THE BIG IDEA
An Idea for Electoral College Reform That Both Parties Might Actually Like
The way we now elect presidents would horrify the authors of the U.S. electoral system. But the system can be fixed, and the power lies with the states.

By EDWARD B. FOLEY | January 12, 2019
Americans have heard for years that the Electoral College is broken—just look at the presidential elections of 2000 and 2016, when the winner earned fewer votes nationally than the loser. We have also heard that, despite its flaws, this system won’t change anytime soon. Republicans generally oppose a national popular vote, which would both undermine them electorally and violate the Founding Fathers’ desire for the presidency to reflect America’s federalist structure as a union of separate states.

But here is an argument for Electoral College reform that might actually appeal to conservatives: Simply put, the way we currently elect presidents would horrify the early American authors of the U.S. electoral system, as defined in the 12th Amendment.

The drafters of that amendment, above all, wanted presidents to be elected according to the principle of majority rule. By the early 1800s, America had experimented four times with presidential elections, and had seen how the Founders’ original electoral system gave undue power to the minority party. In response, members of Congress devised a system—still federalist in nature—in which the winner of an Electoral College majority was supposed to have won majority support in the states.

The problem? In the decades since, states have abandoned their commitment to majority rule. Candidates today can win all of a state’s Electoral College votes with simply a plurality of votes in that state—and that state, either alone or along with others where the same thing happens, can swing entire elections. In 2016, Donald Trump won all the electoral votes, totaling 101, in six states where he received less than 50 percent of the popular vote: Arizona, Florida, Michigan, North Carolina, Pennsylvania and Wisconsin. (Hillary Clinton won seven states this way.) Those 101 votes were one-third of the 304 Trump won overall—they were essential to his reaching an Electoral College majority of 270 and becoming president.

How did America’s presidential elections go so far astray from the goals of the 12th Amendment? And can we go back?

Understanding this deviation requires first going back to the origins of our current Electoral College system and examining what it was designed to accomplish. This history can also offer models for how states might change their rules in order to restore America’s commitment to majority rule.

Principled constitutional originalists should be leading the call for this kind of reform—a reform that requires not a constitutional amendment but only changes in state law. In reality, the current system works to the detriment of both Republicans and Democrats. A candidate from either party easily could prevail again in a way that is inconsistent with the original intent of the Electoral
The Electoral College system governing us today, as delineated in the 12th Amendment, is primarily the result of congressional deliberations in 1803, which revised the original system adopted at the Constitutional Convention in 1787. To the Founders, the goal of the first electoral system was to elect presidents who were consensus choices, rising above the fray of squabbling political factions. Each elector was required to cast two votes for president, each for a different candidate and the two candidates coming from different states. The assumption was that nationally acceptable second-choice candidates often would prevail over disparate “favorite son” candidates from each state.

This worked with George Washington in 1789 and 1792. But in the next two elections, after Washington retired, head-to-head competition developed between two opposing political parties—the Federalists, led by John Adams and Alexander Hamilton, and the Jeffersonians, led by Thomas Jefferson and James Madison. It soon became clear that two-party politics was incompatible with the two-presidential-votes-per-elector rule.

In the election of 1800, Jefferson outpaced Adams in the Electoral College tally—73 to 65—but tied his running mate, Aaron Burr, since the Jeffersonian electors each cast their two votes for their party’s presidential and vice-presidential candidates. The Constitution’s mechanism for breaking this tie was a vote in the outgoing House of Representatives (by a special procedure in which each state’s delegation had one vote), which meant that the party controlling the outcome in the House (the Federalists) was opposed to the party whose candidates had tied for the presidency (the Jeffersonians). Not only had the Electoral College not yielded a clear winner, but tie-breaking process made matters tenser; the governors of Virginia and Pennsylvania were even prepared to use their state militias to defend Jefferson’s claim to the presidency.

Eventually, the Federalists backed down, in large part because Hamilton convinced his fellow partisans that, while Jefferson’s principles were abhorrent, at least he had principles, whereas Burr did not. (All who have seen the phenom musical Hamilton will remember this point.) Still, it was clear to the Jeffersonians that they had to do something to prevent such circumstances in the future.

Not only that, but the Jeffersonians wanted the Electoral College to yield winners who were more reflective of the prevailing sentiment among the American people. This was strategic: Ahead of the election of 1804, Jefferson had just completed the Louisiana Purchase, which Federalists opposed...
but the rest of the country enthusiastically applauded. The Jeffersonians also held two-thirds majorities in both houses of Congress in 1803; they did not need Federalist support to send a constitutional amendment to the states, where they were dominant as well.

So, when Congress met that year, the Jeffersonians introduced a draft of what would become the 12th Amendment, and lawmakers went to work debating it. In fact, Congress in 1803 gave much more thought to the nature of presidential elections than the 1787 convention delegates had given. While it is possible to read through everything the Philadelphia delegates said on the topic of presidential elections in a few hours, it takes a couple of weeks of solid work to digest the extensive philosophical debates that members of Congress had about presidential elections in 1803.

The Federalists—with Senator Uriah Tracy of Connecticut most conspicuously leading the way—defended the 1787 Electoral College system, clinging to the idea that it allowed a minority party to block a majority party’s presidential candidate. If the minority electors found the majority candidate objectionable, all they had to do was cast their two votes for their own presidential candidate and the vice-presidential candidate of the majority party, and the majority party’s vice-presidential candidate would almost certainly end up with more votes than the majority party’s presidential candidate. The Federalists contended that this minority veto was more consistent with the consensus-seeking goal of the 1787 Electoral College.

The Jeffersonians, however, argued strenuously that, according to fundamental principles of republican government, the chief executive must be the choice of the majority party. Senator John Taylor, a constitutional scholar from Virginia, asserted that it “never” is appropriate that “a minor faction should acquire a power capable of defeating the majority in the election of President.” Instead, Taylor proclaimed on the Senate floor, “the election of a President should be determined by a fair expression of the public will by a majority.” The 12th Amendment that he and the Jeffersonians proposed—in which electors each cast a single vote for president and then a separate vote for vice president—was designed to entrust power to the majority vote, which the Jeffersonians saw as representative of the popular sentiment.

Other Jeffersonians echoed Taylor. “I do not understand the principle of minorities governing majorities,” said Senator William Cocke of Tennessee. His fellow Tennessean, Representative George Campbell, elaborated that “in all free Governments the will of the majority must be considered for the purposes of Government as the will of the nation, and that it ought, therefore, to prevail and control the will of the minority when opposed to it.” Campbell specifically thought it essential that the Electoral College system be amended so that “a fair and unequivocal expression of the public will may be obtained, and will have its due weight.”

The Jeffersonians did not conceive of this majority rule as a national popular vote. Sufficiently
committed to federalism, they wanted a candidate to achieve a majority of Electoral College votes by securing majority support *within the states* providing those electoral votes. A duly elected president under the 12th Amendment, in other words, would attain a federally appropriate, compound majority-of-majorities.

Eventually, the Jeffersonians got their way in 1803. The next year, the 12th Amendment was ratified, making clear the young republic’s commitment to the will of the majority.

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**At first, the system** devised in 1803 produced results generally consistent with the 12th Amendment’s original intent. But over time, the amendment began to lose its majoritarian moorings.

The primary reason was a major transformation in the methods that states use for appointing their Electoral College members. Before the 12th Amendment, most often a state’s legislature voted directly for Electoral College electors, which was consistent with the principle of majority rule. When states let citizens vote for the electors, they took steps to make sure that the chosen electors still represented the majority of the state’s voters, as well. For example, Massachusetts and New Hampshire experimented with different forms of runoffs in the event that an elector did not receive a majority of votes from the citizenry. Some states used districts to vote for presidential electors, rather than have all the voters of the state vote for all the state’s electors. This method permitted a regionally based minority party within the state to win at least some of the state’s electors, but presumably the majority party within the state overall would control a majority of the state’s Electoral College votes.

All of this began to change with the rise of the plurality winner-take-all system, in which all of a state’s electors are awarded to the candidate who receives the highest number of votes in the state—even if that candidate receives only a plurality of the popular vote. Winner-take-all became the dominant method of appointing electors among the states after Andrew Jackson felt robbed of the presidency in 1824 and helped to persuade state legislatures to change their rules to permit plurality victories.

Today, 48 states rely on the plurality winner-take-all system to select their presidential electors. It has long been the norm. But it is also a system the Jeffersonians would find entirely objectionable insofar as it empowers a party and a candidate that lack a majority of votes. The Jeffersonians would find it even more objectionable if such a candidate achieved an Electoral College victory only as a result of these minority-vote wins in enough states. Yet this is exactly what has happened in several recent elections.
It’s not just 2016. In 2000, George W. Bush won Florida with less than half the popular vote, and this is true even assuming that he would have prevailed in the recount that the Supreme Court stopped. Ironically, William Jefferson Clinton’s election in 1992 was the most un-Jeffersonian of all. The only state in which he won a majority of the popular vote (setting aside the District of Columbia) was his home state of Arkansas.

Why have we have seen un-Jeffersonian results with accelerating—and alarming—frequency, whereas previous periods were largely immune? The answer is that third-party candidates have become more common. When there are only two candidates, the plurality winner is necessarily also a majority winner, but not so when there are three or more candidates on the ballot.

For an 80-year period between 1912 and 1992—most of the 20th century, in other words—third-party candidates did not make a difference in which major-party candidate prevailed, and so Americans became conditioned to the idea that the Electoral College was working as it was supposed to. But third-party candidates easily can affect which of the two main candidates is the one with a plurality in a given state. George H.W. Bush thought Ross Perot deprived him of the majority that he would have received running against only Bill Clinton in 1992. (According to political scientists, it’s debatable.) Ralph Nader almost certainly cost Al Gore the state of Florida, and thus the presidency, in 2000. In 2016, would Clinton have beaten Trump in Michigan, Pennsylvania and Wisconsin if Gary Johnson and Jill Stein hadn’t been in the race? Who knows for sure? But it’s possible.

In the increasingly polemical environment of American politics, it is likely that third-party candidates will be even more significant in the future, especially as negative views of the two major-party candidates intensify. Looking to 2020, it is easily conceivable that one or more third-party candidates will attempt to compete against Trump and his Democratic opponent. Ohio’s former governor, John Kasich, has sent strong signals that he is considering this. Michael Bloomberg, if he is unable to win the Democratic nomination, might decide to compete as an independent. (He has thought about doing so before.)

Suppose in 2020 there is a three-way split in a pivotal state that determines the Electoral College winner: Say, 38 percent for a Democrat, 37 percent for a Republican and 25 percent for a third-party candidate. Suppose, further, that if the third-party candidate were not on the ballot, the Republican would have pulled ahead, achieving a 52 percent majority, with the Democrat ending up with only 48 percent—because the third-party candidate’s 25 percent support split 15-10 in favor of the Republican. Letting the Democrat become president according to the winner-take-all system would be exactly the kind of minority victory that the Jeffersonians so adamantly opposed.

In 2020, either the Republican or the Democrat could be the one with only 37 percent—the one
who would have achieved a majority in a two-way race. Which means both parties have an incentive to avoid this kind of un-Jeffersonian disaster.

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**How to do so?** It is the states that have the power to restore the Electoral College to its original intent—and to ensure that it better represents the will of the American people. To do so, they must commit themselves to this majority-rule principle: *No candidate receives all of a state’s electoral votes unless the candidate gets a majority of the state’s popular votes.*

There are many methods states can use to comply with this principle. They could have a regular runoff between the top-two candidates, held in late November, if no candidate received a majority in the initial popular vote. Alternatively, states could hold a preliminary vote—perhaps on the Tuesday after Labor Day—to clear the field of third-party and independent candidates, so that only the top two finalists appear on the November ballot. (This option would function similarly to the “top two” system that California and Washington state currently use for nonpresidential elections.) Or, states could adopt the kind of “instant runoff voting” procedure that Maine recently employed successfully for its congressional elections: Voters can rank their preferences among multiple candidates, so that a computer can tally which of the top two finalists receives a majority once all lower-ranked candidates are eliminated.

Another idea: A state could award all of its electoral votes to a candidate who receives a majority of the state’s popular vote, but if no candidate does, then the state would apportion its electoral votes among the candidates. For example, in the instance of a 38-37-25 percent split among three candidates in a state’s popular vote, a state with 10 electoral votes might split them 4-4-2.

Obviously, the state would need a rounding formula, given the impossibility of fractional votes in the Electoral College, but computers easily can handle these calculations. Or a state could, instead, dispense with winner-take-all entirely, choosing to apportion its electoral votes even if there is a majority winner of the state’s popular vote. Finally, states could also adopt the kind of district-based system that Maine and Nebraska currently have, where each congressional district votes for an elector (and two at-large electors are chosen in statewide votes), though doing so runs the risk of gerrymandering in presidential elections.

The 12th Amendment left in place the power of states to appoint their electors “in such Manner as the Legislature thereof may direct,” consistent with the Jeffersonians’ commitment to federalism. What this means, as a practical matter, is that each state can embrace Jeffersonian majority rule by means of either ordinary legislation or a ballot initiative (in those states that permit them)—as long as a ballot initiative lets the state’s legislature choose the particular method of securing Jeffersonian majority rule. The force of inertia is strong, to be sure. But overcoming lack of political
will is easier than passing a constitutional amendment. Just as citizens have been able to achieve gerrymandering reform on their own initiative, as in Michigan, so too they can achieve this Electoral College reform.

This commitment to majority rule, moreover, is actually fairer to third-party and independent candidates than the current system, because it gives them a chance to break through without risk of affecting the outcome if they don’t. When voters don’t have to worry about how a third-party candidate might skew the election, they might feel more emboldened to vote for that candidate, and the candidate has a better opportunity to make his or her case.

It would be best if, before 2020, all states became compliant with Jeffersonian majority rule. But it is most important that the battleground states do so. If only Florida had done so before 2000, the outcome that year would have been different. And if Florida and just one or two other states had done so before 2016, the same might have been true then, as well. There is urgency to this reform. No one should want a president elected in 2020 with only a minority of support, perhaps even under 40 percent in the pivotal states.

Americans eventually might replace the Electoral College with something entirely different. But that certainly won’t happen before 2020. As long as we continue to have the Electoral College, we should make it work as intended. This means bringing it back into compliance with the majority-rule principle.

As one supporter of the 12th Amendment, Representative James Holland of North Carolina, exclaimed during the congressional debate in 1803: “The will of the majority in their election of the Chief Magistrate” must be “the first principle of our Government.”