-won-t-take> [https://perma.cc/Q67C-TPR9].

9. Ron Fournier, *Bloomberg's Case Against Trump*, ATLANTIC (July 27, 2016), <http://www.theatlantic.com/politics/archive/2016/07/bloombergs-case-against-trump/493367/> [https://perma.cc/KT22-UG6K]; see also Philip Bump, *Donald Trump Now Hates Michael Bloomberg Because Bloomberg Was Mean to Him*, WASH. POST (July 29, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/29/donald-trump-now-hates-michael-bloomberg-because-bloomberg-was-mean-to-him/> (“One of the more effective speeches during the Democratic convention came from former New York City mayor Michael Bloomberg.”) [https://perma.cc/52AV-564Y]; *Ex-NYC Mayor Bloomberg: 'Richest Thing About Donald Trump Is His Hypocrisy'*, CHI. TRIB. (July 27, 2016), <http://www.chicagotribune.com/news/nationworld/politics/ct-michael-bloomberg-hillary-clinton-donald-trump-20160727-story.html> [https://perma.cc/3JD9-E457]; Emily Ngo, *Michael Bloomberg on Trump: 'I Know a Con When I See One'*, NEWSDAY (July 27, 2016), <http://www.newsday.com/long-island/politics/bloomberg-assails-trump-saying-i-know-a-con-when-i-see-one-1.12101800> [https://perma.cc/SV5P-E65W].

10. For a discussion of the “spoiler effect” and its role in designing electoral systems, see WILLIAM POUNDSTONE, *GAMING THE VOTE: WHY ELECTIONS AREN'T FAIR (AND WHAT WE CAN DO ABOUT IT)* 59–91 (2008), and see also MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* 1096–97 (2d ed. 2015), and KEENA LIPSITZ, *COMPETITIVE ELECTIONS AND THE AMERICAN VOTER* 162 (2011).

anyway, the country would have been no worse off for having had a chance to consider Bloomberg as an alternative. But suppose, however, with Trump's candidacy spinning out of control in a series of unacceptable comments (as it appeared to do in early August),<sup>11</sup> the American electorate might have preferred a head-to-head matchup between Bloomberg and Clinton, rather than one between Trump and Clinton. Maybe Clinton would have beaten Bloomberg in that head-to-head matchup. That is fine; that is a democratic choice reflecting the preference of the electorate. But maybe Bloomberg would have beaten Clinton. We will never know, because the actual system in place was not designed to enable the American electorate to have that choice. In this respect, the existing system is deficient. It deprives the American electorate of an option it should have. The purpose of this Article is to offer a repair for this deficiency.

#### I. A BRIEF HISTORY OF THIRD-PARTY AND INDEPENDENT PRESIDENTIAL CANDIDATES

The authors of the U.S. Constitution, when designing the Electoral College system for presidential elections, insisted on avoiding a situation in which a candidate won the presidency with less than a majority of the votes. Article II of the Constitution explicitly states: "The Person having the greatest Number of Votes shall be President, *if such Number be a Majority of the whole Number of Electors appointed.*"<sup>12</sup> Article II then goes on to provide that "if no Person have a Majority," then the House of Representatives shall choose among the top five vote getters.<sup>13</sup> In making this choice, however, the House votes by a special procedure in which each state's delegation of Representatives gets one vote.<sup>14</sup> Moreover, in keeping with its insistence that the winner of the presidential election receive majority support, Article II

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11. After the Democratic convention, Trump attacked the parents of a Muslim soldier who died fighting for his country. See Alexander Burns, Maggie Haberman & Ashley Parker, *Donald Trump's Confrontation with Muslim Soldier's Parents Emerges as Unexpected Flash Point*, N.Y. TIMES (July 31, 2016), <http://www.nytimes.com/2016/08/01/us/politics/khizr-khan-ghazala-donald-trump-muslim-soldier.html> [https://perma.cc/GMF5-EFE8]. Trump followed that with, among other things, suggesting that "Second Amendment people" could pursue their own remedy to prevent Hillary Clinton from appointing justices on the Supreme Court. Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests 'Second Amendment People' Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <http://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> [https://perma.cc/L7BB-S68N]. Trump also accused President Obama of being the "founder of ISIS." Nick Corasaniti, *Donald Trump Calls Obama 'Founder of ISIS' and Says It Honors Him*, N.Y. TIMES (Aug. 9, 2016), <http://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> [https://perma.cc/G7G2-6K93]. Whether cause or coincidence, as Trump continued to make these inflammatory statements, his support in the polls dropped precipitously. See Gregory Krieg, *Donald Trump's 27-Day Spiral: From Convention Bounce to Campaign Overhaul*, CNN (Aug. 18, 2016), <http://www.cnn.com/2016/08/17/politics/donald-trump-post-convention-controversy-polls-shakeup/> [http://perma.cc/Z3US-BXTQ].

12. U.S. CONST. art. II, § 1, cl. 3 (emphasis added).

13. *Id.*

14. *See id.*

expressly adds that “a Majority of all the States shall be necessary to a Choice.”<sup>15</sup>

When the election of 1800 caused a genuine constitutional crisis<sup>16</sup>—because partisanship prevented breaking the Electoral College tie between Thomas Jefferson and his running mate Aaron Burr, threatening the failure to elect a President by Inauguration Day (the Federalist party, preferring Burr to Jefferson, used its power in the House to block Jefferson’s election)—Congress responded with the Twelfth Amendment. This requires separate Electoral College votes for Vice President rather than making the Electoral College runner-up the Vice President, as the original Constitution did.<sup>17</sup> But the Twelfth Amendment retained the requirement that the President win a *majority* of Electoral College votes in order to avoid the election devolving upon the House:

The person having the greatest Number of votes for President, shall be the President, *if such number be a majority of the whole number of Electors appointed*; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.<sup>18</sup>

The Twelfth Amendment retains the rule that, if the choice of the President falls to the House, then the House votes by the special procedure of each state’s delegation of Representatives having one vote.<sup>19</sup> The Twelfth Amendment also retains the requirement that “a majority of all the states shall be necessary to a choice.”<sup>20</sup>

The only time that a presidential election went to the House under the Twelfth Amendment because no candidate won a majority of Electoral College votes was in 1824 (the election of 1800 went to the House because of the Jefferson-Burr tie, with both of them having an Electoral College majority).<sup>21</sup> Andrew Jackson won the most Electoral College votes in 1824, a plurality of ninety-nine, with John Quincy Adams receiving eighty-four, followed by William Crawford with forty-one, and Henry Clay with thirty-seven.<sup>22</sup> As a result of an alliance between Adams and Clay, which some

15. *Id.*

16. *See generally* SUSAN DUNN, *JEFFERSON’S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004); EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN* (2007); JAMES ROGER SHARP, *THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE* (2010).

17. U.S. CONST. amend. XII (“The Electors . . . shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President.”). *See generally* TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804* (1994).

18. U.S. CONST. amend. XII (emphasis added).

19. *See id.*

20. *Id.*

21. *See generally* DONALD RATCLIFFE, *THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824’S FIVE-HORSE RACE* (2015).

22. *Id.* at 279.

then and since have called “a Corrupt Bargain,”<sup>23</sup> the House awarded the presidency to Adams even though he received fewer popular votes as well as Electoral College votes than Jackson.<sup>24</sup>

Since then, the presence of a significant third-party or independent candidate has never prevented one of the two major-party candidates from achieving an Electoral College majority. This fact, however, does not mean that third-party or independent candidates have not played a decisive role in determining which of the two major-party candidates achieves that Electoral College majority. On the contrary, in more elections than most Americans realize, a third candidate has caused the winner of the presidency to be a candidate who would *not* have won if that third candidate had not been in the race. In other words, if the race had been between only the two leading candidates, then the winner would have been the opposite of the candidate who actually reached the White House.<sup>25</sup>

#### A. Election of 1844

The first of these opposite-outcome elections occurred in 1844.<sup>26</sup> Although James Polk defeated Henry Clay by 170–105 Electoral College votes,<sup>27</sup> the election also involved James Birney as the candidate of the abolitionist Liberty Party. Polk was a proslavery Democrat, and Clay a moderate abolitionist Whig. Birney won votes that, if he had not been in the race, would have gone to Clay. Polk beat Clay in New York by only 5,106 votes.<sup>28</sup> Birney received 15,812 votes in New York.<sup>29</sup> There is little doubt that Clay would have won New York but for Birney’s candidacy. And if Clay indeed had won New York, then Clay—not Polk—would have had an Electoral College majority of 141–134.<sup>30</sup>

The 1844 presidential election, moreover, turned out to be one of the most consequential in U.S. history. Polk, who espoused Manifest Destiny, instigated the Mexican-American War to achieve the annexation of Texas and the westward expansion of the United States. Clay, by contrast, favored negotiation with Mexico rather than war. If Clay had won, the whole pace and outcome of westward expansion would have been different, with potential implications for the status of Native Americans as well as the circumstances leading up to the Civil War.

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23. For a discussion of the “Corrupt Bargain,” see *id.* at 229–57.

24. See 1 CQ PRESS, *supra* note 4, at 755, 845.

25. For an excellent discussion of these elections, see generally POUNDSTONE, *supra* note 10.

26. See generally JOHN BICKNELL, *AMERICA 1844: RELIGIOUS FERVOR, WESTWARD EXPANSION, AND THE PRESIDENTIAL ELECTION THAT TRANSFORMED THE NATION* (2015); MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* (1999); ROBERT W. MERRY, *A COUNTRY OF VAST DESIGNS: JAMES K. POLK, THE MEXICAN WAR, AND THE CONQUEST OF THE AMERICAN CONTINENT* (2009).

27. 1 CQ PRESS, *supra* note 4, at 286; POUNDSTONE, *supra* note 10, at 61.

28. 1 CQ PRESS, *supra* note 4, at 760.

29. *Id.*

30. See Sean Wilentz, *The Bombshell of 1844*, in *AMERICA AT THE BALLOT BOX: ELECTIONS AND POLITICAL HISTORY* 36, 54–55 (Gareth Davies & Julian E. Zelizer eds., 2015).

Clay almost certainly also would have won a majority of the national popular vote in 1844 had the election been a two-way race between him and Polk. As it was, Clay fell behind Polk in the popular vote by only 39,490 votes.<sup>31</sup> But Birney won 62,103 votes nationwide.<sup>32</sup> Thus, with Birney out of the race, Clay would have picked up enough of these votes for a nationwide popular majority over Polk. Yet the American electorate never had the opportunity of a head-to-head matchup between just Polk and Clay to show which of these two the electorate preferred.

### B. Election of 1848

Four years later, a similar situation occurred. In opposition to Zachary Taylor, the Whig candidate, Democratic support was split between Lewis Cass, who won their party's nomination, and Martin Van Buren, the former President who was denied renomination by his party because he had more antislavery views than Cass.<sup>33</sup> Spurned in this way, Van Buren then ran as a Free Soiler.<sup>34</sup>

Van Buren likely made the difference in four northeastern states: Connecticut, Massachusetts, New York, and Vermont. New York alone, in which Van Buren ran second, would have flipped the Electoral College if Cass had received Van Buren's support in the state.<sup>35</sup> Taylor won the Electoral College 163–127, but, had Cass combined his own support with Van Buren's in New York, Cass would have won the Electoral College by the same margin as Taylor's ultimate victory, 163–127.<sup>36</sup>

Cass also would have won the national popular vote had he been able to combine Van Buren's votes with his own.<sup>37</sup> His national popular vote total was only 137,933 behind Taylor's, while Van Buren won 291,501 nationwide.<sup>38</sup> While we will never know for sure whether Cass would have beaten Taylor in a head-to-head matchup without Van Buren in the race, the fracturing of the Democrats between Cass and Van Buren most likely caused Taylor to prevail.<sup>39</sup>

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31. 1 CQ PRESS, *supra* note 4, at 760.

32. *Id.*

33. See JOEL H. SILBEY, PARTY OVER SECTION: THE ROUGH AND READY PRESIDENTIAL ELECTION OF 1848, at 3, 21 (2009).

34. See *id.* at 72–73.

35. See POUNDSTONE, *supra* note 10, at 62–63; SILBEY, *supra* note 33, at 133.

36. SILBEY, *supra* note 33, at 134.

37. See *id.*

38. 1 CQ PRESS, *supra* note 4, at 761; SILBEY, *supra* note 33, at 134.

39. In 1856, there was a three-way race between James Buchanan, the Democrat and ultimate winner of the election; John Fremont, the Republican; and former President Millard Fillmore, running as the third-party candidate of the anti-immigration American Party, often called the "Know-Nothings." 1 CQ PRESS, *supra* note 4, at 289. Although Fillmore's national popular vote total (873,053) was almost double the national popular vote margin by which Buchanan defeated Fremont (493,727), it is unclear that Fremont would have received Fillmore's votes if Fillmore had not been in the race. *Id.* at 763. Moreover, the geographic distribution of both Fremont's and Fillmore's votes was such that Buchanan still would have received an Electoral College majority if Fremont had received all of Fillmore's votes. In this situation, Pennsylvania would have been exceptionally close, and if Fremont had won Pennsylvania along with Connecticut, Illinois, and New Jersey (all states where Fillmore ran



*C. Election of 1860*

Lincoln's victory in 1860 is undoubtedly the most consequential election in U.S. history because it precipitated the secession of the southern states and thus the Civil War.<sup>40</sup> Moreover, Lincoln won less than 40 percent of the national popular vote,<sup>41</sup> and he undoubtedly would have lost the national popular vote to Stephen Douglas if the two of them had been the only candidates in the race. The anti-Lincoln vote was split three ways—between Douglas, the northern Democrat; John Breckinridge, the candidate of the breakaway Southern Democrats; and John Bell, the candidate of the Constitutional Union Party that formed from the remnants of the Whigs who refused to join Lincoln and the Republicans. If a runoff had been used to choose between Lincoln and Douglas as the top two vote getters nationwide (in the same way that France currently uses a runoff to pick its President from the top two vote getters in its preliminary round),<sup>42</sup> Douglas would have won a popular vote majority.<sup>43</sup>

Lincoln, however, still would have won an Electoral College majority even if he and Douglas were the only two candidates in the race. As it was, Lincoln won a *majority*—not merely a plurality—of the popular vote in fifteen northern states,<sup>44</sup> which collectively amounted to 169 of the 303 total Electoral College votes. Three highly populous states accounted for half of Lincoln's dominance in the Electoral College count: New York (35); Pennsylvania (27); and Ohio (23). Eliminating Breckinridge and Bell from the ballot in these Lincoln-majority states would not have made any difference to the Electoral College outcome. Thus, although not widely recognized as such, 1860 is the election in which the Electoral College diverged most significantly from the national popular vote. Only if the Electoral College had been replaced with a system like the one used in France to make sure that the winning candidate receives a majority (and not just a plurality) of the national popular vote, would Douglas rather than Lincoln have emerged as victorious in 1860.<sup>45</sup>

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strong), then Fremont would have obtained an Electoral College majority. It is interesting to speculate what would have happened if only Buchanan and Fremont had been in the race, but ultimately the significant ideological divergence between Fremont and Fillmore—Fremont being antislavery, Fillmore being anti-immigrant—means that one cannot be confident that 1856 is an example of an election where the presence of the third-party candidate made a difference in which other candidate won.

40. See generally DOUGLAS R. EGERTON, *YEAR OF METEORS: STEPHEN DOUGLAS, ABRAHAM LINCOLN, AND THE ELECTION THAT BROUGHT ON THE CIVIL WAR* (2010); THE ELECTION OF 1860 RECONSIDERED (A. James Fuller ed., 2013).

41. EGERTON, *supra* note 40, at 335; POUNDSTONE, *supra* note 10, at 65.

42. See MICHAEL S. LEWIS-BECK, RICHARD NADEAU & ÉRIC BÉLANGER, *FRENCH PRESIDENTIAL ELECTIONS 164–65* (2012).

43. See *Procedures & Applications: Electing a Single Candidate by the Instant Runoff Procedure*, WHYDOMATH, [http://www.whynomath.org/node/voting/instant\\_runoff.html](http://www.whynomath.org/node/voting/instant_runoff.html) (last visited Nov. 19, 2016) [<https://perma.cc/72GF-S8R2>].

44. See 1 CQ PRESS, *supra* note 4, at 764.

45. The election of 1880, like 1856, was another instance in which the third-party candidate did not make a difference in the Electoral College, and it is unclear what effect the third-party candidate had on the national popular vote. As the Greenback Party candidate, James Weaver's 306,921 votes nationwide dwarfed the tiny 8,355 popular vote margin

*D. Election of 1884*

New York was the pivotal state in 1884, which was one of the closest presidential elections ever. Grover Cleveland, the incumbent governor of New York and the Democratic candidate for President, won his home state by only a plurality of 1,047 votes over Senator James Blaine, a Republican from Maine.<sup>46</sup> Had Blaine carried New York, he would have had an Electoral College majority of 218–183.<sup>47</sup> As it was, winning his home state gave Cleveland an almost identical Electoral College majority of 219–182.<sup>48</sup>

In addition to Cleveland and Blaine, third and fourth candidates played a significant role in the election. John St. John, former Republican governor of Kansas, was the Prohibition Party's presidential nominee. Benjamin Butler, former Democratic governor of Massachusetts, was the Greenback Party's candidate. St. John undoubtedly pulled votes away from Blaine. Indeed, Republicans had asked St. John not to run, but he refused to withdraw.<sup>49</sup> Butler most likely took more votes from Cleveland than he did from Blaine.

If only Blaine and Cleveland had been on the ballot in 1884, Blaine almost certainly would have won New York and with it, the presidency. St. John received 24,999 votes in New York, far more than Cleveland's miniscule 1,047-vote margin of victory in the state.<sup>50</sup> Butler garnered 16,955 votes in New York.<sup>51</sup> Even if all of these votes had gone to Cleveland instead, they would not have been nearly enough to overcome the extra votes that Blaine would have received if St. John had not been on the ballot.

It does not appear that the combined candidacies of St. John and Butler altered the outcome of any other state. For example, Butler won 24,382 votes in his home state of Massachusetts, but Blaine's margin of victory over Cleveland there was only ten votes fewer (24,372), and St. John won 9,923 votes there.<sup>52</sup> Thus, it is safe to say that in a two-way race between just Blaine and Cleveland, Massachusetts would have stayed in Blaine's column.

Given New York's outcome-determinative status, 1884 is a clear instance in which the presence of a third and fourth candidate on the ballot determined which of the two major-party candidates won the White House. Blaine might

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between James Garfield, the Republican, and Winfield Hancock, the Democrat. *Id.* at 769. It is likely that Weaver pulled more votes from Hancock than Garfield (especially since the Democrats and Greenbacks were forming "fusion" tickets in local elections during this period), in which case Hancock probably would have won if some sort of national popular runoff had been the method of determining the winner. But Weaver himself had been a Republican before becoming a Greenback, and thus it is at least possible that he drew votes from both major-party candidates. In any event, removing Weaver from the race would not have affected Garfield's Electoral College majority, because combining Weaver's and Hancock's votes would not have exceeded Garfield's votes in the states that Garfield won.

46. *Id.* at 770; POUNDSTONE, *supra* note 10, at 68.

47. See 1 CQ PRESS, *supra* note 4, at 860.

48. See MARK WAHLGREN SUMMERS, RUM, ROMANISM, AND REBELLION: THE MAKING OF A PRESIDENT, 1884, at 289 (2000).

49. POUNDSTONE, *supra* note 10, at 68.

50. 1 CQ PRESS, *supra* note 4, at 770; POUNDSTONE, *supra* note 10, at 68.

51. 1 CQ PRESS, *supra* note 4, at 770.

52. *Id.*

not have won the national popular vote if only he and Cleveland had been on the ballot. As it was, Blaine was 62,670 votes behind Cleveland in the national popular vote.<sup>53</sup> St. John secured 150,658 votes nationwide, while Butler secured 135,594.<sup>54</sup> Removing St. John and Butler from the race and redistributing their votes to Blaine and Cleveland probably would have kept Cleveland ahead in the national popular vote. But in a two-person race, Blaine would have beaten Cleveland in New York, and that difference would have given Blaine the critical Electoral College majority.

*E. Election of 1892*

The 1892 election between Grover Cleveland and Benjamin Harrison served as a rematch of the 1888 election in which Harrison had defeated Cleveland's bid for reelection. This time, however, Cleveland ousted the incumbent Harrison. Although not as clear cut as in 1884, Cleveland's victory might have been caused by the presence of additional candidates on the ballot.

Once again, there was a Prohibition Party candidate, John Bidwell, who siphoned votes from the Republican. But Bidwell did not win enough votes in New York to prevent Harrison, the Republican, from winning the state.<sup>55</sup> Moreover, New York was not uniquely pivotal in 1892 as it had been eight years earlier, because Harrison would have had to win much more than just New York to overcome his 277–145 defeat in the Electoral College.<sup>56</sup> Moving only New York to Harrison's column still would have left Cleveland with a 241–181 Electoral College victory.<sup>57</sup>

In addition to Bidwell, James Weaver ran as the nominee of the newly formed Populist Party.<sup>58</sup> He did remarkably well, winning 8.5 percent of the national popular vote—much more than the 3 percent vote margin between Cleveland and Harrison.<sup>59</sup> Weaver also may have made the difference in several states. But it is unclear whether Weaver pulled more votes from Harrison than Cleveland. In general, the Populists were somewhat more allied with Democrats than Republicans (merging with the Democrats four years later). Thus, removing Weaver from the race still may have left Cleveland ahead of Harrison in enough states for an Electoral College majority.<sup>60</sup> There should have been a head-to-head matchup between Cleveland and Harrison so that the country could have known for sure which of the two was the one that the American electorate actually preferred that year.

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53. *Id.*

54. *Id.*

55. *See id.* at 772.

56. *Id.* at 862.

57. *See id.*

58. He had run as the Greenback candidate in 1880. *See id.* at 769.

59. *Id.* at 772; POUNDSTONE, *supra* note 10, at 70.

60. There also was a Socialist Labor candidate who may have been something of a factor in New York and other northeastern states.

*F. Election of 1912*

Unquestionably, the most consequential third-party candidacy in the history of presidential elections was Teddy Roosevelt's "Bull Moose" run as the Progressive Party nominee in 1912.<sup>61</sup> Although he declined to run in 1908 and anointed William Taft as his successor, Roosevelt had a change of heart in 1912 and sought to wrest the Republican nomination from Taft despite Taft's incumbency in the White House. Unsuccessful, Roosevelt bolted from the Republican National Convention and formed the Progressive Party, thereby setting up a three-way split between himself, Taft, and the Democratic nominee Woodrow Wilson.

The fracturing of Republicans between Roosevelt and Taft caused Wilson to prevail, although Wilson won only 41.8 percent of the national popular vote.<sup>62</sup> Roosevelt came in second, with 27.4 percent, while Taft garnered only 23.2 percent.<sup>63</sup> Had there been a mechanism for a runoff between Wilson and Roosevelt, as the top two vote getters, Roosevelt undoubtedly would have secured a majority of the national popular vote. All of Taft's supporters would have preferred Roosevelt to Wilson. While Taft was the more conservative Republican, Roosevelt was a moderate Republican, and thus more congenial to Taft's conservative base than the more left-leaning Wilson. Adding Taft's 23.2 percent to Roosevelt's 27.4 percent would have given Roosevelt a national popular vote majority of 50.6 percent.

Had the election been confined to Roosevelt and Wilson, Roosevelt also would have secured an Electoral College majority. Roosevelt would have won Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, West Virginia, Wisconsin, and Wyoming—for a combined 252 Electoral College votes—all of which Wilson actually won due to the Republican fissure between Roosevelt and Taft.<sup>64</sup> Add these 252 Electoral College votes to those of Michigan, Minnesota, Pennsylvania, South Dakota, and Washington, which Roosevelt actually won, as well as those of Utah and Vermont, which Taft won, and Roosevelt would have won 329 Electoral College votes, far more than the 266 necessary for a majority.

Interestingly, if the election had been a two-person race between Roosevelt and Wilson, Roosevelt would have lost California to Wilson, even though he

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61. See generally JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004); LEWIS L. GOULD, FOUR HATS IN THE RING: THE 1912 ELECTION AND THE BIRTH OF MODERN AMERICAN POLITICS (2008); see also GEOFFREY COWAN, LET THE PEOPLE RULE: THEODORE ROOSEVELT AND THE BIRTH OF THE PRESIDENTIAL PRIMARY (2016); DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013).

62. 1 CQ PRESS, *supra* note 4, at 777; POUNDSTONE, *supra* note 10, at 72.

63. 1 CQ PRESS, *supra* note 4, at 777; POUNDSTONE, *supra* note 10, at 71.

64. Allocating Colorado, Ohio, and Wisconsin to Roosevelt requires giving him not just Taft's votes in these states but also the votes of the Prohibitionist candidate Eugene Chafin. But as the Prohibition Party tended to pull votes away from Republicans, not Democrats, it is reasonable to assume that Roosevelt would have won these votes if Chafin had not been on the ballot. See POUNDSTONE, *supra* note 10, at 72–73.

actually won it, due to the presence of a Socialist fourth candidate, Eugene Debs.<sup>65</sup> In California, Debs won almost 80,000 votes.<sup>66</sup> Roosevelt beat Wilson in California by a mere 174 votes.<sup>67</sup> Without Debs in the race, Wilson would have captured much of the Socialist's support. Since Taft won less than 4,000 votes in California, reducing the race to just Roosevelt and Wilson would have caused California to move to Wilson's column.<sup>68</sup> But this wrinkle does not detract from the main point: in a head-to-head matchup between Wilson and Roosevelt—as the two most popular candidates nationwide—Roosevelt would have prevailed over Wilson *both* in the national popular vote *and* in the Electoral College. Roosevelt, in other words, would have won another term in the White House.

Moreover, if Roosevelt rather than Wilson had been in the White House from 1913–1917, the consequences to U.S.—indeed world—history would have been monumental.<sup>69</sup> Roosevelt surely would have brought the United States into World War I much more quickly than Wilson did. Roosevelt was advocating for entry into the war as early as 1914, whereas Wilson delayed entry into the war until 1917, when it was almost over.

Additionally, if Roosevelt had been in charge of U.S. policy, both during World War I and in its aftermath, the outcome and ensuing events might have been very different. Roosevelt, in sharp contrast to Wilson, was a pragmatist, not an idealist in foreign policy. He did not support Wilson's plan for a League of Nations, and his conception of peace after the end of war unlikely would have included the harsh terms that were imposed on the Germans. And although it necessarily falls into the realm of speculation, if a Roosevelt-brokered peace would have been more lenient to Germany, there might never have been cause for the rise of Hitler and Nazism. We can never be sure, but the entire history of the twentieth century might have flowed very differently if Roosevelt had been elected President in 1912—as he arguably should have been, given that he would have won a two-way race against Wilson.<sup>70</sup>

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65. *See id.*

66. 1 CQ PRESS, *supra* note 4, at 777.

67. *Id.*; POUNDSTONE, *supra* note 10, at 72–73.

68. *See* 1 CQ PRESS, *supra* note 4, at 777.

69. *See generally* John Lukacs, *The Election of Theodore Roosevelt, 1912: Brokering an Earlier End to World War I*, in *WHAT IF? 2: EMINENT HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN* 181 (Robert Cowley ed., 2001); *see also* Jeff Nilsson, *Teddy Roosevelt and World War I: An Alternative History*, SATURDAY EVENING POST (Apr. 17, 2014), <http://saturdayeveningpost.com/2014/04/17/uncategorized/roosevelt-1912.html> [https://perma.cc/89A3-97PF].

70. In 1968, as a third-party candidate, the Segregationist George Wallace won five southern states with forty-five Electoral College votes and 13.5 percent of the national popular vote. 1 CQ PRESS, *supra* note 4, at 791, 881. It is unlikely, however, that he affected the outcome of the race between Richard Nixon and Hubert Humphrey. If Wallace had not been on the ballot, Nixon almost certainly would have won Wallace's southern states. Nixon had his own "southern strategy" that year, and Barry Goldwater had proved four years earlier that a conservative Republican could win in the Deep South. Even in the North, moreover, polls tended to show that Nixon most likely would have picked up more of Wallace's votes than Humphrey. Thus, in both the Electoral College and the national popular vote, Nixon presumably would have beaten Humphrey in a two-man race.

*G. Election of 1980*

In the election of 1980, Ronald Reagan won an Electoral College landslide, 489–49, against incumbent Jimmy Carter.<sup>71</sup> Moreover, Reagan won a majority of the national popular vote: 50.7 percent.<sup>72</sup> Thus, the conventional wisdom is that the additional candidates on the ballot that year, including independent John Anderson, did not make a difference in the outcome of the race.<sup>73</sup>

On closer inspection, however, the analysis is more complicated. To be sure, Reagan still would have won a majority of the national popular vote no matter what. But if one assumes that in a two-man race, Carter would have won all of the votes that actually went to all the other candidates, then Carter could have eked out an Electoral College victory over Reagan.

Is this a reasonable assumption? Perhaps but probably not. Since John Anderson had been a Republican, albeit a liberal one, before running as an independent, it is conceivable he might have siphoned some votes from Reagan rather than Carter. Likewise, the Libertarian candidate Ed Clark probably received some votes that would have gone to Reagan, rather than Carter, in a two-man race. Still, there was a widespread perception in 1980 that most ballots cast for candidates other than Reagan and Carter were protest votes against Carter's disappointing performance as President. But these voters would not have voted for Reagan and, if forced to choose, would reluctantly have supported the flawed incumbent. Yet we can never be sure if this analysis is sound. On balance, it is better to assume that Reagan still would have pulled out an Electoral College victory in a two-man race against Carter. But it would have been closer than it actually was.

*H. Election of 1992*

Many people believe that Ross Perot was responsible for George H.W. Bush losing his bid for reelection in 1992.<sup>74</sup> Had Perot's 18.9 percent of the national popular vote<sup>75</sup> gone to Bush, then Bush clearly would have beaten Bill Clinton. Not only would Bush have won 56.3 percent of the national popular vote (his 37.4 percent plus Perot's percentage), but he also would have won the Electoral College, adding 299 to the 168 he got even with Perot in the race.<sup>76</sup>

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71. *Id.* at 884.

72. *Id.* at 794.

73. See CRAIG SHIRLEY, *RENDEZVOUS WITH DESTINY: RONALD REAGAN AND THE CAMPAIGN THAT CHANGED AMERICA* 581 (2009) ("For all the talk during the campaign about the 'Anderson Difference,' it turned out that John Anderson had little effect on the election's outcome."). See generally ANDREW E. BUSCH, *REAGAN'S VICTORY: THE PRESIDENTIAL ELECTION OF 1980 AND THE RISE OF THE RIGHT* (2005).

74. See J. DAVID GILLESPIE, *CHALLENGERS TO DUOPOLY: WHY THIRD PARTIES MATTER IN AMERICAN TWO-PARTY POLITICS* 8 (2012) ("Many Republicans blamed Perot for spoiling Bush's 1992 reelection bid by siphoning away millions of votes."); POUNDSTONE, *supra* note 10, at 74.

75. 1 CQ PRESS, *supra* note 4, at 797; POUNDSTONE, *supra* note 10, at 75.

76. 1 CQ PRESS, *supra* note 4, at 797, 887.

There is reason to doubt, however, that Perot cost Bush the election. Instead, there is evidence that Perot pulled votes away from Clinton at least as much as he did from Bush.<sup>77</sup> If so, then he ultimately was not a factor in the outcome, despite his strong showing for an independent candidate. The key point is that there should have been a way to determine with certainty whether Clinton would have won the election anyway, even without Perot in the race.

### I. Election of 2000

Whatever one thinks about Perot's role in 1992, there should be no doubt about Ralph Nader's in 2000. If only Al Gore and George W. Bush had been on the ballot, then Gore would have won Florida and, with it, an Electoral College majority. No other states would have changed. Nader won 97,488 votes in Florida that year.<sup>78</sup> One can quibble about just how many of those votes Gore would have won if the race had been between just him and Bush, but it undoubtedly would have been much more than Bush's 537 vote plurality over Gore, and more than Bush's total would have been even after allocating to Bush the votes cast for Pat Buchanan (17,484) and all other minor-party candidates (23,095).<sup>79</sup>

Gore beat Bush in the national popular vote even with Nader and the other minor-party candidates on the ballot. Thus, Gore would have won a national popular majority in a two-man race between him and Bush. But he also would have won an Electoral College majority, and thus the presidency, in a two-man race against Bush. If anyone still has any question about this, it only underscores the ultimate point that the system should have provided a mechanism for that head-to-head face-off to have actually occurred.<sup>80</sup>

Nor can anyone doubt the significance of America's electoral system placing Bush, rather than Gore, in the White House notwithstanding the

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77. See GILLESPIE, *supra* note 74, at 8; see also Dean Lacy & Barry C. Burden, *The Vote-Stealing and Turnout Effects of Ross Perot in the 1992 U.S. Presidential Election*, 43 AM. J. POL. SCI. 233 (1999).

78. 1 CQ PRESS, *supra* note 4, at 799; POUNDSTONE, *supra* note 10, at 90.

79. 1 CQ PRESS, *supra* note 4, at 799. The most detailed analysis of Nader's effect on the result in Florida reached the conclusion that Nader spoiled Gore's presidency only because the 2000 presidential race in Florida was "so incredibly tight." Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore's Presidential Bid?: A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, 2 Q.J. POL. SCI. 205, 222 (2007). For further analysis, see BRIAN F. SCHAFFNER, *POLITICS, PARTIES, & ELECTIONS IN AMERICA* 37 (2012).

80. Ralph Nader himself does not dispute these facts but instead calls for electoral reforms (including elimination of the Electoral College) that would give third-party and independent candidates an appropriately competitive role in the process. Above all, Nader resents the label "spoiler" being attached to his 2000 candidacy. See Ralph Nader, *Ralph Nader: I Was Not a 'Spoiler' in 2000. Jill Stein Doesn't Deserve That Insulting Label, Either*, WASH. POST (Sept. 2, 2016), [https://www.washingtonpost.com/opinions/ralph-nader-i-was-not-a-spoiler-in-2000-jill-stein-doesnt-deserve-that-insulting-label-either/2016/09/02/02df0e74-6fa3-11e6-993f-73c693a89820\\_story.html?utm\\_term=.75123405f844](https://www.washingtonpost.com/opinions/ralph-nader-i-was-not-a-spoiler-in-2000-jill-stein-doesnt-deserve-that-insulting-label-either/2016/09/02/02df0e74-6fa3-11e6-993f-73c693a89820_story.html?utm_term=.75123405f844) [<https://perma.cc/HAH2-7UYW>]. Whatever the label, the indisputable truth—as Nader himself recognizes—is that Gore would have won Florida if there had been a head-to-head runoff in the state between just Gore and Bush.

majority of the electorate's preference for Gore over Bush.<sup>81</sup> No one can be completely confident that Gore would not have taken the United States into war in Iraq, but there are reasons to believe that he would not have done so and that, even if he did, the nature of the military conflict would have been prosecuted very differently. Gore's policies on torture, for example, would have been much different than Bush's, and Gore most likely would not have pursued war on the cheap in the way that Bush did with advice from Donald Rumsfeld.

Moreover, Gore's overall economic policy would have been very different from Bush's, without the drastic tax cuts that sent the U.S. government heavily into debt. Gore, of course, would have aggressively pursued policies to address the issue of climate change, and his U.S. Supreme Court appointments—if he had won a second term and had the opportunity to make them—would have been jurisprudentially opposite to Chief Justice Roberts and Justice Alito, Bush's two appointees.

Whatever one thinks of Bush's presidency—and the initial historical assessment is scathing<sup>82</sup>—one must acknowledge this fact: he, rather than Gore, occupying the Oval Office from 2001–2005 was hugely consequential. When one combines this fact with a similar truth regarding the elections of 1844 and 1912, the conclusion is inescapable: three elections in which the outcome was indisputably determined by the presence of a third candidate on the ballot were three of the most history-shaping elections in the entirety of the republic's existence. If Henry Clay had won in 1844, as a majority of the electorate wanted, U.S. and world history would have developed very differently than it did. The same point is true if Roosevelt had won in 1912, as the majority of the electorate wanted. And although the election of 2000 is much more recent than these other two, its history-shaping nature is readily apparent.

Of the fifty-three presidential elections held since the restructuring of the Electoral College rules in the Twelfth Amendment, arguably a half-dozen or so have been ones in which the lack of a runoff mechanism affected which of the top two candidates won. This can be seen as a failure rate of over 10 percent—failure in the sense that those who designed the Electoral College wanted the winner to have majority support but thought that in a race with several strong candidates, this majority support would come from a vote in the House of Representatives. They failed to envision how the distinctive institutional role of the Electoral College would collapse into a mechanism for counting popular votes on a state-by-state basis and that this collapse easily could cause a candidate to win a majority of Electoral College votes in a multicandidate race despite being strongly opposed by a majority of the voting electorate.

While a failure rate of over 10 percent is disconcerting enough, what is especially troubling is that three of these failures—1844, 1912, and 2000—

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81. For an exploration of this counterfactual, see generally JEFF GREENFIELD, 43\*: WHEN GORE BEAT BUSH—A POLITICAL FABLE (2012).

82. See generally JEAN EDWARD SMITH, BUSH (2016).



are clear instances of the monumental consequences that this electoral malfunctioning can produce. Three times, the existing electoral system has sent to the White House the candidate whom the majority of voters clearly did not want to send there, and on these three occasions, this electoral error made a difference in terms of ensuing war or peace. In light of this historical record, the American electorate deserves a system that puts a candidate in the Oval Office whom a majority of voters want there and thus, conversely, keeps out of the Oval Office a candidate whom the majority of voters oppose.

## II. THE HISTORICAL PROBLEM EASILY COULD REPEAT ITSELF

The memory of Nader in 2000 contributed to Bloomberg's decision not to run in 2016. Simply put, Bloomberg did not wish to do to Clinton what Nader did to Gore. To be sure, Bloomberg had the chance to do much better than Nader. But even if he won 25 percent of the vote, if the result still was Trump finishing ahead of Clinton when Trump would be behind Clinton in a two-person race, then the upshot still would have been that Bloomberg's role was no different than Nader's. Whether or not one uses the pejorative term "spoiler" to describe this role, the simple fact would be that Bloomberg's presence would deprive Clinton of a victory that Clinton otherwise would win—just as Nader being on the ballot in 2000 deprived Gore of the victory he would have had over Bush in a two-man race. Bloomberg did not want that consequence on his conscience.

But suppose Bloomberg had not stepped aside in this way. Suppose, instead, like Roosevelt in 1912, Bloomberg had put his hat in the ring. Whether for reasons of ego, or otherwise, we can easily imagine Bloomberg failing to exercise the self-restraint that he showed and instead subjecting the United States to a candidacy that, while ultimately unsuccessful, would have determined which of the two major-party candidates prevailed.

In America's existing electoral system, there is nothing except self-restraint to stop a candidate like Bloomberg from entering the race. History makes this point perfectly clear. If a state attempted to limit its presidential ballot to only the two major parties, the Supreme Court almost certainly would hold the state law unconstitutional.

In *Williams v. Rhodes*,<sup>83</sup> Ohio attempted to defend a set of rules that made it exceedingly difficult for third-party and independent presidential candidates to get on the ballot. Ohio's defense was the straightforward argument that it wanted to promote a two-party system.<sup>84</sup> The Supreme Court emphatically rejected this defense, asserting: "[T]he Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly."<sup>85</sup> This language suggests that Ohio, or another state, might develop a different set of rules that favored a two-party system without

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83. 393 U.S. 23 (1968).

84. *See id.* at 31–32.

85. *Id.* at 32.

favoring two particular parties. But it is difficult to imagine what that different set of rules would be. For example, suppose a state law provided that the only two parties eligible for the ballot would be the two parties with the most votes cast during the primaries. Other language in the Court's opinion suggests that this alternative approach also would be unconstitutional. Ohio argued that "if three or more parties are on the ballot, it is possible that no one party would obtain 50 percent of the vote, and the runner-up might have been preferred to the plurality winner by a majority of the voters."<sup>86</sup> The Court, however, found this argument deficient:

Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters. But to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year.<sup>87</sup>

But this same argument would be the basis for any alternative rule designed to limit the ballot to only two parties. Thus, the Court's rejection of this argument would equally apply to those alternative regulations as well.

Fifteen years later, in *Anderson v. Celebrezze*,<sup>88</sup> the Supreme Court again invalidated Ohio's election laws as imposing too onerous a regulation for independent presidential candidates to get on the ballot.<sup>89</sup> This time, the regulation concerned Ohio's excessively early deadline for an independent candidate to submit his or her petition to get on the ballot. The Court made it clear that it wished to facilitate access to the ballot for an independent candidate like John Anderson: "[S]everal important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer."<sup>90</sup> The Court added: "Seventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot."<sup>91</sup> After *Anderson*, it is clear that a state cannot enact a regulatory regime designed to limit the presidential election ballot to just two candidates.<sup>92</sup>

Given *Williams* and *Anderson*, there is no doubt that Bloomberg could have forced himself on the ballot in all fifty states if he wanted to, regardless of whatever preventive efforts states pursued. Thus, it remains emphatically clear that what kept him off the ballot was only his self-restraint. Had his ego propelled him forward, there would have been no obstacle, as history confirms.

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86. *Id.*

87. *Id.*

88. 460 U.S. 780 (1983).

89. *See id.* at 780.

90. *Id.* at 791–92.

91. *Id.* at 800.

92. Neither *Williams* nor *Anderson*, it should be noted, prohibits states from adopting instant runoff voting, or some other runoff mechanism, as long as the state gives independent and third-party candidates an adequate opportunity to compete against the two major-party candidates.

Perot, Anderson, Roosevelt—they all entered the race in their respective years, having the effect that they did. In Roosevelt's case, as a third-party candidate, he did even better than Taft, one of the two major-party candidates, and Roosevelt himself would have won if Taft had voluntarily withdrawn. Thus, as a matter of morality, who is to say that these independent or third-party candidates should not enter? And is the outcome any more deficient, from the perspective of electoral democracy, when they do?

To examine this issue more closely, let us suppose that Bloomberg had decided to enter the race and would have made the difference in its outcome. Suppose, in other words, that in a two-way race, Clinton beats Trump in the national popular vote 50–45 percent, with an Electoral College victory of 347–191.<sup>93</sup> But suppose that, if Bloomberg had run, making it a three-way race, the national popular vote would have split: Trump with 40 percent, Clinton with 35 percent, and Bloomberg with 25 percent. Suppose, further, that with this split in the national popular vote, Trump would have won the Electoral College 352–186.<sup>94</sup> In this scenario, is Trump's Electoral College victory any less legitimate than Clinton's would have been if Bloomberg had not entered the race?

Yes, is the answer. No one should win the presidency when opposed by a majority of the electorate. In this situation, a majority of voters want Trump not to win the White House, and this fact is true whether it is a two-way race of Trump versus Clinton or a three-way race of Trump versus Clinton versus Bloomberg. The fact that Trump could prevail in the Electoral College despite being opposed by a strong majority of voters, if Bloomberg had entered the race, is a flaw in the system.

This point, moreover, applies not only to when independent or third-party candidates finish third in a three-way race, as we have been assuming Bloomberg would have done. Rather, the point applies just as much to those situations in which the third-party or independent insurgent finishes second and would have won in a runoff—as was true in 1912, when Roosevelt finished ahead of Taft and would have beaten Wilson in a two-man race. We can imagine that kind of situation happening again in the future, even if it does not happen in 2016.

Suppose, for example, that in 2020, Republicans nominate ultraconservative Ted Cruz, who clearly has positioned himself as the leading Republican contender after 2016. Suppose that Hillary Clinton, after winning in 2016, declines to run for a second term and leaves the Democrats deeply split between centrists and progressives.<sup>95</sup> We can imagine, especially after

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93. This Electoral College count gives Clinton the battleground states of Colorado, Florida, Iowa, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin, but it has Trump winning Georgia and Arizona. To conduct this calculation oneself, see *2016 Presidential Election Map*, 270 TO WIN, <http://www.270towin.com> (last visited Nov. 19, 2016) [<https://perma.cc/5FBB-AVPJ>].

94. This Electoral College count has Trump winning all of the battleground states because of Bloomberg syphoning votes away from Clinton.

95. This same split between centrist and progressive Democrats could also occur in 2024 if Hillary Clinton decided to run for reelection in 2020 and her reelection bid masked over

Bernie Sanders's strong run in 2016, that the Democrats lean hard-left in 2020, nominating a Bernie-like candidate who appeals to the party's base but without significant mainstream support in the overall electorate. We could imagine that Democratic nominee being Elizabeth Warren, for example, but it also could be incumbent New York City Mayor Bill de Blasio. With Cruz running hard-right and this ultraliberal Democratic nominee running hard-left, there is an opening for a centrist Democrat that the party spurned in its nomination process. Indeed, this centrist Democrat might even be the broadly popular potential Vice President, Tim Kaine.

Imagine then, in a mirror image of 1912, Tim Kaine entering the 2020 race as an independent, appealing to centrist voters left behind by Cruz and the ultraliberal Democratic nominee. In the general election, Kaine might come in second, behind Cruz but ahead of the ultraliberal. This result would also be just like 1912, except this time the Democrats rather than the Republicans would split apart. We can assume, also, that Kaine would beat Cruz in a runoff. But Cruz would win the White House, as did Wilson in 1912, even though a majority of the electorate strongly opposed Cruz becoming President. Indeed, Cruz could win even with less than 40 percent of the national popular vote. That result would be deeply flawed. No candidate should win the White House when over 60 percent of voters want someone else to win, and the overwhelming majority of these voters happen to split their strong opposition between two candidates.

In this scenario, Kaine might come close to Cruz in the national popular vote even with the ultraliberal Democratic nominee also in the race. Suppose the result were Cruz with 36 percent of the national popular vote, Kaine with 35 percent, and the ultraliberal Democrat with 29 percent. Although Cruz easily could win an Electoral College landslide in this situation—just as Wilson did in 1912—Cruz should not become President when it is so clear that Kaine would easily defeat him if given the opportunity for a head-to-head vote against Cruz without the ultraliberal Democratic nominee also in the race. This poses a serious question: How do we best fix this flaw in the existing system?

Ideally, Americans would amend the Constitution to replace the Electoral College with a new system that included a runoff if no presidential candidate received a majority in the national popular vote. This runoff could be of the “instant” variety if the United States adopted for presidential elections the kind of “ranked choice voting” that currently exists in Australia as well as some U.S. cities.<sup>96</sup> Even better would be the kind of “two-round” system that France and most other nations use for their presidential elections.<sup>97</sup>

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deep divisions within the Democratic Party. Thus, one could defer for another four years the scenario I describe as possible in 2020.

96. See DAVID M. FARRELL & IAN MCALLISTER, *THE AUSTRALIAN ELECTORAL SYSTEM: ORIGINS, VARIATIONS AND CONSEQUENCES* 52–57 (2006). See generally *ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES* (Gary Bugh ed., 2010).

97. *Electoral Systems*, ACE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/main/english/es/esi01b.htm> (last visited Nov. 19, 2016) [<https://perma.cc/83K3-D5G2>].

The advantage of a two-round system, compared to “instant runoff voting,” is that it permits the electorate to have another look at the top two finalists before settling on a single winner. The head-to-head comparison between Trump and Clinton may look a bit different than considering Trump and Clinton within a larger field that may include not only Bloomberg but also other independent and minor-party candidates like Gary Johnson and Jill Stein. If a constitutional amendment adopted a two-round system for the U.S. presidential election, the dates for each round could be adjusted so that both rounds could occur before the inauguration of the newly elected President. For example, if Inauguration Day remained January 20, then round one could occur on November 1 and, if necessary, round two on December 10.<sup>98</sup> Adoption of this two-round system would be consistent with whatever primary process the parties and states wish to employ for nominating their presidential candidates.

### III. REFORM WITHOUT A CONSTITUTIONAL AMENDMENT

No matter how beneficial it would be to amend the Constitution to replace the Electoral College with the kind of two-round popular vote that most other countries have for their presidential elections, no one should rely on the possibility of a constitutional amendment as an available method of reform. Constitutional amendments are notoriously difficult to pass in general, and they have proved particularly hard to pass with respect to the existing Electoral College system. Since the adoption of the Twelfth Amendment to fix the feature of the original system that caused the crisis of 1800, there have been hundreds of proposals to replace or reform the Electoral College, all of which have failed.<sup>99</sup> It is worth considering, therefore, what reform might be possible in the absence of a constitutional amendment.

Under the Constitution as it currently stands, any state legislature has the power to adopt instant runoff voting for the appointment of its presidential electors. Article II of the Constitution expressly declares: “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.”<sup>100</sup> In *Bush v. Gore*,<sup>101</sup> the Supreme Court confirmed that this power of the state legislatures is “plenary”—each legislature can appoint its state’s electors directly or choose any electoral method for this appointment that does not violate any other provision of the Constitution.<sup>102</sup> Obviously, no state could limit elections for

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98. There would need to be expedited procedures prepared in the event that the outcome of either round was disputed, but those expedited procedures could be similar to those proposed by the American Law Institute for existing presidential elections. *See generally* PRINCIPLES OF THE LAW ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES pt. III (AM. LAW INST., Tentative Draft No. 1, 2016).

99. *See generally* ALEXANDER KEYSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? (forthcoming 2016).

100. U.S. CONST. art. II, § 1.

101. 531 U.S. 98 (2000).

102. *Id.* at 104.

the appointment of presidential electors to only male voters or only voters over the age of twenty-one, because both those restrictions would violate the Nineteenth and Twenty-Sixth Amendments, respectively.<sup>103</sup> But any state legislature, on its own initiative, could employ ranked choice voting (another name for instant runoff voting) to select among several presidential candidates appearing on the state's ballot.<sup>104</sup>

Even if no other state made this same move, it would be constitutionally permissible for a single state to do so. From the constitutional perspective of Article II, this unilateral move by a single state would be no different from one or two states deciding to appoint some of their presidential electors on a district-by-district basis, as Maine and Nebraska are the only two states currently to do. Likewise, adoption of instant runoff voting for the appointment of presidential electors for some but not all states would be no more constitutionally problematic than having some, but not all, states use "no excuse" absentee voting or "same day registration" as elements of their procedures for presidential elections.

If Florida had been the only state to use instant runoff voting for the appointment of its presidential electors in 2000, then Al Gore would have been the winner of an Electoral College majority rather than George W. Bush. Florida would have employed ballots that asked each voter to indicate their second and third choice candidates.<sup>105</sup> Using the mathematical computations associated with ranked choice voting, Florida would have one-by-one eliminated those candidates with the lowest number of first-choice votes and, for each of these eliminated candidates, would have examined all the ballots having that candidate as a first choice and reallocated those votes to the second-choice candidates on those ballots.<sup>106</sup> Thus, at the stage of the process that Pat Buchanan was eliminated (having only the fourth highest number of first-choice votes), if 90 percent of voters who ranked Buchanan first also ranked Bush second, then Bush would have been allocated 90 percent of these Buchanan-first ballots.

Under this procedure, when it came time to eliminate Nader as the candidate with only the third highest number of first-choice votes, the system would have examined the 97,488 Nader-first ballots to see which candidate each of these voters identified as their second choice. Presuming that Gore would have been the second-choice candidate on most of these Nader-first ballots, Gore would have been allocated most of these votes in this way. This process undoubtedly would have resulted in Gore having a majority of the votes in Florida. Based on this result, Gore's slate of presidential electors would have been appointed as Florida's electors, and they would have cast

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103. See U.S. CONST. amends. XXVI, XIX.

104. The Ninth Circuit has held that San Francisco's use of instant runoff voting does not violate the Fourteenth Amendment. *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).

105. Florida might have asked each voter to rank all ten candidates on the ballot that year in order of preference, but for sake of simplicity, Florida could have limited the ranking of candidates to just each voter's top three choices.

106. For an instant runoff voting calculator on the internet, see *Voting Calculator*, ERIC GORR, <http://ericgorr.net/condorcet/> (last visited Nov. 19, 2016) [<https://perma.cc/L5EP-9PK9>].

their Electoral College votes for Gore on December 18, 2000. On January 6, 2001, Congress would have counted Florida's twenty-five Electoral College votes for Gore, and, with them, Gore would have had a majority of Electoral College votes and thus been declared the winner of the presidency in this congressional session.<sup>107</sup>

While it would have been enough in 2000 for Florida alone to have adopted instant runoff voting (to assure that the Electoral College winner was the candidate with majority support in the national popular vote), in future years, one state might not be enough. Imagine our hypothetical three-way split between Trump, Clinton, and Bloomberg. In this situation, we can envision ten states in which Clinton would win if the states used instant runoff voting, but Trump would win these states if they employed conventional plurality voting. To prevent Trump from attaining an Electoral College majority, it would be necessary for at least three of these states—Florida, Pennsylvania, and one other—to adopt instant runoff voting. If Florida and Pennsylvania declined to do so, then it would take at least four others—Ohio, Virginia, North Carolina, and one other—for Clinton rather than Trump to reach a majority of Electoral College votes. The number of states necessary depends on how many Electoral College votes each of these potentially pivotal states has, as well as on how many electoral votes Clinton could win in states using conventional plurality voting even with Bloomberg added to the race.

Of course, it would be best if all states moved to instant runoff voting for the appointment of their presidential electors. If all states did so, it would substantially reduce the chances that a Trump-like candidate could prevail in the Electoral College despite being strongly opposed by a majority of the American electorate just because two other candidates, like Clinton and Bloomberg, split the anti-Trump vote between them. Employing instant runoff voting for the appointment of presidential electors in every state, conversely, would substantially increase the likelihood that Clinton, as the stronger of the two anti-Trump candidates compared to Bloomberg, would be able to attain a majority of Electoral College votes.

But adopting instant runoff voting in each of all fifty states is not the same thing as simply using instant runoff voting to determine the winner of the national popular vote. Rather, in a severely divided three-way race, using instant runoff voting in each state might cause no candidate to receive a majority of Electoral College votes, in which case, under the Twelfth Amendment, the election would be thrown to the House of Representatives for the first time since 1824. That is what would have happened in 1912 if instant runoff voting had been employed then in every state.

The reason is that while Roosevelt was the second-place finisher in the national popular vote, with Taft finishing third, Taft actually finished second (not third) in a large number of states and would have won the electoral votes of those states had they employed instant runoff voting. These states include

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107. It would have been an awkward ceremony because Gore would be the presiding officer of the congressional session given his status on January 6 as the incumbent Vice President, but, despite its awkwardness, it would have been official.

New York with its forty-five Electoral College votes at the time, Ohio with twenty-four, Massachusetts with eighteen, Wisconsin with thirteen, and a smattering of others, amounting to a total of 133 Electoral College votes.<sup>108</sup> Under instant runoff voting, Roosevelt, as the third-place finisher in each of these states, would have been the candidate eliminated, with the ballots listing him as first choice allocated according to their second-choice votes. It is reasonable to assume that most voters in these northern states who ranked Roosevelt first would have ranked Taft second, above Wilson. Therefore, Taft would have been allocated most of these ballots, making him the winner of these states.<sup>109</sup>

Roosevelt, conversely, would have won those states in which he came in second, with Taft behind him. These include Illinois with twenty-nine Electoral College votes, Indiana with fifteen, New Jersey with fourteen, as well as nine smaller states, for a total of 123 Electoral College votes.<sup>110</sup> Under instant runoff voting, Taft, as the third-place finisher, would have been eliminated, and the ballots listing him in first place would have been reallocated. Roosevelt would have been the second-choice candidate on these Taft-first ballots, and thus the reallocation of these ballots to Roosevelt would have given these states to him.

Instant runoff voting also would have awarded to Roosevelt those states in which he came in first with only a plurality of votes, and eliminating the third-place finisher would have favored him, rather than the candidate in second place. These states include Pennsylvania with its thirty-eight Electoral College votes, where Taft came in third, and whose voters clearly would have preferred Roosevelt to Wilson.<sup>111</sup> The same is true for Minnesota with twelve and Washington with seven.<sup>112</sup> In Michigan, Wilson came in third, with Taft in second place behind Roosevelt;<sup>113</sup> but Wilson's voters there would have preferred Roosevelt to Taft. In all, under instant runoff voting in every state, Roosevelt would have garnered 204 Electoral College votes, an impressive number but not the 266 necessary for a majority.<sup>114</sup>

Under instant runoff voting, Wilson would have won 182 Electoral College votes. Most of these would have been from southern states, where Wilson won an outright majority of the popular vote in each of those states, and thus there would have been no necessity for a reallocation of ballots after

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108. See 1 CQ PRESS, *supra* note 4, at 867. The other states in this category (with Taft finishing second, ahead of Roosevelt, but Wilson failing to secure a majority of the votes cast in the state) were Connecticut, Delaware, Idaho, New Hampshire, New Mexico, Rhode Island, and Wyoming. *Id.* at 777.

109. Under instant runoff voting, Taft also would have won Utah, where he was the plurality winner; there, too, Roosevelt was the third-place finisher, and we can assume that his votes would have been reallocated to Taft rather than Wilson. See *id.*

110. See *id.* at 777, 867.

111. *Id.*

112. *Id.*

113. *Id.* at 777.

114. In Vermont, under instant runoff voting, Roosevelt would have won the state even though Taft came in first there. Wilson was the third-place finisher in Vermont, and reallocation of his votes to Roosevelt (because his voters clearly preferred Roosevelt to Taft) would have made Roosevelt the winner of that state. *Id.*



eliminating the third-place finisher in order to identify a candidate with a majority of votes. Wilson also would have picked up California because, as indicated earlier, most of the ballots with Eugene Debs as first choice would have been reallocated to Wilson.

In any event, there would have been a three-way Electoral College split if every state in 1912 had used instant runoff voting to determine the winner of its Electoral College votes. No candidate—not Roosevelt, not Wilson, not Taft—would have reached the magic number of 266 Electoral College votes. Accordingly, in that situation, the House of Representatives, voting by state delegation, would have chosen one of these three candidates to be President. With Democrats controlling twenty-two congressional delegations, Republicans controlling twenty-one, and four more split evenly between the two parties—and with the Twelfth Amendment requiring a *majority of all states*—it is anybody's guess what would have happened, and who would have been elected, if the 1912 presidential election had been thrown to the House.<sup>115</sup>

Something similar could happen in the future if every state adopted instant runoff voting for the appointment of its presidential elections. Consider, again, the possibility of a three-way race in 2020 between Ted Cruz, Tim Kaine, and an ultraliberal Democratic nominee—let's assume Elizabeth Warren for purposes of discussion. In this situation, it is easy to imagine that Kaine would come in second behind Cruz in some states, with Warren trailing in third place—Virginia and North Carolina, for example. By contrast, it is equally easy to imagine that Warren would come in second behind Cruz in other states, with Kaine finishing third in these—Pennsylvania and Wisconsin, for instance. Thus, with Warren's votes reallocated to Kaine in some states, and Kaine's votes reallocated to Warren in others, both of these candidates could win enough states to prevent Cruz from reaching 270 Electoral College votes but with Kaine and Warren each also falling short of 270.

Obviously, it would be undesirable to have the House of Representatives decide a presidential election, especially using a procedure—as mandated by the Twelfth Amendment—that gives Wyoming the same single vote as California despite their huge disparity in population. Were this situation to occur, it just might be enough to finally provoke a constitutional amendment to get rid of the antiquated Electoral College. Moreover, faced with the

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115. This three-way split in the Electoral College between Wilson, Roosevelt, and Taft, if all states had used instant runoff voting then, is consistent with the point made earlier—Roosevelt would have won the Electoral College if only he and Wilson had been on the ballot. The reason is that the earlier point did not identify the top two vote getters on a state-by-state basis, as the use of instant runoff voting in each state would have. Instead, the earlier point identified the top two candidates based on the national popular vote—Wilson and Roosevelt—and thus (hypothetically) eliminated Taft from the ballot in all states. Roosevelt would have won all of Taft's votes according to this analysis, regardless of whether Roosevelt actually came in second or third in the particular state. Consequently, under this instant runoff voting, Roosevelt could amass an Electoral College majority. By contrast, with instant runoff voting applied on a state-by-state basis, Taft would eliminate Roosevelt in some of these states, thereby preventing Roosevelt from reaching an Electoral College majority under this approach.

prospect of the House choosing Cruz, Kaine and Warren might reach a deal in which one gives way to the other. For example, if Warren won only 29 percent of the national popular vote and only 118 Electoral College votes, whereas Kaine won 35 percent of the national popular vote and 229 Electoral College votes, Warren might “release” the presidential electors pledged to her, telling them to vote for Kaine instead. If they did as she instructed, then Kaine would get more than 270 Electoral College votes after all, thereby winning the presidency and preventing the House from electing Cruz.

It is theoretically conceivable that, even without a constitutional amendment, it would be possible for the winner of a presidential election to be determined according to ranked choice voting applied to the national popular vote, rather than ranked choice voting on a state-by-state basis. How would this be possible? If all states agreed to adopt ranked choice voting for their presidential ballots, then it would be possible to calculate a winner mathematically from all these ranked ballots on a nationwide basis. The mathematical procedure would eliminate the third-place candidate nationally and reallocate these ballots according the second-choice votes on the ballots that ranked this eliminated candidate first. This reallocation also would be conducted on a nationwide basis, rather than state-by-state, producing an overall national winner. The states then, by invoking their Article II power to appoint their presidential electors as they see fit, could all agree to appoint the electors pledged to whichever candidate prevailed in this nationwide ranked choice voting procedure.

But what if some states refused to participate? What if they refused not only to appoint their presidential electors according to this procedure but also to provide ballots that enabled their voters to rank the candidates? Without such rankings from these states, the other states could not compute an overall national winner even if those states used ballots with ranked choice voting in their own states.

If enough states agreed to adopt ranked choice voting for presidential elections, however, they might be able to force recalcitrant states to get in line. Suppose for example that California, New York, and some other large states all agreed to adopt ranked choice voting and to appoint their presidential electors according to whichever candidate prevailed according to the ranked choice voting calculation among participating states. If enough states agreed, they could pool together 270 Electoral College votes among themselves, without the participation of all states. The winner of the presidential election would be determined, then, according to the ranked choice voting calculation among participating states.<sup>116</sup> Nonparticipating

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116. This interstate agreement would be similar to the current National Popular Vote bill, in which eleven states with 165 Electoral College votes have so far agreed to award their Electoral College votes according to the winner of the national popular vote if enough states—with at least 270 Electoral College votes collectively—agree to do so. *See* NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com> (last visited Nov. 19, 2016) [<https://perma.cc/EBD3-EH9A>]. The difference is that the current National Popular Vote bill would award the presidency to a mere plurality vote winner, even one who gained only 35 percent of the national popular vote. By contrast, the ranked choice voting proposal here would award the

states might suddenly decide that they do not wish to be left out. Better that their voters participate in the election of the President rather than the presidency be determined solely by voters in other states. In this way, the pressure would build for all states to adopt ranked choice voting for their presidential elections.

This plan for an interstate alliance is complicated, and it might invite constitutional challenge<sup>117</sup>—even if that constitutional challenge is unlikely to prevail, given the plenary power of states under Article II to appoint their presidential electors as they see fit, as long as their method of appointment does not violate any other provision of the Constitution. In the meantime, states simply should adopt instant runoff voting for the appointment of their own presidential electors. That change alone would be hugely significant. It would dramatically reduce the risk of a third-party or independent candidate affecting which of the two major-party candidates ultimately wins the White House, and it would open up the possibility of an independent or third-party candidate actually winning the election if that candidate earns enough support to be at least second-place in first-choice votes, as well as the second-choice for voters who preferred the candidate who came in third in first-place votes. Additional constitutional reform might be desirable. In the meantime, however, state legislation of this nature would be a major intermediary step.

Because each state currently has the constitutional power to adopt instant runoff voting for the appointment of its own presidential electors, each state also has the same constitutional power to experiment with other voting methods. For example, “Condorcet voting” (named after the eighteenth-century French philosophe Marquis de Condorcet) endeavors to identify in a multicandidate election the one candidate who beats all others when compared head to head.<sup>118</sup> Condorcet voting is often considered normatively attractive insofar as any Condorcet winner can be described as having majority support compared to all other candidates in the field.<sup>119</sup> In a three-way race between Trump, Clinton, and Bloomberg, Bloomberg likely would have been the Condorcet winner in a nationwide vote—preferred by a majority of all American voters compared to Trump and preferred by a

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presidency to whichever candidate ended up with a majority of votes according to ranked choice voting calculation.

117. The much simpler plurality-winner National Popular Vote plan currently underway has been questioned as to its constitutionality. *See supra* note 116 and accompanying text. *See generally* Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523. Even if one is not persuaded by the arguments against the plan’s constitutionality, that such arguments are plausible means that pursuing such a plan might not be successful. The best bet, however, is that the Supreme Court consider it a “political question,” and determine whether the National Popular Vote Bill is inconsistent with the originalist norm that the Electoral College was intended to be distinct from prevailing popular sentiment.

118. *See* DENNIS C. MUELLER, PUBLIC CHOICE III, at 148–50 (2003); POUNDSTONE, *supra* note 10, at 133–48. *See generally* HANNU NURMI, COMPARING VOTING SYSTEMS (1987).

119. This point was recently reiterated by Nobel Prize-winning economists. *See* Eric Maskin & Amartya Sen, *How Majority Rule Might Have Stopped Donald Trump*, N.Y. TIMES (Apr. 28, 2016), <http://www.nytimes.com/2016/05/01/opinion/sunday/how-majority-rule-might-have-stopped-donald-trump.html> [<https://perma.cc/8DA6-E7N9>].

different majority of all American voters compared to Clinton. Consensus-based candidates who are the second-choice of many voters, even if they are the first-choice candidates of only a few, are often Condorcet winners. John Kasich, for example, likely would have been the Condorcet winner in a three-way race with Trump and Cruz for the Republican nomination (preferred by Cruz supporters to Trump and by Trump supporters to Cruz but only the first-choice candidate for a small percentage of Republican primary voters).<sup>120</sup>

Given how the 2016 presidential election has transpired, one easily might think it would be beneficial if each state adopted Condorcet voting for the appointment of its presidential electors.<sup>121</sup> But there are significant drawbacks to the adoption of Condorcet voting. For one thing, the mathematical calculations necessary to identify the Condorcet winner in a given election can be quite complicated, significantly more so than the math necessary to identify a winner with instant runoff voting.<sup>122</sup> The value of transparency in a democracy is so important that it would be problematic if television news anchors, like Wolf Blitzer on CNN, would have difficulty demonstrating why Bloomberg won the election because of Condorcet voting, even though both Trump and Clinton were the preferred candidates of many more voters than Bloomberg was.

There is, however, an even more fundamental objection to the use of Condorcet voting for a presidential election. It is possible that a Condorcet winner could be an extremely weak candidate, the very lukewarm second choice of many voters.<sup>123</sup> That situation, for example, could exist this year with Gary Johnson. Trump supporters would prefer Johnson to Clinton, and Clinton supporters would prefer Johnson to Trump, but perhaps neither Trump nor Clinton supporters are enthusiastic at all about Johnson. The only thing going for him, from their perspectives, is that he is preferable to their candidate's main opponent. Were Johnson to win the presidency based on Condorcet voting, just because he beats both Trump and Clinton head to head, would leave America with an extremely weak President whom nobody really wanted. In terms of governance of the nation for the four years of a President's term, it would be better to require the electorate to make a decisive choice between the two front-runners, Trump and Clinton, rather than let Johnson win the White House even though he might have been the

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120. *Id.*

121. One might even add that states and political parties should adopt Condorcet voting for the primary elections determining the delegates who nominate each party's presidential candidate.

122. Several Condorcet voting calculators are available on the internet. See CONDORCET INTERNET VOTING SERV., <http://civs.cs.cornell.edu> (last visited Nov. 19, 2016) [<https://perma.cc/UU5T-XN3Y>]; *Ranked Pairs*, ERIC GORR, <http://condorcet.ericgorr.net/condorcetCompute.php> (last visited Nov. 19, 2016) [<https://perma.cc/3ZHE-NTJV>]; RANKED-BALLOT VOTING CALCULATOR, <http://www1.cse.wustl.edu/~legrand/rbvote/calc.html> (last visited Nov. 19, 2016) [<https://perma.cc/H8PA-2PXX>].

123. See Alec Slatky, *Why the Condorcet Criterion Is Less Important Than It Seems*, FAIRVOTE (Aug. 10, 2010), <http://www.fairvote.org/why-the-condorcet-criterion-is-less-important-than-it-seems> [<https://perma.cc/VAW5-ZA6T>].

first-choice candidate of fewer than 10 percent of the voters.<sup>124</sup> Instant runoff voting, in contrast to Condorcet voting, is a method that requires the electorate as a whole to make a definitive choice between the two front-runners in a multicandidate field.

#### CONCLUSION

There is no perfect voting system. Social scientists proved that truth long ago.<sup>125</sup> But this truth also does not negate the fact that some voting systems are better and others are worse, especially in the context of a particular nation at a particular point in its history. For America in the early decades of the twenty-first century, its existing Electoral College system is especially deficient.

A feasible improvement would be for each state legislature, using its existing power under Article II of the U.S. Constitution, to adopt instant runoff voting as the method for appointing the state's presidential electors. This reform is practical insofar as it can occur one state at a time. It also is not overly ambitious insofar as instant runoff voting, while hardly yet widespread in the United States, is not entirely unknown or unproven. Having been adopted in several major American municipalities, as well as in Australia and elsewhere around the world, instant runoff voting has a track record of performance. While it theoretically could produce an anomalous result on occasion (as could the two-round systems used in most nations for presidential elections, which simply involve runoffs held at a later date rather than at the same time), America's existing Electoral College system has an excessively high rate of picking a winner who actually was opposed by a majority of America's voters.

America would do much better if each state used instant runoff voting for the appointment of its presidential electors. Not only would Ralph Nader not have affected the outcome in 2000, but Teddy Roosevelt would have prevailed in 1912, and Henry Clay in 1844—as a majority of voters would have preferred in each instance. History proves the monumental consequences of not electing the majority-preferred candidate, as the existing system all too often does. It is time for the adoption of a reform that facilitates the election of a President that the majority of the electorate actually prefers.

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124. The same objection just made to Condorcet voting can also be made to another voting method, called "approval voting," which permits voters to cast a vote of approval for as many, or as few, candidates in the field as they wish. One could envision Gary Johnson receiving more approval votes than either Trump or Clinton, especially because Trump and Clinton are so disliked by partisans on the other side. Republicans nervous about Clinton prevailing might cast an approval vote for Johnson as a hedge against Clinton, and Democrats nervous about Trump prevailing might similarly cast an approval vote for Johnson. The consequence of this might be that Johnson would receive more approval votes than either Clinton or Trump, even though neither side really wanted him to win.

125. See generally ERIC MASKIN & AMARTYA SEN, *THE ARROW IMPOSSIBILITY THEOREM* (2014).