

THE PROBLEM OF THE FAITHLESS ELECTOR: TROUBLE APLENTY BREWING JUST BELOW THE SURFACE IN CHOOSING THE PRESIDENT

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While there was a bit of suspense on election night of 2004, by the next morning it was clear that George Bush had secured reelection, no ifs, ands, or buts. Or was it? The electoral college was not to meet (in fifty-one separate state and District of Columbia gatherings) until the Monday after the second Wednesday in December, some forty-one days later.¹ Suppose at those electoral college proceedings, a majority of the electors had cast their votes not for George Bush, as they had been committed to do beforehand, but for Utah's Senator Robert Bennett (or, for that matter, anyone else who was a natural born citizen of the United States, at least thirty-five years old, and had been resident in the United States for the prior fourteen years),² even though not a single popular vote in the entire nation had been cast for Bennett.³ That, of course, did not happen, and there was never any real chance of it happening. But what if it had happened? Would George Bush or Robert Bennett—or perhaps neither—be our president? That is the problem, in its starkest form, of the “faithless” elector.

Some states have statutory provisions that explicitly purport to “bind” electors to vote in accord with their prior commitments. These laws sometimes simply instruct electors to vote as committed,⁴ but sometimes they provide penalties of one sort or another. North Carolina, for instance, imposes a fine of \$500 for faithlessness, while New Mexico makes it a “fourth degree felony.”⁵ Some laws require political parties to extract pledges, while others have state officers compose and administer oaths of faithful-

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¹ 3 U.S.C. § 7 (2000).

² See U.S. CONST. art. II, § 1, cl. 5.

³ One can say this about Bennett with great—though perhaps not absolute—confidence, precisely because of the peculiarities of the way we choose a president. Unless there is some aberrant state that allows a voter to write in a presidential candidate's name even though there are no electors associated with that candidate, Bennett could not have received any votes. See *infra* notes 21 & 22.

⁴ E.g., ME. REV. STAT. ANN. tit. 21-A, § 805(2) (2004) (“The presidential electors . . . shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes . . .”).

⁵ N.C. GEN. STAT. ANN. § 163-212 (West 2001); N.M. STAT. ANN. § 1-15-9(B) (West 2004).

ness.⁶ And some states provide that a faithless vote constitutes resignation from the office of elector.⁷

If these laws purport to change faithless votes, however, they may be unavailing. In the 1952 decision *Ray v. Blair*, the Supreme Court held that states may allow political parties to extract pledges of faithfulness to the nominee of the national party from candidates for elector who seek to run in the party's primary.⁸ But the court explicitly reserved the possibility that the pledge was "legally unenforceable because of an assumed constitutional freedom."⁹ A whole host of electoral college commentators insists that electors have just such a "constitutional freedom" to vote faithlessly.¹⁰

All very interesting, you may say, but law professors seemingly thrive on whimsical questions that have little relevance for the real world. Outside of Utah, few people have even heard of Robert Bennett. Don't we have enough real problems to worry about, so that we can ignore this hypothetical one? Well, if you prefer more realistic possibilities, try this question: May electors effectively disregard the statewide popular votes that put them in office and successfully cast their votes for the "losing" candidate in their states—the candidate of the other major political party? If just a few electors were to succeed in such an effort, it could change the result of a close election. That possibility is not far-fetched at all, as evidenced in the last two elections.

While no president has ever come to office through the votes of faithless electors, one faithless elector abstained in the presidential balloting in the 2000 election, while in 2004 another elector in a different state voted for John Edwards for president, rather than John Kerry. Over the years there have been perhaps a dozen faithless electors of one stripe or another in the presidential contests. And, at least in the close 2000 election, there is nothing at all fanciful about the possibility that faithless electors might have changed the outcome. Even after the Florida contest was decided in George

⁶ Compare ALASKA STAT. § 15.30.040 (2003) ("[P]arty shall require . . . a pledge."), with MASS. GEN. LAWS ANN. ch. 53, § 8 (2004) (stating that acceptance of nomination for post of elector shall be "signed by each candidate . . . on a form to be provided by the state secretary . . . [which] form shall include a pledge").

⁷ See, e.g., MICH. COMP. LAWS ANN. § 168.47 (West 2004) ("[F]ailure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes resignation from the office of elector."); N.C. GEN. STAT. § 163-212 (2004); UTAH CODE ANN. § 20A-13-304(3) (2004).

⁸ *Ray v. Blair*, 343 U.S. 214 (1952).

⁹ *Id.* at 230.

¹⁰ See, e.g., AFTER THE PEOPLE VOTE 8 (John C. Fortier ed., 3d ed. 2004); AFTER THE PEOPLE VOTE 13 (Walter Berns ed., 2d ed. 1992) [hereinafter AFTER THE PEOPLE VOTE I] (stating that electors have the "constitutional status of free agents"); GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 20, 25–26 (2004); Akhil Reed Amar, *Presidents, Vice Presidents and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 219, 230 (1995); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665 (1996); cf. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 114, 116 (2004).

Bush's favor that year, if three Republican electors had (successfully) voted for Albert Gore—but all other electors had remained faithful to their pre-election commitments—Gore would have triumphed in the electoral college, 270–268.¹¹ And if two Republican electors had (successfully) abstained or voted for someone other than Bush or Gore, the presidential selection would have been relegated to the House of Representatives for want of an electoral college majority.¹²

With these possibilities in view, Gore—or others associated with him—was rumored to have investigated the prospects of Republican elector defections.¹³ After all, in the 2000 election Gore had decisively captured more popular votes nationwide than had Bush. Even the loss of the pivotal Florida electors by Gore was razor thin at best, and subject to lots of dispute at worst. For one reason or another, Gore might well have thought that a few “conscientious” Republican electors could be convinced to give him the nod.¹⁴ That “conscientiousness” might have been fortified, moreover, by a promise of some things the electors coveted, such as nomination for high public office or espousal by the new president of some favored policy position. The presidency of the United States is such a high-stakes position that those seeking the office may be inclined to promise a great deal to get it.

If such efforts were made on behalf of Gore, it may simply have been turned about fair play. In the period immediately before election day, many polls suggested just the reverse of what happened. There were predictions that Bush would win the popular vote but lose to Gore in the electoral college—if all votes were cast faithfully.¹⁵ In the face of this possibility, it was reported that the Bush campaign was investigating the possibility of faithlessness, of convincing some Democratic electors to vote for Bush. In his recent book, George Edwards provides an account of the preparations:

[The] campaign had prepared talking points about the essential unfairness of the electoral college and intended to run advertisements, encourage a massive talk radio operation, and mobilize local business leaders and the clergy against acceptance of a Gore victory The goal was to convince electors that they

¹¹ The faithless elector in the 2000 election was a District of Columbia Democratic elector who abstained to protest the lack of representation of the District in the House and Senate. I am assuming that she would have voted for Gore had she gotten wind of the possibility of faithlessness by some Republican electors.

¹² U.S. CONST. amend. XII; see Robert W. Bennett, *The Peril That Lurks in Even Numbers: Selecting the President*, 7 GREEN BAG 2D 113 (2004).

¹³ ROSS, *supra* note 10, at 118. In the 2004 edition of *After the People Vote*, *supra* note 10, at 8, it is reported that “[d]uring the 2000 election controversy, Bob Beckel, a Democratic consultant, claimed to head an effort to persuade Bush electors to vote for Al Gore, using the argument that Gore had won the popular vote.”

¹⁴ At least one commentator confessed to having thought it was a real possibility. See Timothy Noah, *Faithless Elector Watch*, SLATE, Dec. 7, 2004, <http://slate.msn.com/Default.aspx?id=2110786&>.

¹⁵ See ROSS, *supra* note 10, at 144.

should cast their votes for the popular vote winner and not the winner in the electoral college.¹⁶

Whatever the truth to the rumors in 2000,¹⁷ at least one candid vice-presidential candidate did in the past make little secret of the campaign's intention to seek out electoral college defections in that forum for a contest that promised to be a close one.¹⁸

If the 2000 election had been decided by faithless electors—either way—the result would have held great peril for the nation. To all appearances, the modern electoral college is one in which each state conducts a popular election among presidential candidates. The state's allocation of electors—one for each member of the House and Senate, and effectively three for the District of Columbia¹⁹—is then awarded on the basis of the outcome in the state. The electoral college winner is the candidate who secures a majority of the total number of electors. At least in a two-person race, short of an electoral college tie²⁰ there seems to be no room for ambiguity about the result. That is why on the morning after election day in 2004 George Bush was understood to have won—no ifs, ands, or buts.

If this is a misunderstanding, moreover, it is because states have been up to their elbows in laws and practices which help create it. The Illinois absentee ballot that I filled out for the 2004 election, for instance, said the following (omitting the Spanish):

For President and Vice President of the United States

Vote For One	John F. Kerry and John Edwards George W. Bush and Dick Cheney Michael Badnarik and Richard V. Campagna	Democratic Republican Libertarian
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¹⁶ EDWARDS, *supra* note 10, at 158. Edwards, of course, tellingly misstates—or at least oversimplifies—the situation, for if, as he believes, elector faithlessness is constitutionally protected, *see supra* note 10, there would have been no “winner in the electoral college” until after the electoral votes had been cast. And if Bush had won the popular vote, and the Bush campaign's reported effort had succeeded, the popular vote winner would have become the “winner in the electoral college.”

¹⁷ Highly placed officials in the Bush campaign denied allegations of any plan to “discredit” the electoral college. *See* ROSS, *supra* note 10, at 217 n.34.

¹⁸ In 1977 Robert Dole, who had been the Republican vice-presidential candidate in the close 1976 election, testified that after the election—and before the electoral college vote—the Republican ticket was “looking around for electors.” Dole remarked that “the temptation is there for that elector in a very tight race to really negotiate quite a bunch.” LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER 2000*, at 78 (1999). A casual remark to the same effect is reported in T. R. Reid, *Direct Presidential Election Again Sought by Sen. Bayh*, WASH. POST, Jan. 28, 1977, at A2.

¹⁹ U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XXIII.

²⁰ *See* Bennett, *supra* note 12.

This is an example of the “short ballot,”²¹ which is in use in most of the states. The names of the electors nowhere appear. And even in those states where the names of electors are still found on the ballot, those of the presidential and vice-presidential candidates are typically given considerably greater prominence.²² In either case the voter can apparently signal with abandon a preference for a paired duo of candidates for president and vice president. This is what the ballot tells him the election is about.

Given this modern understanding, widespread social turmoil, even widespread violence, could well result if an election result was altered by faithless electors. While electoral votes are cast about forty days after the election, the votes are not formally counted for another three weeks or so, at a joint meeting of the House and Senate.²³ At that meeting, the validity of elector faithlessness would, no doubt, be challenged, and the legitimacy of that challenge might be challenged as well. Particularly if the two houses were controlled by different political parties, the outcome of the struggle could remain uncertain for a long time, with unforeseeable results. The Supreme Court might get into the fray, as it did in the 2000 election,²⁴ but there is no guaranteeing that the joint meeting would accede to a court decision, particularly if the court decision favored a candidate of a party that was in the minority in both houses. After all, the Constitution says that the joint meeting is where the votes “shall . . . be counted.”²⁵ One venerable commentator has said that “the . . . dispute over the legitimacy of the elec-

²¹ See MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* 23 (1992). Even though the ballot may still be quite long, the term is used to distinguish those ballots on which the electors names do not appear (a “short ballot”) from those on which they do.

²² In an environment defined by the short ballot, the election is transformed into one to choose electors only by virtue of a provision in the state election law that stipulates that a vote for presidential and vice-presidential candidates is “really” for the slate of electors pledged to them. See LONGLEY & PEIRCE, *supra* note 18, at 107–09. The form and wording of ballots vary enormously from state to state, and sometimes even within states. At my request, Jim McMasters of the Northwestern Law Library collected sample ballots for the 2000 election from fourteen states. Those from California, Wisconsin, Washington, West Virginia, Texas, North Carolina, Nevada, and Maine contain neither the names of the elector candidates, nor any hint of a role for such an officer. Instead, the ballots indicate that a vote is to be cast for one or another set of candidates for president and vice president. The Oregon ballot indicates at the top of a column of “national” candidates listed by party that in voting for president and vice president “[y]our vote for the candidates for President and Vice President shall be a vote for the electors supporting those candidates.” The ballots from Tennessee, Colorado, and Florida indicate that the vote is for “electors,” but does not name them. The voter then casts a vote for a named presidential candidate. The Leon County Florida ballot has a column headed by the word “electors,” and then instructs the voter to “vote for group,” designated by the names of presidential candidates in large type and their running mates in smaller type. The Clay and Palm Beach County Florida ballots, on the other hand, add a parenthetical explanation that “[a] vote for the candidates will actually be a vote for their electors.” And finally, ballots from Georgia and Idaho list the electors in fine print underneath the names of the presidential and vice-presidential candidates.

²³ U.S. CONST. amend. XII.

²⁴ *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

²⁵ U.S. CONST. amend. XII.

tion of a new President [where faithless electors played a role] might well inflict grave injuries upon the nation.”²⁶ That is, perhaps, to put it mildly. Is it not possible, for instance, that foreign enemies would confront the United States in the atmosphere of uncertainty that could prevail? Even if that did not happen, and even if some settlement of the election dispute was reached with expedition, there would likely be bitterness and dissension in many quarters, and for a very long time. The poisoned atmosphere would make the unhappiness with the 2000 election seem like child’s play.

Just how have we come to this pass? Perhaps we can begin to understand the polar possibilities for electoral legitimacy by noting a touch of irony in use of the word “faithless” to describe electors who defect from their pre-election commitments. As originally envisaged, electors were to be independent decisionmakers, “men,” in Alexander Hamilton’s words, “most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.”²⁷ They were to deliberate and then exercise discretion to come up with the best person(s) for the job of president. Indeed, it is hard to see why the office of elector would have been created in the first place if no real process of choice attended the office. For this reason, today’s faithless elector might actually be rather faithful to the original conception of his assignment.²⁸

The seemingly awkward choice of separate state meetings for the electors seems to have derived some of its appeal as helping to assure this independence of electors.²⁹ Separate meetings of each state’s electors might be seen as a device for assuring that bargaining would not insinuate itself into the selection process. The “detached and divided situation” of the electors, as Hamilton put it, would expose them much less to “heats and ferments.”³⁰ With no knowledge of the deliberations of the other electoral college dele-

²⁶ Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 17 (1968). Another, with elector faithlessness largely in view, says that “[t]he legitimacy of the electoral process would shatter if the American electorate were suddenly confronted with a fully revitalized electoral college.” GLENNON, *supra* note 21, at 67.

²⁷ THE FEDERALIST NO. 68 (Alexander Hamilton).

²⁸ I should acknowledge that this reading of history—that the electors were meant to be independent decisionmakers rising above political considerations in a search for the best available executive for the nation—has been challenged on occasion over the years. See LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE xi, 3–22 (1958) (“[The] Founding Fathers meant to invite but not to compel a popular appointment of Electors. . . . [W]e must look upon them as a medium for ascertaining the public will.”); cf. Martin Diamond, *The Electoral College and the American Idea of Democracy*, in AFTER THE PEOPLE VOTE I, *supra* note 10, at 44, 47–50. TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 15 (1994), presents a more nuanced view.

²⁹ KURODA, *supra* note 28, at 11, says that the experience with absenteeism in the Continental Congress may have affected the Framers’ hesitance about a single national meeting.

³⁰ THE FEDERALIST NO. 68 (Alexander Hamilton).

gations, each group of electors could ask and answer for itself the question of just who in the country could rise above the battle of interests, who would best answer the call of being an executive not for one faction, nor even for an amalgam of many, but for the entire nation.³¹ This is what leads to the claim mentioned earlier of constitutional protection for elector discretion.

If elector faithlessness can be traced in this fashion to the original constitutional design, it is astounding how quickly many of the assumptions on which it was based proved to be false. Even while many clung to a view of politics in general as rising above factions in the search for the common good, ferocious differences surfaced almost immediately about just what the “true interest” of the new republic was, and the multiplicity of interests and sentiments coalesced around two large-scale groupings characterized by a great deal of mutual distrust. Political parties, nowhere mentioned in the Constitution, quickly became the organizing media of politics, and almost immediately reached not only into the legislature but into the electoral college mechanism for selecting the president as well. Electors increasingly came to think of themselves as agents of political parties rather than as engaged in deliberation about who in the nation might best serve as a wise president above factional politics.³² And with political parties as instruments of political coordination and communication, cooperation among the various state electoral college delegations could proceed before the simultaneous far-flung meetings of those delegations.

Two other developments set the stage for the modern, streamlined conception of the electoral college that I sketched above and that most of us have in mind when we think of presidential elections. The first was to separate the electoral college voting for president and vice president, so that electors could vote for a set of candidates for the two offices that had been predetermined by the political parties with which the electors were associated. In the original Article II provisions, electors were to cast two votes each, and those votes were to be undifferentiated between the two positions. The person who received the greatest number of votes would become president if he received votes from a majority of the electors. The runner-up would be vice president. And if no person received the necessary majority, the choice was relegated to the House of Representatives, which would choose from among those with the five highest number of electoral votes. The House would also break any tie in the electoral college, in the seemingly unlikely case that more than one candidate got the votes of a majority of electors, but there was a tie.³³ This possibility of a tie must have seemed

³¹ See KURODA, *supra* note 28, at 21–22.

³² “By 1800 partisanship in appointment of electors had become the absolute rule and consequently electors had become the pawns of political parties.” Robert G. Dixon, Jr., *Electoral College Procedure*, 3 WESTERN POL. Q. 214, 214 (1950).

³³ U.S. CONST. art. II, § 1, cl. 3.

unlikely to those who devised the system, since discretionary and uncoordinated choices of a large number of individuals deliberating in many separate meetings would seemingly come up with a tie only by uncanny accident.

Political parties upset this assumption as well. Washington had received one of the votes of every elector in each of the first two elections and could almost surely have been elected again. But he shunned a third term. With the father of the country headed for retirement, the nascent Federalist and “Republican” (i.e., Jeffersonian, later known as “Democratic”) political parties that had emerged were emboldened and given rough national shape by congressional caucuses. The two congressional caucuses each produced a slate of a presidential and a vice-presidential candidate. The spirit of party was already sufficiently strong to guarantee that no candidate would achieve Washingtonian unanimity in the electoral college balloting, but party discipline was not yet sufficient to rigidify the electoral balloting. The result—not quite the factionless deliberation envisaged by the craftsmen of the electoral college process, nor yet modern party politics—was the choice of the Federalist John Adams as president and the Republican Thomas Jefferson as vice president. As the Federalist and Republican parties further coalesced in the years immediately following, the 1796 choice of executive officers divided between parties came to be seen as a failure of party discipline, and this conception led directly to the fateful drama of the 1800 election.

In 1800, John Adams and Thomas Jefferson were the presidential choices of their respective congressional caucuses, as they had been four years earlier. Political parties had sufficiently gelled at the state levels that most electors considered themselves to be party loyalists. The Republican choice for vice president was Aaron Burr, and, haunted by what had happened in 1796, all the Republican electors cast their two votes in those far-flung meetings for Jefferson and Burr.³⁴ Each achieved the required majority, but they had the same majority, and the choice was thrown into the constitutionally mandated contingent procedure in the House of Representatives.³⁵ While Jefferson won in that proceeding, the process proved to be protracted and difficult. This led to the adoption of the Twelfth Amendment, separating the electoral college balloting for the two executive offices. With the balloting for the two offices separated, each elector could cast a strict party-line vote without concern that a tie would again confound the process.

³⁴ See KURODA, *supra* note 28, at 99.

³⁵ Thus Chief Justice Rehnquist committed a misstep in his recent book when he said that “the chosen electors did not give a majority of their votes to a single candidate . . . in 1800, when Thomas Jefferson and Aaron Burr each received the same number of votes” WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, at 4 (2004).

The second development was the move to popular election in the choice of electors. The Constitution leaves the “manner” of choosing electors up to each state legislature.³⁶ In the first several elections, the states employed a variety of mechanisms for designating electors, importantly including direct designation by the legislature.³⁷ But popular election was used by some states as well, and rather quickly after the tumultuous 1800 election, popular election carried the day. With very few exceptions, popular election of electors has been used by every state since the 1830s.³⁸ It is universal today, albeit with one important difference among the states. With just two exceptions, the states today (including for this purpose the District of Columbia) employ a general ticket election, often called “winner-take-all.” Under this system, political parties advance entire slates of electors. The voters check a box next to (or otherwise designate) the name of a presidential candidate, and the slate pledged to the winning candidate gets all of the state’s electors. In the other two states—Maine and Nebraska—two of the electors are chosen through such a winner-take-all (i.e., winner-take-two) statewide vote, and the remaining electors are determined by the popular vote in each of the state’s congressional districts.³⁹

These various developments have produced a modern conception of the electoral college that bears scant resemblance to what those who devised it had in mind. It is dominated by popular election of electors, which is not inconsistent with what the constitutional framers envisaged, but is not required by that vision either. However chosen, the electoral college is not made up of discretion-laden electors, as the framers intended. Political parties are central to its operation, rather than absent—or at best peripheral—as the framers hoped and expected. The separate state meetings are not the disconnected deliberations they envisaged, but rather staged and coordinated proceedings orchestrated by those same political parties. The only respect in which the modern electoral college resembles what the constitutional framers had in mind is the allocation of electoral voting strength by states. And even that has been importantly transformed by near-universal state adoption of winner-take-all rules for awarding a state’s electoral votes.

The assumption of elector faithfulness appeared very early. In 1796 Samuel Miles’s vote for Thomas Jefferson despite his prior commitment to the Federalist candidate John Adams elicited the following response from an aggrieved Federalist: “What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I

³⁶ U.S. CONST. art. II, § 1, cl. 2.

³⁷ *McPherson v. Blacker*, 146 U.S. 1 (1892) (reviewing the methods used in the early elections).

³⁸ See LONGLEY & PEIRCE, *supra* note 18, at 102.

³⁹ *Id.* at 102–09.

chuse him to *act*, not *think*.”⁴⁰ James Russell Lowell, elected as a Republican elector in the contentious 1876 election, made the same point from the other side of the relationship of voter to elector. Urged to vote for the Democrat (and nationwide popular vote winner) Tilden, he declined, saying,

I have no choice, and am bound in honor to vote for [the Republican] Hayes, as the people who chose me expected me to do. They did not choose me because they had confidence in my judgment, but because they thought they knew what that judgment would be. . . . It is a plain question of trust.⁴¹

Over the years this assumption of elector reliability has come to go without saying, as the form of the ballots mentioned above silently, but dramatically, attests. Just as surely, however, the possibility of elector faithlessness persists, hiding in the shadows of the process. This is a mischievous mix that we would do well to resolve before rather than after we find ourselves embroiled in damaging controversy. I think we can do so, and do so without following the difficult path of constitutional amendment. I explain how—along with lots of other things about the electoral college—in a book soon to be published.⁴² Now that you see so clearly what is at stake—including the possibility of Robert Bennett as president—I am sure, my esteemed readers, that it is a book you will not want to miss.

⁴⁰ The comment appeared in the newspaper *United States Gazette*. See *id.* at 24. For a defense of Miles, see WILMERDING, *supra* note 28, at 177.

⁴¹ 2 HORACE ELISHA SCUDDER, JAMES RUSSELL LOWELL: A BIOGRAPHY 216–17 (1901).

⁴² ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE (forthcoming 2006).