National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

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Seth Barrett Tillman, None

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1. INTRODUCTION
Defenders of the Electoral College frequently assert that victory in the Electoral College requires a winning candidate to “produce a coalition of states with wide and diverse interests”\(^1\) thereby producing “a broadly based electoral victory.”\(^2\) For the defenders of the College, simply winning the popular vote is not sufficient.

Not just any majority will do in a government dedicated to protecting the equal rights of all. One must pay heed not only to the numerical size of a winning coalition, but to the manner of its composition.\(^3\)

In elections such as 2000, in which the winner of the national popular vote lost the vote in the Electoral College, “the candidate who did a better job of building a national coalition and generating support nationally was sent to the White House.”\(^4\) “In each case the victor was able to succeed because his opponent did not build the national coalition that is required by the Electoral College.”\(^5\) None of these supporters of the Electoral College ever pauses to consider the fragility of the narrow Electoral College victories such as the one achieved George W. Bush in 2000.

In 2003 Neubauer and Zeitlin showed that Bush’s victory over Gore depended on the House size being not too large.\(^6\) Assuming that state-by-state election results remain unchanged,

- The minimum House size for a Gore victory is at 492. (There is a dead heat when the House size is 491 and Bush wins for all House sizes up to 490.)
- The maximum House size for a Bush victory is 596. (There is a dead heat when the House size is 597 and Gore wins for all larger House sizes except 655, which

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5. Id. at 170. This statement explains nothing. It simply states that the winning candidate won the Presidency by winning the Electoral College.
The Fragility of Narrow Electoral College Victories

also produces a dead heat.\textsuperscript{7}

Not surprisingly. Bush’s victory also depended on the precise number of Senators per state.\textsuperscript{8} If there were only one Senator per state,\textsuperscript{9} then Bush would have received 30 fewer

\textsuperscript{7} Id. In 1979 testimony to the Senate Subcommittee on the Constitution James E. Shaw demonstrated that by changing the size of the House “’Ford could have won the 1976 presidential election without the switch of a single state, without any change in defecting electors and without Congress’ rejecting any electoral votes. So too could have Richard Nixon won in 1960, Samuel Tilden in 1876, John Adams in 1800 and Thomas Jefferson in 1796. Winfield Hancock in 1880 and Lewis Cass in 1848 could have achieved ties in the electoral college, forcing the election into the House of Representatives.” James Evan Shaw, \textit{The Electoral College and Unstable Apportionment, A Summary}, in \textit{Direct Popular Election of the President and Vice President of the United States: Hearings on S. J. Res. 28, 96\textsuperscript{th} Congress, 1\textsuperscript{st} session, March 27, 30, April 3, and 9, 1979} 463, 464 (Government Printing Office 1979). Shaw does not explain these claims. The outcomes cited for 1976, 1960, 1880, 1848, and 1800 result from extremely small House sizes. The election of 1876 demonstrates the same sort of pattern as the 2000 election.

- The first Hayes-Tilden tie occurs with a House size of 222.
- The first Tilden victory occurs with a House size of 231
- The last Hayes victory occurs with a House size of 321.
- The last Hayes-Tilden tie occurs with a House size of 344.

(Spreadsheet on file with the author. The actual House size was 293.)

My research has demonstrated that if the Second Congress had passed the first apportionment bill it considered, dividing by 30,000 and rounding down, thereby resulting in seven additional House seats, then the 1796 election between Adams and Jefferson would have come down to the electoral votes of the additional elector in Maryland. (In 1796 Maryland’s ten electors cast seven electoral votes for Adams and four for Jefferson!) If the additional Maryland elector had cast one of his votes for Jefferson and the other for someone other than Adams then the election would have likely resulted in these two Founders each receiving 73 electoral votes, a bare majority of the 145 electors who would have cast votes.

\textsuperscript{8} Bush’s Electoral College victory would have also depended on the precise boundaries of the state of Florida. The Walker amendment to the Florida Organic of 1822 proposed that all of Florida west of the Appalachicola, “shall become and form a part of the state of Alabama,” provided the Alabama legislature consented. 38 \textit{Annals of Congress} 275. March 5, 1822. The Senate rejected the Walker amendment by a vote of 19-25 with little support from the southern bloc in the Senate.

The area in question now forms the ten counties in present day Florida in the Central Time Zone, immediately south of Alabama. These ten counties gave George W. Bush a plurality of 126,189 votes. The remainder of Florida gave Al Gore a plurality of 125,652 votes. See Mark Whitman, \textit{Florida 2000: A Sourcebook on the Contested Presidential Election} 329-330 (Lynne Rienner 2003). Had these ten counties been part of Alabama Michael L Rosin

\textit{Work in progress!!!}

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electoral votes and Gore 21 fewer. This would have resulted in a 246-241 electoral vote victory for Gore!

rather than Florida then, all other things being equal, Al Gore would have won Florida’s 23 electoral votes and had a no questions asked 291-247 victory in the Electoral College. (One electoral vote shifts from Florida to Alabama and one more from Florida to Massachusetts.)

The first draft of the joint Florida-Iowa statehood bill incorporated a proviso to enable the future partitioning of Florida at the Suwanee River. H. R. 497 §3, 28th Cong. January 7, 1845. If the Florida had been partitioned at the Suwanee then, all other things being equal, then George W. Bush would have won West Florida’s four electoral votes by 101,875 votes and Al Gore would have won East Florida’s 23 electoral votes by 101,338 votes. Gore would have won the electoral vote by 290 to 250.

Florida’s four electoral votes were crucial to Hayes’ victory over Tilden in 1876. Had the Walker amendment been incorporated into the Florida Organic Act of 1822, then Florida would likely have been apportioned one less House seat in the second apportionment of 1872. As a result, the best Hayes could have hoped for would have been a 184-184 electoral vote tie. With the Democrats in control of the lame duck 44th House it is certain that Tilden would have become President rather than Hayes. Had Florida been partitioned, as provided for in the first draft of the joint Florida-Iowa statehood bill, then West Florida’s three electoral votes would have been cast for Hayes and East Florida’s three electoral votes would have been cast for Tilden. This would have given Tilden a 187-183 Electoral College victory.


9 Or, more precisely, if there were only one Senate-based electoral vote per state. No one at the Constitutional Convention ever proposed that there be only one Senator per state. Nevertheless, as Seth Barrett Tillman has noted (in his review of Ross’s book) “So the size of the bonus matters. But if any bonus, 2 votes, 3 votes, 4 votes, or 50,000 votes, is consistent with federalist principles, would not a bonus of one vote – rather than two – have worked too?” Seth Barrett Tillman, Betwixt Principle and Practice: Tara Ross’s Defense of the Electoral College. 1 NYU Journal of Law & Liberty 922, 930 (2005). (Reviewing: Enlightened Democracy: The Case for the Electoral College (2004)).