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The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation

Seth Barrett Tillman, *None*



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THE FEDERALIST PAPERS AS RELIABLE HISTORICAL SOURCE MATERIAL FOR CONSTITUTIONAL INTERPRETATION

In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally *determines* my position. I believe that the most straightforward reading of [The Federalist] No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Printz v. United States, 521 U.S. 898, 971 (1997)
(Souter, J., dissenting) (emphasis added).

The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821)
(Marshall, C.J.).

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From: Harvard Law Review Articles Editor on behalf of the Staff
 Date: September 1, 2002
 To: President James Madison, Chief Justice John Jay, and Secretary Alexander Hamilton

Sirs:

It is with deep and abiding regret that we must turn down the opportunity to publish your collected papers in our next issue. Our editorial staff met and debated publishing your papers "as is." On the one hand, we recognized your advanced age and distinguished service to your country. And, for that reason, a minority amongst us was willing to put aside our customary editorial standards in favor of your more populist¹ style. However, a larger number of our staff was of the opinion that standards are standards. And, if academic journal standards are to have any force, then they must apply to one and all, your good selves included. Nevertheless, in the interests of comity, a compromise was struck. We at *Harvard Law Review* are willing to put aside our burdensome citation requirements to facilitate early publication, but we must insist on the following corrections² to your formerly anonymous³ papers. Once made, we

¹ Each paper of the *The Federalist Papers* was addressed "[t]o the People of the State of New York." See, e.g., THE FEDERALIST NO. 64, at 325 (Chief Justice John Jay) (Gary Wills ed., 1982). But cf. Republican Party of Minn. v. White, 122 S. Ct. 2528, 2556 (2002) (Ginsburg, J., dissenting) ("When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest.").

² We do not use the word "correction" as a term of opprobrium. We, too, recognize that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37, at 179 (James Madison) (Gary Wills ed., 1982). Nor do we expect you to correct "errors" that arose from the mere failure on your part to perfectly predict how future Article III judges would subsequently interpret the Constitution of 1787. Compare, e.g., THE FEDERALIST NO. 77, at 388 (Alexander Hamilton) (Gary Wills ed., 1982) ("The consent of that body [the Senate] would be necessary to displace [federal officers] as well as to appoint [the President's nominees]."), with *Myers v. United States*, 272 U.S. 52, 136-37 (1926) (Taft, C.J.) (President has sole power of removal, and Act of Congress requiring Senate consent to removal is unconstitutional) (citing THE FEDERALIST NO. 77), and *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) ("*Myers v. United States* [was] a carefully researched and reasoned . . . opinion."). Rather, we are here referring to *clear error* that must have arisen from a lack of familiarity on your part with the Constitution itself. No doubt the heat of passion from your anonymous participation in public debate overcame your good sense or denied you a full opportunity to then familiarize yourselves with the document whose ratification you politically sponsored.

³ Compare THE FEDERALIST NOS. 1-85 (Alexander Hamilton, John Jay, and James Madison) (Gary Wills ed., 1982) (published anonymously prior to ratification of the Constitution of 1787 and the Bill of Rights), with *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting) ("I do not know where the Court derives its perception that 'anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.'" (quoting *McIntyre*, 514 U.S. at 357 (Stevens, J.)), and *Talley v. California*, 362 U.S. 60, 70 (1960) (Clark, J., dissenting) ("I stand second to none in supporting Talley's right of free

will promptly reconsider *The Federalist Papers* in an expedited review towards publication in our next issue (circa 2005).

I. ORGANIZATION OF THE LEGISLATURE

A. In *The Federalist No. 59*,⁴ you wrote: “[t]he Senators are to be chosen for the period of six years . . . and no State is to be entitled to more than two Senators: A quorum of the body is to consist of sixteen members.”⁵ This seems plainly incorrect. The Constitution specifies that “a majority of each house shall constitute a quorum to do business.”⁶ At the time of the Philadelphia Convention there were thirteen States. A quorum, therefore, would have been fourteen Senators, a simple majority of twenty-six. Indeed, no (reasonable) rule that we could devise could account for your selection of sixteen Senators to make a quorum. For example, two-thirds of twenty-six Senators would be a quorum of eighteen, and three-quarters of twenty-six Senators would be a quorum of twenty.

Indeed, even if we assumed that you were clairvoyant in February 1788 (when you originally published this “paper” in the popular press) and realized that eleven,⁷ and not thirteen, States would ratify the Constitution prior to the meeting of the first Congress, the error on your part is not resolved. With eleven States, there would be twenty-two Senators: a majority of twelve Senators would establish a constitutional quorum. Two-thirds of twenty-two is fifteen, and three-quarters of twenty-two is seventeen.

Lastly, your calculation may have premised on the assumption that ratification would later be achieved with only nine States of the then extant thirteen

speech – but not his freedom of anonymith [sic]. The Constitution say [sic] nothing about freedom of anonymous speech.”).

⁴ This paper is ascribed to Secretary Hamilton and is dated February 22, 1788.

⁵ THE FEDERALIST NO. 59, at 302 (Alexander Hamilton) (Gary Wills ed., 1982); THE FEDERALIST, ON THE NEW CONSTITUTION; WRITTEN IN 1788, BY MR. HAMILTON, MR. JAY, AND MR. MADISON NO. 59, at 322 (Alexander Hamilton) (Philadelphia, Benjamin Warner 1817) (“sixteen members”); THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787 NO. 59, VOL. 1 at 170 (Alexander Hamilton) (reprint Legal Classics Library 1983) (New York, J. and A. McLean 1788) (“fixteen members”) (original spelling shown); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 809 (1995) (citing THE FEDERALIST NO. 59); *id.* at 863 (Thomas, J., dissenting) (same); *Wesberry v. Sanders*, 376 U.S. 1, 40-41 & n.40 (1964) (Harlan, J., dissenting) (same); *Newberry v. United States*, 256 U.S. 232, 248, 255-56 (1921) (McReynolds, J.) (same); *United States v. Gradwell*, 243 U.S. 476, 484-85 (1917) (Clarke, J.) (same); *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (Posner, C.J.) (same); *In re Engle*, 8 F. Cas. 716, 717 (C.C.D. Md. 1877) (No. 4,488) (same).

⁶ U.S. CONST. art. I, § 5; *cf.* THE FEDERALIST NO. 58, at 298 (James Madison) (Gary Wills ed., 1982) (noting that quorum requirement for the House is a mere majority).

⁷ *See infra* notes 12-14.

States – a possibility expressly provided for under Article VII.⁸ However, here too, your calculation still fails. With nine States, there would be eighteen Senators: a majority of ten Senators would establish a constitutional quorum. Two-thirds of eighteen is twelve, and three-quarters of eighteen is fourteen.

B. In *The Federalist No. 84*,⁹ you wrote: “[t]he two branches of the legislature are in the first instance, to consist of only sixty-five persons”¹⁰ Again, this seems plainly incorrect. The Constitution specified that the first *House* would have sixty-five members if it were composed of all thirteen then extant States, and the first *Senate* would have twenty-six members.¹¹ When the first Congress met,¹² prior to ratification by North Carolina¹³ and Rhode Island,¹⁴ the Senate had twenty-two members and the House had fifty-nine mem-

⁸ See U.S. CONST. art. VII (“convention of nine states shall be sufficient”).

⁹ This paper is ascribed to Secretary Hamilton and is dated May 28, 1788.

¹⁰ THE FEDERALIST NO. 84, at 441 (Alexander Hamilton) (Gary Wills ed., 1982); see also *United States v. Morrison*, 529 U.S. 598, 639 n.11 (2000) (Souter, J., dissenting) (citing THE FEDERALIST NO. 84); *Carmell v. Texas*, 529 U.S. 513, 532 (2000) (same); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (same); *City of Boerne v. Flores*, 521 U.S. 507, 549 (1997) (O’Connor, J., dissenting) (same); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (same); *id.* at 288 (Brennan, J., dissenting) (same); *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring) (same); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 584 (1983) (same); *EEOC v. Wyoming*, 460 U.S. 226, 270 n.6 (1983) (Powell, J., dissenting) (same); *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (same); *Duncan v. Louisiana*, 391 U.S. 145, 173 n.4 (1968) (Harlan, J., dissenting) (same); *Griswold v. Connecticut*, 381 U.S. 479, 489 n.4 (1965) (Goldberg, J., concurring) (same); *Kring v. Missouri*, 107 U.S. 221, 226 (1883) (same), *overruled by Collins v. Youngblood*, 497 U.S. 37 (1990); *Legal Tender Cases*, 79 U.S. 457, 666 & n.235 (1870) (Field, J., dissenting) (same); *Mapco, Inc. v. Carter*, 573 F.2d 1268, 1278-79 (Temp. Emer. Ct. App. 1978) (Becker, J.) (same).

¹¹ See U.S. CONST. art. I, § 2 (prior to apportionment following the first census, the House shall be composed of “New Hampshire[’s] three [members], Massachusetts[’s] eight, Rhode Island and Providence Plantations[’s] one, Connecticut[’s] five, New York[’s] six, New Jersey[’s] four, Pennsylvania[’s] eight, Delaware[’s] one, Maryland[’s] six, Virginia[’s] ten, North Carolina[’s] five, South Carolina[’s] five, and Georgia[’s] three”); *id.* at § 3 (“The senate of the United States shall be composed of two senators from each state.”).

¹² The first Congress was scheduled to meet March 4, 1789, but it did not have a quorum until April 6, 1789. See FRED L. ISRAEL, STUDENT’S ATLAS OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1996, at 3 (1997); see also *Owings v. Speed*, 18 U.S. 420, 423 (1820) (Marshall, C.J.) (“it is apparent that [the] operation [of the Constitution] did not commence before the first Wednesday in March [4], 1789”); Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 2 & n.4 (2001) (March 4, 1789 date is “established hornbook doctrine”) (collecting sources).

¹³ “The government did not declare the Constitution in effect until March 4, 1789. After that, North Carolina ratified on Nov. 21, 1789.” THE WORLD ALMANAC AND BOOK OF FACTS 1998, at 514 (Robert Famighetti ed., 1997) (apparently referring to the government under the Articles of Confederation).

¹⁴ Rhode Island subsequently ratified on May 29, 1790. See THE WORLD ALMANAC AND BOOK OF FACTS 1998, at 514 (Robert Famighetti ed., 1997).

bers: a total of eighty-one, not sixty-five, members. Moreover, one of your co-authors shares our interpretation: “[t]he number of which this branch of the legislature [the House of Representatives] is to consist at the outset of the government, will be sixty five.”¹⁵ And, of course, the prior quotation should be corrected to read: “the number of which this branch of the legislature is to consist at the outset of the government will be sixty five, *assuming ratification by all thirteen extant States.*”

Interestingly, given the eight¹⁶ States that had already ratified by the time of your first publication in the New York press,¹⁷ there were no possible ratification scenarios of the remaining five¹⁸ (or fewer) States that could lead to a Congress of exactly sixty-five members.

II. THE VICE-PRESIDENT: ELECTION AND POWERS

A. In *The Federalist No. 68*,¹⁹ you wrote: “[t]he vice-president is to be chosen in the same manner with the president; with this difference, that the senate is to [elect the vice-president in the event that the electoral college fails to reach a unique majority], [as] the house of representatives [elects the president].”²⁰ This too seems plainly incorrect. Secretary Hamilton’s restatement of the law would have been correct, generally speaking, *after* passage of the Twelfth Amendment. The Twelfth Amendment specified that in the event that the electoral college fails to choose a President and Vice-President, then the

¹⁵ THE FEDERALIST NO. 55, at 282 (James Madison) (Gary Wills ed., 1982); *see also* *Utah v. Evans*, 122 S. Ct. 2191, 2206 (2002) (Breyer, J.) (citing THE FEDERALIST NO. 55); *Walker Field, Colo., Public Airport Auth. v. Adams*, 606 F.2d 290, 299 n.2 (10th Cir. 1979) (McKay, J., dissenting) (same); *Whelan v. Cuomo*, 415 F. Supp. 251, 257 (E.D.N.Y. 1976) (same); *Preisler v. Secretary of State of Mo.*, 279 F. Supp. 952, 1001-02 (W.D. Mo. 1967) (same).

¹⁶ By May 28, 1788, eight States had ratified; these States included: Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, and South Carolina. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1998, at 514 (Robert Famighetti ed., 1997). Apparently, Alexander Hamilton was only aware of seven state ratifications. *See* THE FEDERALIST NO. 85, at 449 (Alexander Hamilton) (Gary Wills ed., 1982) (“[Federalists] now have [a hold] . . . upon seven out of the thirteen states . . .”) (emphasis added).

¹⁷ *See supra* notes 1, 3.

¹⁸ After May 28, 1788, five States had yet to ratify the Constitution; these States included: New Hampshire, Virginia, New York, North Carolina, and Rhode Island. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1998, at 514 (Robert Famighetti ed., 1997).

¹⁹ This paper is ascribed to Secretary Hamilton and is dated March 12, 1788.

²⁰ THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Gary Wills ed., 1982) (“The vice-president is to be chosen in the same manner with the president; with this difference, that the senate is to do, in respect to the former, what is to be done by the house of representatives, in respect to the latter.”); *see also* *Williams v. Rhodes*, 393 U.S. 23, 43-44 & n.3 (1968) (Harlan, J., concurring) (citing THE FEDERALIST NO. 68); *Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963) (same); *Ray v. Blair*, 343 U.S. 214, 232 footnote (1952) (Jackson, J., dissenting) (same); *McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (Fuller, C.J.) (same).

President is to be chosen by the House, and the Vice-President is to be chosen by the Senate. But, in 1787, prior to passage of the Twelfth Amendment, the constitutional framework was otherwise. At that time, the time of your first (non-peer reviewed) publication of *The Federalist Papers*, if the electoral college failed to choose a President, then the House was to choose the President, and once chosen, the remaining candidate with the most electoral votes became Vice-President. Effectively, the House, without participation by the Senate, chose *both* the President and the Vice-President. For example, in the contested election of 1800, the House chose Jefferson as President and Burr, the runner-up in the electoral college, became Vice-President. Had the House chosen Burr for President, then Jefferson would have become Vice-President. In neither scenario would the Senate play a role.²¹ The Senate would only play a role if after the election of the President by the electoral college or by the House, there *remained* a tie between or among the runners-up in the electoral college.²²

Furthermore, prior to ratification of the Twelfth Amendment, even with regard to *ties* the procedures associated with a House election of the President differed from the procedures associated with a Senate election of the Vice-President. Thus, in the event of a tie for Vice-President, and contrary to your statement cited above from *The Federalist No. 68*, the President and Vice-President were not to be “chosen in the same manner.”²³ Indeed, commenting on the Constitution as it existed prior to the adoption of the Twelfth Amendment, William Rawle, in one of the first major post-ratification treatises on the Constitution, wrote: “[t]he mode of proceeding was somewhat different as to the vice president [than it was with regard to electing the President].”²⁴ For ex-

²¹ Compare, e.g., Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL’Y 665, 747 n.45 (1996) (“When the House *elected* Jefferson President, Burr *automatically* became Vice President without any Senate action.”) (emphasis added), with <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001133> (last visited Dec. 8, 2002) (noting in Aaron Burr biography that “in the presidential election of 1800, Burr and Thomas Jefferson each had seventy-three [electoral] votes, and the House of Representatives on the thirty-sixth ballot *elected* Jefferson President and Burr Vice President”) (emphasis added).

²² See U.S. CONST. art. II, § 1 (“In every Case [including a House vote for President], after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall ch[oo]se from them by Ballot the Vice President.”), *amended* by U.S. CONST. amend. XII (requiring electors to cast separate ballots for President and Vice-President).

²³ THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Gary Wills ed., 1982).

²⁴ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 53 (Philadelphia, Philip H. Nicklin, 2d ed. 1829); see also *id.* at 53-54 (noting that prior to the adoption of the Twelfth Amendment, election of the President by the Electoral College required a majority of electoral votes, but the Vice-President could be elected by less than a majority). But see THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Gary Wills ed., 1982) (“[A]ll the reasons, which recommend the mode of election prescribed for the [President], apply with great, if not with equal, force to the manner of appointing the [Vice-President].”). Furthermore, prior to the Twelfth Amendment, the Constitution imposed express citizenship, residency, and age qualifications on the President, but no such qualifications were imposed on the Vice-President. See

ample, in a House election²⁵ for President, each State had one vote, a quorum demanded representation from two-thirds of the States, and a majority of all the States was necessary to secure election.²⁶ By contrast, in a Senate election for Vice-President, each State had two votes, a quorum was a simple majority of the Members, and by implication, only a bare majority of a quorum was necessary to secure election.²⁷ More importantly, in the event of an electoral college n-way tie (after the election of the President by the electoral college or by the House), the Senate was to choose the Vice-President from among all those who tied.²⁸ On the other hand, with regard to electing the President in the event of a tie in the electoral college, the House was textually limited to 2-way, 3-way, 4-way, and 5-way ties.²⁹ There was no provision providing for House election of

Letter from the Federal Farmer to the Republican (IV) (October 12, 1787) ("It is doubtful whether the vice president is to have any qualifications; none are mentioned."), at <http://www.constitution.org/afp/fedfar04.txt> (last visited Dec. 8, 2002); cf. U.S. CONST. amend. XII ("[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President.").

²⁵ House selection of the President results from an election, not an appointment. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1456, at 321 (photo. reprint Fred B. Rothman Publications, 2d printing 1999) (1833) ("if the people do not elect a President [in the electoral college], there is a greater chance of *electing* one in this mode [in the House]") (emphasis added); see also Ross & Josephson, *supra* note 21.

²⁶ See U.S. CONST. art. II, § 1.

²⁷ See U.S. CONST. art. I, §§ 1, 3, 5; see also RAWLE, *supra* note 24, at 53-54 (prior to the adoption of the Twelfth Amendment, in electing the Vice-President, the Senate "is not directed that in this respect they shall vote by states [as the House elects the President], it follows that they vote individually as in ordinary cases").

However, with ratification of the Twelfth Amendment, the Senate's quorum and minimum vote requirements for electing a Vice-President were brought into rough parity with the House's quorum and minimum vote requirements for electing a President. Compare U.S. CONST. amend. XII (when "the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice"), with *id.* (House election of President "shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice"). Though the House and Senate quorum and minimum vote requirements were brought into rough parity by the Twelfth Amendment, other differences between House and Senate procedures remain. See, e.g., *infra* note 30; compare RAWLE, *supra* note 24, at 55 ("In the original text it is declared, that the votes of the house of representatives and the senate shall be by ballot, and so it still continues as to the house of representatives, but it is not directed in the [Twelfth] amendment, how the votes of the senate shall be given [for Vice-President]. It is probable, however, that a vote by ballot, would be adopted."), with 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1941, at 224 (1907) (during the 1837 Senate election for Vice-President, the "Secretary of the Senate . . . call[ed] the names of Senators in alphabetical order, and each Senator . . . name[d] the person for whom he vote[d].").

²⁸ See U.S. CONST. art. II, § 1 ("if there should remain two or more who have equal Votes, the Senate shall ch[oo]se from them by Ballot the Vice President"); see also *infra* note 30.

²⁹ See U.S. CONST. art. II, § 1 (House choosing President "from the five highest on the list")

if no candidate has a majority of electoral votes); *id.* (House choosing President from top two contenders if both have a majority of electoral votes and if both have an equal number of votes). Thus there were precisely seventeen distinct scenarios of the electoral college that would throw the election into the House. Why seventeen scenarios? $17 = 1 + 2^{(n-1)}$ where $n = 5$.

The Twelfth Amendment reduced the House's authority; where it previously had the ability to select from the top five contenders in the electoral college, it now has the ability to select only among the top three. See U.S. CONST. amend. XII ("if no person ha[s] . . . [a] majority [of electors cast for President], 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 . . .") (emphasis added). Thus there are now precisely four distinct scenarios of the electoral college that throw an election into the House when no candidate has an absolute majority of electoral votes appointed. (Why four scenarios? $4 = 2^{(n-1)}$ where $n = 3$.) These scenarios include: (i) a 1st, 2nd, and 3rd place finisher (with or without other contenders following behind 3rd place); (ii) a two-way tie for 1st place, and a 2nd place finisher (with or without other contenders following behind 2nd place); (iii) a 1st place finisher, and a two-way tie for 2nd place (with or without other contenders following behind 2nd place); and (iv) a three-way tie for 1st place (with or without other contenders following behind 1st place).

The upshot of the constitutional structure for House contingency elections is that every such election is implicitly bicameral. Any losing candidate (at least among the top three contenders) will generally have the ability to throw the election from the House into the Senate by urging electors "committed" to her to cast their votes in such a way that the ultimate configuration of electoral votes falls outside the fixed scenarios, described above, in which the Constitution permits the House to choose a President. In that event, it is likely that the Senate will choose a Vice-President, who in the absence of a President elect, will also serve as acting President. See U.S. CONST. amend. XX, § 3 (if a President shall not have been chosen or if the President elect fails to qualify, the Vice-President elect "shall act as President"); see also *supra* note 25. For example, in the 2000 election, the States and the District of Columbia were permitted to cast 538 electoral votes. A clear majority was 270 electoral votes. If the breakdown of the electoral vote had been 269 electoral votes for candidate Bush, 267 for candidate Gore, and 2 for candidate X, then candidate X could have had her electors split their vote between herself and candidate Y. In that situation, the final distribution of electoral votes would have been: a 1st place finisher, a 2nd place finisher, and a two-way tie for 3rd place (candidates X and Y having 1 electoral vote each). *Here there are no (obvious) top three contenders among whom the House may choose a President. This may very well preclude the House from acting and electing any President.* And obviously, if either candidates Gore or Bush had thought the House an unfriendly forum to their presidential aspirations, and if they could prevail on their electors (as is likely), then they too could have created the necessary conditions to block House action on the presidential contest.

Our current constitutional structure empowers losers; it allows them to control the forum that selects the ultimate winner. Indeed, losers, as explained below, also have significant control over the forum that selects the Vice-President. See *infra* note 30. Certainly transparency is not a virtue of the current system – pre- or post-Twelfth Amendment. Moreover each and every attempt at forum selection by candidates and/or their electors invites judicial intervention. Is it a higher patriotism that allows the legal community to ignore the crisis in waiting? But see THE FEDERALIST NO. 68 (Alexander Hamilton) ("THE mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents."), at http://memory.loc.gov/const/fed/fed_68.html (last visited April 20, 2003); *id.* ("It was also peculiarly desirable [in designing a system to elect the President] to afford as little opportunity as possible to tumult and disorder.").

the President in the event of an electoral college n-way tie with n greater than or equal to 6.³⁰

³⁰ With ratification of the Twelfth Amendment, the Constitution now has no provision for a presidential electoral college n-way tie with n greater than or equal to 4. See U.S. CONST. amend. XII ("if no person ha[s] . . . a majority [of electors cast for president], 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 . . ."). Similarly, with ratification of the Twelfth Amendment, the Constitution now has no provision for a vice-presidential electoral college n-way tie with n greater than or equal to 3. See *id.* ("from the two highest numbers on the list, the Senate shall choose the Vice-President"); see also RAWLE, *supra* note 24, at 55 ("[O]ne difficulty not provided for, may possibly some day occur. If more than three of those highest in [electoral] votes for president, or [more] than two of those voted for as vice president should be equal in number of votes, it is not directed how the selection shall be made.").

These scenarios may not be as unlikely as they at first appear. Indeed, the complexity of our constitutional guideposts, even after the enactment of the Twelfth Amendment ostensibly designed to "fix" the presidential election process, offers the morally and democratically challenged elector near boundless opportunities to frustrate the (apparently) intended process for electing the President and/or Vice-President.

For example, in the 2000 election 538 electors were elected by the 50 States and the District of Columbia. A clear majority was 270 electoral votes. 271 electors were pledged to Bush/Cheney, and 267 electors were pledged to Gore/Lieberman. See http://www.archives.gov/federal_register/electoral_college/votes_2000.html (last visited Jan. 13, 2003) (267 electors were pledged to Gore/Lieberman, but one District of Columbia elector abstained nonetheless). Had the Bush/Cheney ticket received two fewer electoral votes, thereby placing the election into the hands of the House and Senate, electors pledged to vice-presidential candidate Lieberman would have had the opportunity to delay and/or block Senate action on the vice-presidential contest. *First*, if exactly half the Lieberman electors switched their vice-presidential votes to then presidential candidate Gore, then Gore would have been *both* a candidate for President and a candidate for Vice-President. At that point, the Senate would have been obliged to restrain any action on the unresolved vice-presidential contest until the House had elected a President. See *infra* notes 31-34 and accompanying text. *Second*, and more importantly, strategic voting by electors pledged to Lieberman would probably result in disabling the Senate (acting alone) from electing *any* Vice-President. Why? The text of the Constitution requires the Senate to select from the two candidates with the greatest number of electoral votes. See U.S. CONST. amend. XII (the Senate shall choose from "*the* two highest") (emphasis added). But in this scenario – in which the Lieberman electors split equally between Lieberman and Gore – there would be no two highest candidates from whom the Senate should choose a Vice-President (i.e., Cheney would have a plurality of 269 electoral votes, and Lieberman and Gore would tie for second place with 134 or fewer electoral votes each). For constitutional purposes, it appears that this is an *effective three-way tie for Vice-President* – precisely the constitutional lacunae envisioned by Rawle. See also *infra* note 31 and accompanying text. Hence, the office of Vice-President would be vacant because the Senate could not proceed. And if vacant, a Vice-President must be nominated by the President and confirmed by *both* Houses. See U.S. CONST. amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.").

Furthermore, were the House unable to reach the constitutionally required quorum for electing the President (two-thirds of all States represented by at least one of its Members) or were a majority of the whole number of State delegations unable to select a President or *were the Speaker (and his popular majority) to intentionally delay House action (or authentication of House action) on the presidential contest*, the office of chief magistrate would fall to the Speaker (assuming she

Rawle, in his treatise, *A View of the Constitution*, suggested that another difference between House and Senate procedures, prior to the adoption of the Twelfth Amendment, was that the Senate was “restrained” from electing the Vice-President until the House elected the President.³¹ Rawle does not clarify

qualified). See U.S. CONST. amend. XII (quorum and minimum vote requirements of presidential election by House); 3 U.S.C. § 19 (2002) (specifying order of presidential succession); cf. CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SIXTH CONGRESS, H.R. Doc. No. 105-358, House Rule I, cl. 4 (1999) (“The Speaker *shall* sign all acts and joint resolutions passed by the two Houses and all writs, warrants, and subpoenas The Speaker *may* sign enrolled bills and joint resolutions whether or not the House is in session.”) (emphasis added); 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1982 (1907) (during the House presidential election contest of 1801, the House *majority* agreed that all procedural questions during the balloting “shall be decided by State[]” delegation voting); *id.* (during the House presidential election contest of 1801, the House, by a vote of 53 to 47, agreed to a rule forbidding adjournment once balloting for President had begun until “a choice be made”). But cf. *id.* § 1983 & p.291 n.1 (in spite of the House Rule against adjournments during the House presidential election contest of 1801, the House agreed to “postponement of the balloting”). Perhaps in the last situation described, see the italicized language above, the federal courts might intervene. See U.S. CONST. amend. XII (“the House of Representatives shall choose [the President] *immediately*”) (emphasis added); cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (Brennan, J.) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it”). It is difficult to imagine that such intervention would be timely.

Though academic scholarship and state statutes have attempted to address the problem of the faithless elector, nothing to date has been discovered addressing the potential constitutional crisis risked by clumsily drafted constitutional text allowing for strategic manipulation by *even a minority* of electors (and by Representatives and Senators) *acting collectively*. See *infra* note 31; THE FEDERALIST NO. 68, at 345-46 (Alexander Hamilton) (Gary Wills ed., 1982) (“Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption. . . . The business of corruption, when it is to embrace so considerable a number of men, requires time, as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen states, in any combinations, founded upon motives, which though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.”). That this is the case in spite of the closeness of the 2000 election and the ensuing election litigation is quite frankly astounding. Could it be that today’s lawyers are both unable to render prospective legal advice on political matters and unwilling to draft new constitutional text unless the crisis is actually experienced firsthand and adjudicated in *United States Reports*? See, e.g., RICHARD A. POSNER, BREAKING THE DEADLOCK/THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 205 (2001) (“[A] constitutional problem, however serious, that does not leave its traces in the pages of the *United States Reports* is unlikely to appear on the academic radar screen.”).

³¹ See RAWLE, *supra* note 24, at 54 (“By the first mode of proceeding the senate was restrained from acting until the house of representatives had made their selection, which if parties ran high, might be considerably delayed; – by the [Twelfth] amendment, the senate may proceed to choose a vice president immediately”).

Rawle believed that the Twelfth Amendment, which provided that the electors vote separately for President and Vice-President, made it unnecessary for the Senate to delay electing the Vice-President until the House elected the President. *Id.* (“[The Constitution] has been usefully

whether Senate restraint arose from comity or had constitutional status.³² In either case, we lean towards Rawle's position. Moreover, though the text of the Constitution does not expressly state that the two offices – President and Vice-President – are incompatible,³³ it is clear that the unstated premise of the Constitution is that the two offices are held by different persons in order that the Vice-President can succeed the President in the event of the latter's removal from office, death, resignation, or disability.³⁴ In this sense, Senate restraint precludes a precipitate choice whereby both houses elect the same candidate to both offices.

altered by providing that the ballots of the electors shall be separately given for president and vice president . . ."). The fact that President and Vice-President are now voted for separately does not make it mandatory that the electors vote for *distinct* persons. See U.S. CONST. art. II, § 1, cl. 3 ("The Electors shall . . . vote by Ballot for *two* Persons . . .") (emphasis added), *amended by* U.S. CONST. amend. XII ("The Electors shall . . . vote by ballot for President and Vice-President . . ."). Rawle ignored the possibility of strategic voting by post-Twelfth Amendment electors thereby placing a candidate in contention for both offices. See *supra* note 30 (discussing the need for Senate restraint if a minority of strategically voting electors creates a constitutionally effective three-way tie for Vice-President).

³² Though uncited by Rawle, Rawle's position – that prior to the Twelfth Amendment the Senate was restrained from electing the Vice-President until the House elected the President – may have some support in the constitutional text. See U.S. CONST. art. II, § 1, cl. 3 ("In every Case, *after* the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should *remain* two or more [candidates] who have equal Votes, the Senate shall ch[oo]se from them by Ballot the Vice President.") (emphasis added); compare U.S. CONST. art. II, § 1 ("the House of Representatives shall *immediately* ch[oo]se" the President) (emphasis added), with *id.* ("the Senate shall ch[oo]se" the Vice-President). But compare U.S. CONST. amend. XII ("the House of Representatives shall choose *immediately*" the President) (emphasis added), with *id.* ("the Senate shall choose the Vice-President").

³³ See U.S. CONST. art. I, § 6 (Legislative Incompatibility Clause and Emoluments Clause); *id.* at art. II, § 1 (Presidential Elector Incompatibility Clause). Of course, even if the two offices – President and Vice-President – are incompatible, incompatibility does not in and of itself preclude a person from being a *candidate* in the same general election for both offices. But cf. U.S. CONST. amend. XII ("The Electors shall . . . vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . ."). Candidates frequently run for more than one office – even if the offices are incompatible. For example, in the 2000 election, Senator Lieberman ran for both a seat in the United States Senate and for Vice-President. See <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000304> (last visited Jan. 22, 2003) (Joseph I. Lieberman ran successfully for the United States Senate "in 2000 for the term ending January 3, 2007; [and ran as an] unsuccessful candidate for vice president in 2000 . . ."). These offices are generally thought to be incompatible. See U.S. CONST. art. I, § 6, cl. 2.

³⁴ See U.S. CONST. art. II, § 1 (Presidential Succession Clause); see also U.S. CONST. amend. XX, § 3 (Vice-President succeeds to presidency upon death of president-elect; if a President shall not have been chosen or if the President elect fails to qualify, the Vice-President "shall act as President"); *id.* at amend. XXV, § 1 (Vice-President succeeds to presidency if President is removed, dies, or resigns); *id.* at amend. XXV, §§ 3, 4 (Vice-President becomes Acting President if President is "unable to discharge the powers and duties of his office").

B. In *The Federalist No. 69*,³⁵ you wrote: “[i]n the national government, if the Senate should be divided, no [presidential] appointment could be made”³⁶ This statement seems incorrect, or, at least, deserving of clarification. Certainly, the Vice-President has the power of breaking a Senate tie.³⁷ And, in some cases this would allow the President to make the appointment.³⁸ Indeed, in the immediately preceding paper, you specifically noted that the Constitution granted the Vice-President a tie-breaking vote in order “to secure at all times the possibility of a definitive resolution of the body”³⁹

Though this latter rationale for the Vice-President’s tie-breaking vote, i.e., securing a definitive resolution of an issue before the Senate, indicates that you were aware that a presidential appointment might be made in some circumstances even if the Senate were evenly divided, this rationale nevertheless seems somewhat contrived. “[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the

³⁵ This paper is ascribed to Secretary Hamilton and is dated March 14, 1788.

³⁶ THE FEDERALIST NO. 69, at 353 (Alexander Hamilton) (Gary Wills ed., 1982); *see also* Holder v. Hall, 512 U.S. 874, 953 (1994) (Blackmun, J., dissenting) (citing THE FEDERALIST NO. 69); Schick v. Reed, 419 U.S. 256, 263 (1974) (Burger, C.J.) (same); Mora v. McNamara, 389 U.S. 934, 936 n.7 (1967) (Douglas, J., dissenting from denial of writ of certiorari) (same); Zweibon v. Mitchell, 516 F.2d 594, 638 n.112 (D.C. Cir. 1975) (Wright, Skelly, J., plurality opinion for en banc court) (same); Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974) (same); Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part, dissenting in part from en banc opinion) (same); Holtzman v. Schlesinger, 484 F.2d 1307, 1318 (2d Cir. 1973) (Oakes, J., dissenting) (same); Briehl v. Dulles, 248 F.2d 561, 594 (D.C. Cir. 1957) (Bazelon, J., dissenting from en banc opinion) (same), *rev’d*, Kent v. Dulles, 357 U.S. 116 (1958); Jones v. Clinton, 869 F. Supp. 690, 695-96 (E.D. Ark. 1994) (Wright, Susan Webber, J.) (same), *aff’d in part, rev’d in part*, 72 F.3d 1354 (8th Cir.), *motion granted*, 519 U.S. 925 (1996); Nixon v. Sampson, 389 F. Supp. 107, 136 (D.D.C.) (same), *stay granted*, Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975); *In re* Grand Jury Subpoena to Nixon, 360 F. Supp. 1, 4 n.5 (D.D.C. 1973) (Sirica, C.J.) (citing THE FEDERALIST NOS. 67-77), *modified*, Sirica, 487 F.2d at 700.

³⁷ *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1813 n.246 (2002) (“The lack of mention of the Vice President is surprising given that [Hamilton] discussed the Vice President (and her tie-breaking vote) in the immediately preceding essay”) (citing THE FEDERALIST NOS. 68, 69 (Alexander Hamilton)).

³⁸ *See* U.S. CONST. art. I, § 3 (“The Vice President of the United States . . . shall have no Vote, unless the[] [Senate] be equally divided.”). *But compare* U.S. CONST. art. II, § 1 (“if there should remain two or more [vice-presidential candidates] who have equal [number of electoral] Votes, the Senate shall ch[oo]se from them by Ballot”), *with* U.S. CONST. amend. XII (“a majority of the whole number [of Senators] shall be necessary to a choice [of Vice-President by the Senate]”) (emphasis added).

³⁹ THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Gary Wills ed., 1982); *see also* Center Bank v. Dep’t of Banking and Fin., 210 Neb. 227, 237 (Neb. 1981) (Krivosha, C.J., concurring in result, dissenting in part) (“It is in the public interest that there be a proper method to break deadlocks and to avoid impasse in the [state] Senate. This was the rationale for vesting in the Vice President the casting vote in the United States Senate: ‘to secure at all times the possibility of a definitive resolution of the body.’”) (quoting THE FEDERALIST NO. 68 (Alexander Hamilton)); Opinion of the Justices of the Supreme Court in Response to Questions Propounded by the Governor of Del., 225 A.2d 481, 485 (Del. 1966) (same).

body.”⁴⁰ Therefore, it cannot be doubted that in the absence of a Vice-President or in the absence of a Vice-President’s tie-breaking vote, a tie *is* a “definitive resolution” of an issue, bill, or appointment. A tie means the measure or appointment *failed*. Indeed, St. George Tucker, author of another early post-ratification commentary on the Constitution, put forward an alternative explanation for the Vice-President’s tie-breaking vote that to us, at any rate, seems more reasonable. Judge Tucker wrote that the Vice-President was “placed, with no very great propriety, in the chair” of the Senate “for want of something else for [the Vice-President] to do, whilst there is a president in office”⁴¹

III. ELECTION OF THE PRESIDENT

In *The Federalist No. 64*,⁴² you wrote: “the president [is] to be chosen by select bodies of electors to be deputed by the people for that express purpose; and they have committed the appointment of senators to the state legislatures.”⁴³ This statement is perplexing in the extreme. The Constitution of 1787 committed the selection of Senators to the state legislatures and left the selection of presidential electors to the discretion of the state legislatures: the “people” played no direct role and played no role as a matter of right.⁴⁴ This error on

⁴⁰ United States v. Ballin, 144 U.S. 1, 6 (1892) (Brewer, J.). In all parliamentary bodies, unless otherwise provided, a majority (of a quorum) is required to secure *any* measure. Indeed, so universal is this rule that the Constitution finds it unnecessary to expressly specify majority rule with regard to bicameral passage of statutes or with regard to Senate action on presidential appointments. See U.S. CONST. art. I, § 5 (expressly specifying quorum requirements, but failing to expressly specify the nature of the majority required for bicameral passage of statutes); *id.* at art. II, § 2 (failing to expressly specify the nature of the majority required for senatorial advice and consent – except with regard to treaties); *cf.* AMERICAN SOC’Y OF LEGISLATIVE CLERKS AND SECRETARIES, MASON’S MANUAL OF LEGISLATIVE PROCEDURE § 50(6), at 46 (2000) (“The power that establishes a public body can require the vote of more than a majority to take certain actions, but, unless more than a majority vote is clearly required, a majority vote can take any action that the body has the power to take.”).

⁴¹ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA Editor’s App. D:234 (Philadelphia, W.Y. Birch and A. Small 1803), available at <http://www.constitution.org/tb/t1d06000.htm>.

⁴² This paper is ascribed to Chief Justice Jay and is dated March 5, 1788.

⁴³ THE FEDERALIST NO. 64, at 325 (John Jay) (Gary Wills ed., 1982); *see also* United States v. Locke, 529 U.S. 89, 99 (2000) (citing THE FEDERALIST NO. 64); United States v. Munoz-Flores, 495 U.S. 385, 395 (1990) (same); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) (same); INS v. Chadha, 462 U.S. 919, 956 n.20 (1983) (same); Haig v. Agee, 453 U.S. 280, 294 n.24, 308 (1981) (same); United States v. Nixon, 418 U.S. 683, 708 n.17 (1974) (same); United States v. Pink, 315 U.S. 203, 230 (1942) (same).

⁴⁴ Compare U.S. CONST. art. II, § 1 (“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.”) (emphasis added), and Bush v. Gore, 531 U.S. 98, 111-22 (2000) (Rehnquist, C.J., concurring) (same) (citing U.S. CONST. art. II), with U.S. CONST. art. I, § 3 (“[t]he senate of the United States shall be composed of two Senators from

your part is made all the more strange by the fact that both your co-authors seem to agree with your position. For example, in *The Federalist No. 68*, Alexander Hamilton stated that “the people of each state shall choose a number of persons as electors, equal to the number of senators and representatives of such state in the national government”⁴⁵ Nor was this a lone misstatement. In *The Federalist Nos. 60*,⁴⁶ *68*,⁴⁷ *69*,⁴⁸ and *77*,⁴⁹ Hamilton repeated this position *ad nau-*

each state, *chosen by the legislature thereof*)” (emphasis added), *amended by* U.S. CONST. amend. XVII (direct election of Senators).

Indeed, state legislatures reserved unto themselves the power to elect presidential electors well into the nineteenth century. See *McPherson v. Blacker*, 146 U.S. 1, 32 (1892) (Fuller, C.J.) (“[In] South Carolina . . . the legislature chose [electors] up to and including 1860.”); Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 857 & n.22 (2002) (South Carolina legislature elected/appointed its electors until the election of 1868); see also Mathew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2155 n.190 (2001) (“In 1876, Colorado chose its electors in the territorial legislature, on the eve of its admission to statehood.”).

⁴⁵ THE FEDERALIST NO. 68, at 346 (Alexander Hamilton) (Gary Wills ed., 1982); see also *supra* note 20 & *infra* note 47 (collecting cases citing THE FEDERALIST NO. 68 (Alexander Hamilton)).

⁴⁶ See, e.g., THE FEDERALIST NO. 60, at 305 (Alexander Hamilton) (Gary Wills ed., 1982) (“The house of representatives [is] to be elected immediately by the people; the senate by the state legislatures; the president by electors chosen for that purpose by the people”); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 791-92, 833 (1995) (citing THE FEDERALIST NO. 60); *id.* at 886 n.18 (Thomas, J., dissenting) (same); *Nixon v. United States*, 506 U.S. 224, 237 (1993) (Rehnquist, C.J.) (same); *Oregon v. Mitchell*, 400 U.S. 112, 211 (1970) (Harlan, J., concurring in part, dissenting in part) (same), *superseded by* U.S. CONST. amend. XXVI; *id.* at 290 (Stewart, J., concurring in part, dissenting in part) (same), *superseded by* U.S. CONST. amend. XXVI; *Powell v. McCormack*, 395 U.S. 486, 552 n.2 (1969) (Douglas, J., concurring) (same); *Bond v. Floyd*, 385 U.S. 116, 137 n.13 (1966) (Warren, C.J.) (same); *Newberry v. United States*, 256 U.S. 232, 248 (1921) (McReynolds, J.) (same); *id.* at 283 (Pitney, J., concurring in part) (same).

⁴⁷ See, e.g., THE FEDERALIST NO. 68, at 344 (Alexander Hamilton) (Gary Wills ed., 1982) (“It was desirable, that the sense of the people should operate in the choice of the [President] This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose”); see also *Ray v. Blair*, 343 U.S. 214, 232 footnote (1952) (Jackson, J., dissenting) (quoting this particular passage from THE FEDERALIST NO. 68 (Alexander Hamilton), without analysis, clarification, or explanation). But cf. *Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963) (“The electoral college was designed by men who did not want the election of the President to be left to the people.”) (citing THE FEDERALIST NO. 68).

⁴⁸ See, e.g., THE FEDERALIST NO. 69, at 353 (Alexander Hamilton) (Gary Wills ed., 1982) (“The President of the United States would be an officer elected by the people for *four* years.”) (emphasis in original); see also *Nixon v. Sampson*, 389 F. Supp. 107, 136 (D.D.C.) (quoting this particular passage from THE FEDERALIST NO. 69 (Alexander Hamilton), without analysis, clarification, or explanation), *stay granted*, *Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975).

⁴⁹ See, e.g., THE FEDERALIST NO. 77, at 388 (Alexander Hamilton) (Gary Wills ed., 1982) (“the election of the President [is determined] once in four years by persons *immediately* chosen by the people for that purpose”) (emphasis added); see also *Weiss v. United States*, 510 U.S. 163,

seam. Moreover, it appears that James Madison also took this position at the Philadelphia Convention, at the Virginia ratifying convention, and elsewhere.⁵⁰ Nor is this a cramped reading of the text of *The Federalist Papers* or of contemporaneous history. Constitutional scholars have noted that “in a number of places, the Federalist paper[] [sic] uses language whose straightforward reading indicates a right – or, at the very least, expectation – of popular rather than state legislative control over presidential elector selection.”⁵¹ We think this is a significant and systematic error on your part. A mere arithmetic error (i.e., quorum requirements) can be ascribed to simple mistake, and a mistake regarding an unlikely circumstance (i.e., House and/or Senate election of the President and/or Vice-President) perhaps can be ascribed to ambiguous and difficult language in the unadjudicated text.⁵² But, this error displays a fundamental lack of familiarity on your part with regard to the regular process for electing the chief magistrate, whose election depended on a process that was extensively debated amongst the participants at the Philadelphia Convention.⁵³ Frankly, we expected more from you.

186 & n.1, 188 (1994) (Souter, J., concurring) (citing THE FEDERALIST NO. 77); *Nixon v. Fitzgerald*, 457 U.S. 731, 773 (1982) (White, J., dissenting) (discussing electoral process as check against abuse of power by President) (citing THE FEDERALIST NO. 77); *Myers v. United States*, 272 U.S. 52, 136-37 (1926) (Taft, C.J.) (citing THE FEDERALIST NO. 77); *id.* at 293-95 (Brandeis, J., dissenting) (same); *Luther v. Borden*, 48 U.S. 1, 53 (1849) (Woodbury, J., dissenting) (same); *United States v. Woodley*, 751 F.2d 1008, 1017-18 (9th Cir. 1985) (Norris, J., dissenting from en banc opinion) (same).

⁵⁰ See Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II Pressured Judgment Makes Dubious Law*, 48 FED. LAW. 27, 31 (March/April 2001) (“[A]t the Philadelphia Convention, Madison described the electoral college provisions of the final draft as providing that the President is now to be elected by ‘the people.’ And at the Virginia ratifying convention, Madison stated that the Constitution provided that the President was to be chosen by ‘the people’ at large.”); Letter from James Madison to George Hay (Aug. 23, 1823), reprinted in 3 THE FOUNDERS’ CONSTITUTION 556-57 (Philip B. Kurland & Ralph Lerner eds., 1987) (“The district mode [of popular election of the electors] was mostly, if not exclusively in view when the Constitution was framed and adopted . . .”). But see THE FEDERALIST NO. 44, at 231 (James Madison) (Gary Wills ed., 1982) (“The election of the President and Senate, will depend in all cases, on the Legislatures of the several States.”); THE FEDERALIST NO. 45, at 234 (James Madison) (Gary Wills ed., 1982) (“Without the intervention of the State Legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it.”).

⁵¹ Amar & Brownstein, *supra* note 50 (citing THE FEDERALIST NOS. 60, 68 (Alexander Hamilton), No. 64 (John Jay)).

⁵² See *supra* note 2.

⁵³ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 517-31 (Max Farrand ed., rev. ed. 1966); see also, e.g., 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 378 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1941) (1836).

IV. CONCLUSIONS

Obviously, after making the specific changes described above, we must ask you to review your general analysis and conclusions to see if they too remain unchanged. We look forward to reviewing your corrections. And, in the interest of balance, we will publish several critical reviews of your work in conjunction with the papers themselves.

Very sincerely yours,
The Staff

cc: Members of the Committee on Detail
Chief Justice John Rutledge⁵⁴
Chief Justice Oliver Ellsworth
Associate Justice James Wilson
Attorney General Edmund Randolph
Judge Nathaniel Gorham⁵⁵

⁵⁴ [Query to the correspondence editor – before sending this letter to the authors please check on and, if necessary, correct with regard to the following difficulty. Chief Justice Rutledge was an unconfirmed recess appointment. It is not clear to me whether Rutledge should be listed prior to Ellsworth, a confirmed Chief Justice whose appointment followed Rutledge's chronologically.]

⁵⁵ [Query to the correspondence editor – before sending this letter to the authors please check on and, if necessary, correct with regard to the following difficulty. Judge Gorham was also President of the Continental Congress under the Articles of Confederation. Apparently, Gorham had the title of "President of the United States in Congress assembled." See <http://www.constitutionfacts.com/abody2.shtml> (listing Presidents of the Continental Congress); see also THE FEDERALIST NO. 84, at 442 (Alexander Hamilton) (Gary Wills ed., 1982) ("I do not add the President [of the United States as an added expense under the proposed Constitution of 1787], because there is now [under the Articles of Confederation] a president of Congress, whose expenses may not be far, if any thing, short of those which will be incurred on account of the President of the United States."). It is not clear to me whether Gorham should be designated by this title, and if so, whether he should be listed either ahead of Attorney General Randolph or ahead of Chief Justices Rutledge and Ellsworth.]

WHAT WAS THE PURPOSE OF THIS EXERCISE?

The minds of the three authors of *The Federalist Papers* were occupied by the great issue of their day, the issue that would occupy our nation's citizens and statesmen through the Revolution, up to and through the irrepressible conflict and into Reconstruction, and perhaps beyond. That issue was – Union.⁵⁶ Beyond that *The Federalist Papers* fails as a clause by clause *detailed* defense or explication of the Constitution of 1787. And that is as it should be. The purpose of its publication was not to furnish a resource in the legal wrangling and law review nitpicking of our generation, but rather to encourage ratification in theirs.

Undoubtedly, the authors brought substantial knowledge and erudition to the public's attention. Undoubtedly, *The Federalist Papers* should inform our sensibilities with regard to the *larger purposes* of the constitutional structure.⁵⁷ But, with regard to the Constitution's details, the document they produced was by no means infallible, inerrant, or even wholly internally consistent and coherent.⁵⁸ *The Federalist Papers* is not holy writ. Nonetheless, all too often our

⁵⁶ See THE FEDERALIST NO. 1, at 2 (Alexander Hamilton) (Gary Wills ed., 1982) ("The subject speaks of its own importance; comprehending in its consequences, nothing less than the existence of the UNION . . ."); *id.* at 5 ("I propose, in a series of papers to discuss the following interesting particulars – *The utility of the UNION to your political prosperity . . .*"); THE FEDERALIST NO. 85, at 449 (Alexander Hamilton) (Gary Wills ed., 1982) ("A NATION without a NATIONAL GOVERNMENT is, in my view, an awful spectacle.").

⁵⁷ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821) (Marshall, C.J.) ("[*The Federalist Papers*] intrinsic merit entitles it to this high rank [in our estimation]; and the part two of its authors performed in framing the constitution, put it very much in their power to explain *the views with which it was framed*." (emphasis added). *But see id.* ("It is a *complete commentary* on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth.") (emphasis added).

⁵⁸ See, e.g., Kesavan, *supra* note 37 (noting inconsistency between two neighboring papers; these two papers were produced by the same author and published only days apart). In fairness to *The Federalist Papers*, it might be argued that the incoherence of the *Papers* reflects the logical incoherence and inconsistencies buried within the Constitution's provisions. For example, THE FEDERALIST NO. 51 argues that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." THE FEDERALIST NO. 51, at 262 (James Madison) (Gary Wills ed., 1982). Does the Constitution really meet this standard? Consider: *the Constitution makes it easier to remove a President through the process of impeachment than to override a President's veto with regard to a single measure*. Both impeachment and veto override require action by two-thirds of the Senate. And though overriding a veto also requires two-thirds of the House, impeachment by the House merely requires a simple majority of a quorum. How are these differing supermajority requirements coherent? Should not the process for removing a President be at least as difficult as overriding her veto with regard to a single bill? *But see* THE FEDERALIST NO. 73, at 375 (Alexander Hamilton) (Gary Wills ed., 1982) ("A [President] who might be afraid to defeat a law by his single VETO, might not scruple to return it for re-consideration; subject to being finally rejected *only* in the event of more than one third of *each* house concurring in the sufficiency of his objections.") (italics added to illustrate Hamilton's error). Is it not logical to expect that a President who has sufficient House

courts⁵⁹ and the academy treat it as such. Our courts freely cite passages as authority that are simply impossible to believe.⁶⁰ More troubling, our courts without embarrassment systematically cite passages as authority without even a cursory examination of the validity of the surrounding text or the document as a whole.⁶¹ Is such textual cherry picking consistent with the rule of law and fundamental fairness to *today's* litigants? The textual errors pointed out above *are* quibbles; they do not undermine the core message of *The Federalist Papers*. But in our day, it is precisely for such quibbles that our courts all too frequently cite the text. Likewise, rather than recognizing the most palpable errors in *The Federalist Papers*, the academy uses the *errors* as an aid in interpretation. Certainly no criticism is voiced.⁶²

support to sustain a veto may nevertheless refrain from exercising her discretion to veto a controversial bill if she believes that a determined House majority may nevertheless choose to impeach? Cf. THE FEDERALIST NO. 73, at 375 (Alexander Hamilton) (Gary Wills ed., 1982) ("A power of this nature . . . will often have a silent and unperceived though forcible operation. When men engaged in unjustifiable pursuits are aware, that obstructions may come from a quarter which they cannot controul, they will often be restrained, by the bare apprehension of opposition . . ."). To pose the question is to answer it.

Furthermore, it was not clear during the ratification process that the Senate supermajority requirement for impeachment secured a sitting President's term of service. Madison, for example, argued at the Virginia ratifying convention that the House could suspend an impeached President prior to Senate action. See 3 ELLIOT, *supra* note 53, at 498 (Madison stated: "[I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. Should he be suspected, also, he may likewise be suspended till he be impeached and removed, and the legislature may make a temporary appointment. This is a great security."); see also 1 TUCKER, *supra* note 41, at Editor's App. D:302, available at <http://www.constitution.org/tb/t1d15000.htm> ("[I]t is presumable, that whenever a president may he [sic] actually impeached, he would be instantly incapacitated thereby from discharging the duties of his office, until a decision should take place; in which case also, the duties of the office of president, must devolve upon the vice-president.").

⁵⁹ Compare, e.g., *Printz v. United States*, 521 U.S. 898, 971 (1997) (Souter, J., dissenting) ("In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally *determines* my position. I believe that the most straightforward reading of [The Federalist] No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.") (emphasis added), with SIDDUR TEHILLAT HASHEM: NUSACH HA-ARI ZAL ACCORDING TO THE TEXT OF RABBI SCHNEUR ZALMAN OF LIADI 25-26 (Rabbi Nissen Mangel trans., 5747) ("Rabbi Yishmael says: The Torah is expounded by means of thirteen rules . . . [Rule 13] [W]hen two Biblical passages contradict each other, the meaning can be *determined* by a third Biblical text which reconciles them.") (quoting introduction to *Sifra*) (emphasis added) (footnote omitted), and <http://www.deusvitae.com/questionpage.html> (attempting to reconcile *Deuteronomy* 24:1 and *Matthew* 19:8 by reference to *Malachi* 2:16).

⁶⁰ See, e.g., *supra* notes 45, 47-48 and accompanying text.

⁶¹ See, e.g., *supra* notes 5, 10, 20, 36, 43.

⁶² See, e.g., Amar & Brownstein, *supra* note 50, at 31 ("[I]n a number of places, the Federalist paper[] [sic] uses language whose straightforward reading indicates a right – or, at the very least, expectation – of popular rather than state legislative control over presidential elector selection.")

What is there to fear?

(citing THE FEDERALIST NOS. 60, 68 (Alexander Hamilton), No. 64 (John Jay)); *cf.* Kesavan, *supra* note 37, at 1813 n.246 (“The lack of mention of the Vice President is *surprising* given that [Hamilton] discussed the Vice President (and her tie-breaking vote) in the immediately preceding essay”) (emphasis added) (citing THE FEDERALIST NOS. 68, 69 (Alexander Hamilton)). Was the lack of mention of the Vice-President “surprising”? Is this the most straightforward way to bring the reader’s attention to a simple error? Is it not more likely that the author sensed that using clear and unambiguous language with regard to an obvious error in the text would prove embarrassing or, perhaps, even preclude publication?