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Extract from Michael L. Rosin's *A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered* (2009) (unpublished manuscript) citing Tillman's *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation and Betwixt Principle and Practice: Tara Ross's Defense of the Electoral College*

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## **APPENDIX C. WHAT THE FEDERALISTS LEARNED FROM AARON BURR: THE MATHEMATICS OF ELECTORAL COLLEGE MISCHIEF**

### ***A.14 The History***

Had electoral vote *designation* been in place in 1796 there would have been no need for Federalist electors to slough off electoral votes that would have otherwise been cast for John Adams' running mate Thomas Pinckney.<sup>1818</sup> As a result of Federalist over-sloughing Thomas Jefferson, not Pinckney, was elected Adams' Vice-President.<sup>1819</sup> After the electoral votes were cast in December 1796, but before they were counted in February 1797, Federalist William L. Smith of South Carolina proposed the following constitutional amendment on the floor of the House:

*Resolved* that the third clause of the first section of the second article of the Constitution of the United States ought to be amended in such a manner as that the Electors of a President an Vice President be directed to designate whom they vote for as President, and for whom as Vice President.<sup>1820</sup>

This amendment doesn't appear to have made any progress in either the Fourth or Fifth Congress.

Following the protracted election of 1800-1 the need for electoral vote designation resurfaced almost immediately.<sup>1821</sup> This time, the Federalists fought against it tooth and

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<sup>1818</sup> As early as the first presidential election some commentators cited the lack of distinction in the casting of electoral vote as a defect in the Constitution. See, for example, William Tilghman to Tench Coxe, January 2, 1789 in Gordon DenBoer (ed.), 4 *The Documentary History of the First Federal Elections* 125 (Wisconsin 1989). On January 25, 1789 Alexander Hamilton wrote to James Wilson "Every body is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President. Every body sees that unanimity in Adams as Vice President an a few votes insidiously withheld from Washington might substitute the former to the latter." 5 *Hamilton Papers*, *supra* note 766, at 248. Hamilton concluded that it would "be prudent to throw away a few votes say 7 or 8 giving these to persons not otherwise thought of. Under this impression I have proposed to friends in Connecticut to throw away to others in Jersey to throw away an equal number." *Id.* at 248-9.

<sup>1819</sup> Recall that one Maryland elector cast his electoral votes for Adams and Jefferson. (See *supra* note 1115.) Hence, we *presume* that the Adams-Pinckney ticket would have been elected.

<sup>1820</sup> 6 *Annals of Congress* 1824. (January 7, 1797) Another precursor to the Twelfth Amendment was presented to the floor of the Sixth House on February 4, 1800 by an unnamed movant. (10 *Id.*, at 510.) It was referred to the Committee of the Whole from whence it never emerged.

<sup>1821</sup> See, for example, Albert Gallatin's letter to Thomas Jefferson of September 14, 1801. 1 *The Writings of Albert Gallatin*, Henry Adams (ed.), 51-2 (Lippincott 1879) (Available Michael L Rosin Page 464 of 486 07/30/2010

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*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

nail. With their political fortunes on the decline, the few Federalists remaining in Congress realized that scheming provided them their only opportunity to elect someone to one of the nation's two highest offices.<sup>1822</sup> They had learned a lot from Aaron Burr!<sup>1823</sup>

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at <http://books.google.com/books?id=xnUsAAAAMAAJ>. Last accessed April 2, 2009.) (“[I]t seems to me that there are but two ways, either to support Burr once more, or to give only one vote for President, scattering our votes for the other person to be voted for. If we do the first, we run, on the one hand, the risk of the Federal party making Burr President, and we seem, on the other, to give him an additional pledge of being eventually supported hereafter by the Republicans for that office. If we embrace the last party, we not only lose the Vice-President, but pave the way for the Federal successful candidate to that office to become President. All this would be remedied by the amendment of distinguishing the votes for the two offices, and by that of dividing the States into districts.”)

<sup>1822</sup> Alexander Hamilton and James Bayard were notable exceptions. See Hamilton to Gouverneur Morris, March 4, 1802, 25 *Hamilton Papers*, *supra* note 766, at 559 (“it is true Fœderal policy to promote the adoption of these amendments”); Hamilton to Bayard, April 6, 1802, *Id.* at 588 (“Both these appear to me to be points of importance in true Fœderal calculation. Surely the scene of last session ought to teach us the intrinsic demerits of the existing plan.”); and Bayard to Hamilton, April 12, 1802, *Id.* at 600 (“They are recommended strongly by both reason & experience.”) Hamilton wrote to Bayard “For to My Mind the elevation of Mr Burr by Fœderal Mans to the Chief Magistracy of the U. States will be the worst kind of political suicide.” *Id.* at 588. Bayard was defeated in his reelection bid in 1802 by a mere 15 votes. Borden, *supra* note 907, at 134-5. As a result Borden was not a member of the seventh Congress where he might have tempered Federalist opposition to the amendment. For Bayard's role in the contingent election of 1801 see *supra* text to notes 922 and 923 and the sources cited there.

Jefferson would write to Thomas McKean, Governor of Pennsylvania,

That great opposition is and will be made by federalists to this amendment is certain. They know that if it prevails, neither a President or Vice President can ever be made but by the fair vote of the majority of the nation, of which they are not. That either their opposition to the principle of discrimination now, or their advocacy of it formerly was on party, not moral motives, they cannot deny. Consequently they fix for themselves the place in the scale of moral rectitude to which they are entitled. Paul Leicester Ford (Ed.), 10 *Thomas Jefferson* 68 (Putnam's 1905), January 17, 1804.

<sup>1823</sup> Or perhaps they had learned the schemes from James Cheetham who had attributed them to Burr. See *supra* note 1109. I suspect it was Burr who was an avid chess player. There are at least fifteen references to chess in his private journal. See Matthew L. Davis (ed.) 1 *The Private Journal of Aaron Burr During His Residence of Four Years in Europe; with Selections from His Correspondence* 94, 95, 108, 190, 191, 217, 223, 235, 254, 258, 336, 350, 365, 400, 410 (Harper & Brothers 1858). (Available at <http://books.google.com/books?id=MG49AAAAYAAJ>. (Last visited August 5, 2009.)

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

So had the Jeffersonians. At the end of the House debate Representative George W. Campbell from Tennessee summarized the mischief the losing party could cause by casting some of their ballots for the winning party's vice presidential candidate.

[I]t puts it in the power of the minority to control the will of the majority and elevate a man to the Presidential chair who did not receive a vote from the majority for that office. According to the present provision of the Constitution, two persons are voted for by the Electors for President and Vice President, without designating which of them is voted for as President and which as Vice President. Suppose the majority nominate two candidates, the one intended for President and the other for Vice President, and vote for them accordingly. It is well known that the Electors, who are presumed to express the will of the people have in view at the time they vote which of these persons they shall intend to be President and which Vice President, though they are not permitted so to designate them in voting. In this case the minority, by voting for the person intended by the majority to be the Vice President, and not voting for the person intended by them to be President, will contravene the intentions of the majority, and place in the Presidential chair a person not designed by the majority, or by one of them, for that office, nor in most cases agreeably to the minority, but preferred by them in consequence of not possessing in so high a degree of confidence of the majority as the person by them intended for President, and therefore most likely to favor the measures of the minority. And the person thus elected would, in all probability, become suspected by both parties, and possess the confidence of neither. Hence a very serious inconvenience would arise; the majority being disappointed, would become dissatisfied, and the minority would not have the man of their choice, but one from whom they expect some favor, in consequence of having contributed to his elevation; and it is confidently believed the peace of the nation would, in such a case, be more endangered than if a person decidedly the choice of the minority as President had been elected to that office.<sup>1824</sup>

In the end no Federalists voted for the 12<sup>th</sup> amendment in either chamber and it received the barest of two-thirds majorities in each house.<sup>1825</sup>

### **A.15 Ploys and Counter-Ploys**

The Federalists had come to realize that they could cast their electoral votes for the Republican's Vice Presidential candidate in the hopes of electing him President and

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Burr's knowledge of chess would have provided a good foundation for understanding the gambits described in this Appendix.

<sup>1824</sup> 13 *Annals of Congress* 720. December 8, 1803.

<sup>1825</sup> On December 2, 1803 the Senate approved the amendment by a vote of 22-10 with three Republican Senators voting nay and straying from a strict party line vote. *Id.* at 209. The House approved the amendment by a vote of 84-42 on December 8. *Id.* at 776. Six Republican members crossed party lines to vote nay and force Speaker Nathaniel Macon to come down from the chair to cast the decisive aye vote.

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

thereby *trumping* the Republican's intention.<sup>1826</sup> Albert Gallatin and the Republicans recognized that the Federalists' *trumping* strategy might be *thwarted* by "scattering" electoral votes.<sup>1827</sup> Although the debates of 1801-4 centered on schemes for electing the wrong *President*, the election of 1796 had demonstrated that the wrong person might be elected *Vice President* and be first in line to fill a presidential vacancy.<sup>1828</sup> Thus, electing the wrong person *Vice President* is an additional *trumping* concern. In its most general sense, a *winning* ticket's intentions are *trumped* if its presidential candidate is not elected President or its vice presidential candidate is not elected Vice President.<sup>1829</sup>

None of the parties involved in the debates of 1801-4 gave a complete analysis of the possible *trumping* and *thwarting* strategies. The following propositions provide that analysis.

- In fact, *trumping* by the *losing* ticket can always be *thwarted* if slightly more than two-thirds of the electors appointed are pledged to the *winning* ticket.
- If two-thirds or slightly more of the electors appointed are pledged to the *winning* ticket, that ticket's *intentions* may be *jeopardized* by
  - forcing a contingent election in the House between the *winning* ticket's presidential and vice-presidential candidates, OR

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<sup>1826</sup> Bruce Ackerman and Akhil Reed Amar each recognize the possibility of such a trumping strategy, which Amar terms *cross-party inversion*. See Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 353 n.21 (Belknap 2005) and Amar *America's Constitution, supra* note 53, at 338-9. Neither recognizes that an electoral vote super-majority makes this strategy impossible. Amar also recognizes the possibility of what he terms *in-party inversion*, which would have happened if Republican elector Aaron Lispenard had sloughed of his vote for Jefferson. Neither Ackerman nor Amar expresses awareness of Cheatham's claims about Burr's shenanigans. See *supra* note 1109.

<sup>1827</sup> Speaking of the 12<sup>th</sup> amendment, one commentator has noted "In one sense it, was an attempt to restore the protections against party and intrigue believed to be prerequisite in 1787 if the electoral formula was to yield responsible leadership." John J. Turner, *The Twelfth Amendment and the First American Party System*, 35 *The Historian* 221, 236 (1973).

<sup>1828</sup> "[Y]et the danger would be great should any unfortunate event deprive the people of your services." Gallatin to Jefferson, Gallatin *supra* note 1821 at 51.

<sup>1829</sup> For thwarting possibilities in a post-Twelfth Amendment context see generally Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 *W. Va. L. Rev.* 601-19, esp. 607-610, nn.29-30 (2003) (examining the complexity and potential for failure under the Twelfth Amendment's contingency election procedures for electing the President and Vice President); Seth Barrett Tillman, *Between Principle and Practice: Tara Ross's Defense of the Electoral College*, 1 *N.Y.U. J.L. & Liberty* 922-30 (2005) (opining on historical claims made in support of the electoral college).

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

- forcing a contingent election in the Senate between the *winning ticket's* vice-presidential candidate and one or both of the *losing ticket's* presidential and vice-presidential candidates.
- If less than two-thirds of the electors appointed are pledged to the *winning ticket*, then *trumping* is always possible.

The formal statements of these propositions suppose a two *ticket* race.

- **W** presidential electors are appointed pledged to the *winning ticket* of W-Pres and W-VP.
- **L** presidential electors are appointed pledged to the *losing ticket* of L-Pres and L-VP.
- We suppose that  $\mathbf{W+L=T}$ , the total number of presidential electors appointed.
- By hypothesis,  $\mathbf{W > T/2}$ .

(The *losing ticket* may be thought of as the union of all losing tickets.)

In the demonstrations that follow we have the winning ticket *scatter* electoral votes by withholding them rather than casting them for someone else. Casting an electoral vote for someone else always raises the possibility that the *losing ticket's* electors will cast electoral votes for that other person and simply complicate matters further.

**Proposition:** If  $\mathbf{W \geq (2T/3) + 1/2}$  then there is a strategy that thwarts any trumping strategy.

**Demonstration:**

Withhold **L+1** electoral votes for the winning ticket's Vice-Presidential candidate (and none for the ticket's Presidential candidate.) Even if the losing ticket has each of its **L** electors *trumpingly* cast one of their electoral votes for W-VP that results in

W-Pres receiving **W** electoral votes

W-VP receiving  $\mathbf{W - 1 = W - (L + 1) + L}$  electoral votes

Consequently, W-Pres is elected President even if the *losing ticket* employs a trumping strategy.

If the *losing ticket* faithfully casts all of its electoral votes then

W-VP receives  $\mathbf{W - (L + 1)}$  electoral votes

$\mathbf{W - (L + 1) = W - 1 - L}$

By hypothesis,  $\mathbf{W \geq (2T/3) + 1/2}$ .

Hence,  $\mathbf{L \leq (T/3) - 1/2}$ . (Otherwise  $\mathbf{T = W+L > T!}$ )

Consequently,

$\mathbf{-L \geq 1/2 - (T/3)}$

$\mathbf{W-L \geq (2T/3) + 1/2 - (T/3) + 1/2 = (T/3) + 1}$

$\mathbf{W-L-1 = (T/3)}$

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

But,  $(T/3) > (T/3) - 1/2 \geq L$

Consequently,  $W - (L + 1) > L$

Therefore, W-VP is elected Vice-President even if the *losing* ticket faithfully casts all of its electoral votes.

**Proposition:** If  $(2T/3) < W < (2T/3) + 1/2$  then

1. There is a strategy that thwarts any Presidential trumping strategy but may send Vice-Presidential selection between W-VP and one or both of L-Pres and L-VP to the Senate.
2. There is a strategy that may send the Presidential selection between W-Pres and W-VP to the House.

Note that the antecedent inequality can only be satisfied if **T** is congruent to 1 modulo 3 (i.e. **T** divided 3 leaves a remainder of 1.) For example, if **T** =91, as it was for the election of 1789, the antecedent is only satisfied for **W**=61.

**Lemma:** If  $(2T/3) < W < (2T/3) + 1/2$  then  $W - 1 = 2L$

By hypothesis

$$(2T/3) < W < (2T/3) + 1/2$$

Multiply each side of the inequality by 3

$$2T < 3W < 2T + 3/2$$

Now replace **T** by **W + L**

$$2*(W + L) < 3W < 2*(W + L) + 3/2$$

$$2W + 2L < 3W < 2W + 2L + 3/2$$

Subtract  $(2W + L + 1)$  from each part of the inequality

$$L - 1 < W - L - 1 < L + 1/2$$

**W** and **L** are integers. This double inequality can only be satisfied if

$$W - L - 1 = L$$

Hence

$$W - 1 = 2L$$

**Demonstration of 1:**

Withhold **L+1** electoral votes for W-VP (and none for W-Pres). As a result

- W-Pres receives **W** electoral votes

If every one of the *losing* ticket's **L** electors casts one of their electoral votes for W-VP,

- W-VP will still receive only  $W - (L + 1) + L = W - 1$  electoral votes.

Hence, W-Pres is elected President even if the *losing* ticket employs a complete *trumping* strategy.

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

However, if every one of the *losing* ticket's  $L$  electors faithfully casts one of their electoral votes for L-Pres *and none for W-VP* then

- W-VP receives  $W - (L + 1)$  electoral votes
- L-Pres receives  $L$  electoral votes
- (and if each of the *losing* ticket's electors also faithfully cast their for L-VP, then L-VP also receives  $L$  electoral votes)

By the lemma  $W - (L + 1) = L$ . Hence the Vice-Presidential election goes to the Senate with W-VP, L-Pres, and possibly L-VP as the possible choices.

**Demonstration of 2:**

Withhold  $L$  electoral votes from W-VP (and none for W-Pres).

If every one of the *losing* ticket's  $L$  electors *trumpingly* casts one of their electoral votes for W-VP, the

- W-Pres receives  $W$  electoral votes
- W-VP receives  $(W - L) + L = W$  electoral votes

and the Presidential election goes to the House which can only choose from W-Pres and W-VP.

If every one of the *losing* ticket's  $L$  electors faithfully casts their electoral votes for L-Pres and L-VP then

- W-VP receives  $(W - L)$  electoral votes
- L-Pres and L-VP each receive  $L$  electoral votes

By the lemma  $W - (L + 1) = L$  so  $(W - L) = (L + 1) > L$ . Hence, W-VP cannot be denied the Vice Presidency.

**Proposition:** If  $W = (2T/3)$  then

1. There is a strategy that thwarts any Presidential trumping strategy but may cost W-VP the Vice-Presidency.
2. There is a strategy that
  - a. may send the Presidential selection between W-Pres and W-VP to the House
  - b. may send the Vice-Presidential selection between W-VP and one or both of L-Pres and L-VP to the Senate
  - c. but not both

Note that the antecedent inequality can only be satisfied if  $T$  is congruent to 0 modulo 3. For example, if  $T = 138$ , as it was for the elections of 1792, 1796, and 1800, the antecedent is only satisfied for  $W = 92$ .

**Lemma:** If  $W = (2T/3)$  then  $W = 2L$

By hypothesis  $W = 2T/3 = 2*(W + L)/3$ . So

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

$$3W = 2W + 2L$$

Subtracting  $2W$  from both sides results in

$$W = 2L$$

**Demonstration of 1:**

Withhold  $(L + k)$  electoral votes from W-VP (and none from W-Pres) where  $k > 0$ .

Even if the *losing* ticket has each of its  $L$  electors *trumpingly* cast one of their electoral votes for W-VP that results in

- W-Pres receiving  $W$  electoral votes
- W-VP receiving  $W - (L + k) + L = W - k$  electoral votes

Consequently, W-Pres is elected President even if the *losing* ticket employs a complete *trumping* strategy.

However, if every one of the *losing* ticket's  $L$  electors faithfully casts one of their electoral votes for L-Pres *and none for W-VP* then

- W-VP receives  $W - (L + k)$  electoral votes
- L-Pres receives  $L$  electoral votes
- (and if each of the *losing* ticket's electors also faithfully cast their other electoral vote for L-VP, then L-VP also receives  $L$  electoral votes)

By the lemma

$$W = 2L$$

so

$$W - L = L$$

so

$$W - (L + k) < L, \text{ since } k > 0$$

Hence W-VP does not finish second in the electoral vote and is not elected Vice-President.

**Demonstration of 2:**

Withhold  $L$  electoral votes from W-VP (and none from W-Pres).

If the *losing* ticket has each of its  $L$  electors *trumpingly* cast one of their electoral votes for W-VP that results in

- W-Pres receiving  $W$  electoral votes
- W-VP receiving  $W - L + L = W$  electoral votes

Consequently, the Presidential election is goes to the House, which can only choose between W-Pres and W-VP with the loser of the House contingent election becoming Vice-President. Thus, (a) is demonstrated.

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

On the other hand, if every one of the *losing* ticket's  $L$  electors faithfully casts one of their electoral votes for L-Pres *and none for W-VP* then

- W-Pres receives  $W$  electoral votes
- W-VP receives  $(W - L) = L$  electoral votes
- L-Pres receives  $L$  electoral votes
- (and if each of the *losing* ticket's electors also faithfully cast their other electoral vote for L-VP, then L-VP also receives  $L$  electoral votes)

This elects W-Pres President but it sends the Vice-Presidential selection to the Senate, which chooses among W-VP and one or both of L-Pres and L-VP, thereby demonstrating (b).

**Proposition:** If  $W < (2T/3)$  then the *winning* ticket's intentions can always be *trumped*.

**Lemma:** If  $W < (2T/3)$  then  $W < 2L$ .

By hypothesis  $W < (2T/3)$  so

$$3W < 2T = 2*(W + L) = 2W + 2L$$

Subtracting  $2W$  from both sides results in

$$W < 2L$$

and

$$W - L < L$$

**Demonstration:**

Withhold  $k$  electoral votes from W-VP (and none from W-Pres) where  $k \geq 0$ . The demonstration depends on whether

- (a)  $k < L$
- (b)  $k = L$
- (c)  $k > L$

(a) Suppose  $k < L$ . Then  $(L - k) > 0$ .

If the *losing* ticket has each of its  $L$  electors *trumpingly* cast one of their electoral votes for W-VP that results in

W-Pres receiving  $W$  electoral votes

W-VP receiving  $W - k + L = W + (L - k) > W$  electoral votes

Consequently, W-VP is elected President and W-Pres is elected Vice-President. The *winning* ticket's intentions are *trumped*.

(b) Suppose  $k = L$

If the *losing* ticket has each of its  $L$  electors *trumpingly* cast one of their electoral votes for W-VP that results in

W-Pres receiving  $W$  electoral votes

*A Compound Ratio: How the Electoral College Got Its Proportions and How That Has Mattered*

W-VP receiving  $W - k + L = W + (L - k) = W$  electoral votes

Consequently, the Presidential election goes to the House which chooses between W-Pres and W-VP. If the House chooses W-VP it *trumps* the *winning* ticket's intentions.

On the other hand, if the *losing* ticket has each of its  $L$  electors faithfully cast one or both of their electoral votes for one of their candidates *and none for W-VP* then

W-Pres receives  $W$  electoral votes

W-VP receive  $(W - L) < L$  electoral votes

L-Pres and/or L-VP receive  $L$  electoral votes

This elects W-Pres President. The Electoral College elects either L-Pres or L-VP outright or the Vice-Presidential election goes to the Senate, which can only choose between L-Pres and L-VP. In either case, the *winning* ticket's intentions are *trumped*.

(c) Suppose  $k > L$

If the *losing* ticket has each of its  $L$  electors *trumpingly* cast one of their electoral votes for W-VP and their other electoral vote faithfully for L-Pres that results in

W-Pres receiving  $W$  electoral votes

W-VP receiving  $W - k + L = W + (L - k) < W$  electoral votes

Consequently, W-Pres is guaranteed the Presidency.

However, if the *losing* ticket has each of its  $L$  electors faithfully cast one or both of their electoral votes for one of their candidates *and none for W-VP* then

W-VP receive  $(W - k)$  electoral votes

L-Pres and/or L-VP receive  $L$  electoral votes

By hypothesis  $k > L$ , so

$$-k < -L$$

$$(W - k) < (W - L)$$

By the lemma  $(W - L) < L$

$$\text{So } (W - k) < L$$

Consequently, the Electoral College elects either L-Pres or L-VP outright or the Vice-Presidential election goes to the Senate, which can only choose between L-Pres and L-VP. Once again, the *winning* ticket's intentions are *trumped*.