

The Academy of Political Science

475 Riverside Drive · Suite 1274 · New York, New York 10115-1274
(212) 870-2500 · FAX: (212) 870-2202 · aps@psqonline.org · <http://www.psqonline.org>

POLITICAL SCIENCE QUARTERLY

Volume 116 · Number 1 · Spring 2001

No part of this article may be copied, downloaded, stored, further transmitted, transferred, distributed, altered, or otherwise used, in any form or by any means, except:

- one stored electronic and one paper copy of any article solely for your personal, non-commercial use, or
- with prior written permission of The Academy of Political Science.

Political Science Quarterly is published by The Academy of Political Science. Contact the Academy for further permission regarding the use of this work.

Political Science Quarterly
Copyright © 2001 by The Academy of Political Science. All rights reserved.

Editor's Opinion: Why Americans Deserve a Constitutional Right to Vote for Presidential Electors

DEMETRIOS JAMES CARALEY

Americans deserve the constitutional right to vote for president. We do not have it now. Last year's presidential election showed that our Constitution should be amended to declare explicitly that every citizen of requisite age has a constitutional right to vote for presidential electors and that the popular vote in each state determines the allocation of electoral votes. This kind of amendment would retain the electoral vote system of choosing the president and not alter the balance of power between large and small states, among regions, or between parties.

Political scientists, constitutional law experts, and other careful readers were stunned to read in the U.S. Supreme Court's *Bush v. Gore* majority opinion the declaration that "the individual citizen has no federal constitutional right to vote for electors for President unless and until the state legislature chooses statewide election."¹ All of us knew that was literally true in the original 1787 constitutional language. But the actuality since Andrew Jackson's day was that state legislatures had enfranchised essentially all white, adult, male citizens to vote for presidential electors.² Then various constitutional amendments prohibited discrimination in voting on the basis of race, gender, or age above eighteen. Most Americans who even thought about it thus assumed that the long-term de facto right to vote for presidential electors had become through custom and tradition a de jure right and was sufficient to make our

¹ George W. Bush and Richard Cheney, *Petitioners v. Albert Gore, Jr. et al.*, 12 December 2000.

² The exceptions were South Carolina, which held out until 1852, and Florida, which in 1868 briefly went back to having the legislature appoint electors.

DEMETRIOS JAMES CARALEY, the editor of *Political Science Quarterly*, is professor of political science and the Janet Robb Professor of Social Sciences at Barnard College and the Graduate Faculty of Columbia University.

system a secure presidential democracy.³ Probably most voters did not even know they were casting votes only for electors, since the names of electors in almost all states are not on the ballot—only the names of the presidential and vice-presidential candidates.

The original and never amended language of the Constitution left to the states the power to “appoint, in such Manner as the Legislature thereof may direct,” a number of electors equal to the number of senators (two for each state) and representatives to which the state was entitled in Congress.⁴ A reading of the diary that James Madison kept during the 1787 constitutional convention shows why this indirect and decentralized way of choosing the president was adopted. The most important reasons were: first, the delegates had wide differences of opinion on what the role of ordinary citizens should be in the election of the president, so they agreed to disagree and leave that issue to each state; and second, the states with small populations that were very insistent on states’ rights were given another important constitutional power in the interest of their being able to persuade their states to adopt a predominantly nationalizing constitutional document.

In this past year’s presidential election, the Florida legislature showed itself prepared to ignore the popular voting tallies if Al Gore had come out ahead in a recount and simply to select George W. Bush electors on its own authority. By taking that course the Florida legislature would have demonstrated for the future: first, that a state legislature could choose popular vote as the “manner” of selecting electors; and second, that if a plurality of the popular vote in the state went to a candidate of a party other than the one controlling the legislature, the legislature could then change the manner and choose electors pledged to a candidate preferred by the legislative majority rather than by popular vote.

The freewheeling majority of the U.S. Supreme Court gave constitutional cover to such a strategy not only when it made the explicit declaration that no federal constitutional right to vote for president existed but also when it failed to caution the Florida legislature about the harm it would cause by following through with its intention, regardless of all the other advice it gave as dicta. To the contrary, the decision cited an obscure nineteenth-century Senate report, a document that has no status as supreme law of the land, to support the majority’s claim that, “The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”⁵

There is one other provision needed to fully protect the democratic selection of the president: to do away with having actual people as electors even while keeping the electoral vote system for choosing the president. Whatever the case in 1789, there is no merit in the twenty-first century to have real, live electors. When those electors perform the job we have wanted for over 150

³ See, for example, Demetrios Caraley, “Elections and Dilemmas of American Democratic Governance,” *Political Science Quarterly* 104 (Spring 1989): 21.

⁴ *Constitution of the United States of America*, Article II, section 1.

⁵ S. Rep. No. 395, 43d Cong., 1st sess., 1873–74.

years—to elect the president democratically by ratifying the plurality of the popular vote—they become needless rubber stamps. If, on the other hand, electors start deciding to exercise independent judgment as the Framers intended and not just to rubber stamp popular vote pluralities, a small number of strategically placed “faithless” electors could in a close election defeat the intended presidential outcome and provoke a truly dangerous political crisis. Even in the year 2000, one District of Columbia elector pledged to Gore nevertheless cast a blank ballot despite Gore’s winning 85 percent of the District’s popular vote. Moreover, with the genie of the exact language of the Constitution having been taken out of the bottle by the Florida legislature and with the mass media continuously making plain that electors could not be forced to follow the popular will, the danger of some electors becoming faithless in the future is much more likely. This would be especially true if, unlike the 2000 election, such a future presidential election were to be fought over intensely divisive foreign or domestic proposals.

Even newly emerging democracies in the Third World and former Soviet satellites guarantee every ordinary citizen the right to vote for their country’s highest officials. The world’s longest-standing democracy and leader of a worldwide crusade for democracy must at least give its own citizens the constitutional right to vote for presidential electors and thus the right to have that vote accurately counted, regardless of the state in which the voter casts it. We have seen it is no longer sufficient to rely on custom and tradition. It has become necessary to insert firm constitutional language by amendment if we are to be protected against antidemocratic state electors, antidemocratic state legislatures, and antidemocratic Supreme Court justices.^{6*}

⁶ There are also some good reasons for strengthening the democratic nature of presidential elections through doing away with the state-by-state practice of winner-take-all in appointing electors. Moreover that rule is not required by the Constitution and could be changed without an amendment. Maine and Nebraska have alternative apportionment systems even now. Supporters of Thomas Jefferson and of John Adams created the winner-take-all rule in 1800 so that Adams would get no electoral votes from Virginia, and Jefferson would get none from Massachusetts. Its original purpose was thus to disenfranchise statewide popular or legislative minorities from getting any electoral votes at all for their preferred candidate. It is still the case that voters who do not constitute a plurality of the statewide popular vote are disenfranchised, since whether they deliver to their candidate one percent or 49 percent of the popular vote, that candidate gets not a single electoral vote.

*Political Science Quarterly welcomes communications in support or opposition to this opinion.