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HOW THE ELECTORAL COLLEGE IMITATES THE WORLD SERIES

Michael Herz*

INTRODUCTION

The longstanding debate over the electoral college is now sufficiently mature that there may be nothing new to say. When a subject has become overfamiliar, sometimes it is best approached from the side rather than head-on. In this Article I approach the electoral college debate from the side by considering its dominant metaphor, in the hope that doing so will “liberate rather than enslave thought.”

The pervasive metaphor invoked to justify not simply giving the White House to the candidate who receives the most votes is the World Series. To win the World Series, a team must win four games. The winner always and by definition prevails in a majority of the games played. However, the winner does not necessarily score the most total runs. If it loses blowouts and wins squeakers, a team will win the Series despite scoring far fewer total runs.

The most striking example of a “gerrymandered” World

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* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. This Article’s title, as fans of baseball writing will recognize, is borrowed, mutatis mutandis, from a well-known paean to the sport of baseball. See THOMAS BOSWELL, HOW LIFE IMITATES THE WORLD SERIES: AN INQUIRY INTO THE GAME (1982). An alternative would have been “Why Time Begins on Election Day.” Cf. THOMAS BOSWELL, WHY TIME BEGINS ON OPENING DAY (1984). Thanks to John McGinnis and Chuck Yablon for helpful comments on an earlier draft.

1 So one would infer, for example, from the recent publication of a new review of three books on the electoral college that were all published three decades ago. See Ann Althouse, Electoral College Reform: Déjà Vu, 95 NW. L. REV. 993 (2001) (reviewing JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE (1971); ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM (1971); LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM (1972)).

2 Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (1926) (Cardozo, J.) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”).
Series took place in 1960, when the Pittsburgh Pirates prevailed, four games to three, over the mighty New York Yankees. The sweet and stunning victory came on Bill Mazeroski's solo home run in the bottom of the ninth inning of the seventh game, ranked by *The Sporting News* as the second greatest moment in the history of baseball. In their four victories, the Pirates outscored the Yankees by a total of seven runs, winning 6-4, 3-2, 5-2, and 10-9. In their three losses, the Pirates were outscored by 35 runs, losing 16-3, 10-0, and 12-0. Overall, the Yankees outscored the Pirates 55-27; as a team they hit .338 to the Pirates' .256; they had 10 home runs to the Pirates' 4; Yankees pitchers had a collective ERA of 3.54, the Pirates' ERA was 7.11. In short, the Yankees dominated by every measure except the one that counted: total games won. This striking result even produced a moderately well-known Yogi-ism: "We made too many wrong mistakes." 

Although the gap was not as great, the Yankees/Pirates scenario was repeated four decades later—not when the Yankees beat the Mets in the 2000 Series, but the following month when George Bush beat Al Gore in the 2000 presidential election. Bush received 50,456,062 votes (47.89 percent), Gore 50,996,582 (48.4 percent). Despite having half a million fewer runs than his opponent, Bush won the election because he won more games. 

Defenders of the electoral college regularly invoke the World Series in general, and the 1960 World Series in particular. In part,
this reflects the irresistible allure of baseball metaphors, particularly in legal scholarship, where one might almost identify a "turn to baseball." But the World Series metaphor keeps popping up in discussions about the electoral college not just because it is neat and about sports; it is actually quite useful. Its usefulness is my topic.

I. PROVIDING AN ALTERNATIVE MODEL TO CREATE PLAUSIBILITY

Our modern intuitions about elections, formed in the post *Reynolds v. Sims*, one-person-one-vote era, are (1) to determine the winner we add up all the votes and see who has the most and (2) all votes count equally. The electoral college is notoriously inconsistent with these assumptions. First, the electoral college does not add up the popular votes. It adds up the electoral votes, and these are not necessarily the same. Almost every state allocates electoral votes on a winner-take-all system, so the margin of victory within each state is irrelevant to the overall outcome. As in 2000, the popular vote winner can be the electoral college loser. This looks weird. As Representative Ray LaHood (R. Ill.), a long-time electoral college opponent, puts it: "In our democracy, if you run for dogcatcher it's decided by popular vote.... The only exception is the highest elected office in the country." For LaHood, having the popular vote “overridden by the Electoral
College” amounts to a “major calamity.”

On the second point, votes would only be of equal weight if electoral college votes were exactly apportioned among the states, and then on the basis of those actually casting ballots rather than population. But in fact electoral votes are allocated by populations, which are not perfect multiples of 435; the rates of registration and of voting vary from one state to another; each state, regardless of size, gets two electoral votes (corresponding to its two Senators) in addition to the electoral votes allocated by population (corresponding to its Representatives). The result, as has often been pointed out, is a wide variation in the weight of individual votes and a particular dilution of individual voting strength in large states. So in 2000 Vermont had 97,931 1/3 voters per elector; New York had 206,727 1/4 voters per elector. In this sense, a Vermonter’s vote counted twice as much as a New Yorker’s. This also looks odd at best, if not, in the words of Senator Durbin, “undemocratic and unfair.” So the electoral

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11 Id.; see also 112 CONG. REC. 5928 (Mar. 15, 1966) (statement of Sen. Quentin Burdick) (labeling the situation in which a President takes office after losing the popular vote “a tragedy”); AMERICAN BAR ASS’N COMM’N ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT 37 (1967) (concluding that a “national referendum is the only ‘truly democratic process’ for electing the President and Vice-President).

12 These figures are obtained by dividing each state’s 2000 vote totals, as provided by the National Archives and Records Administration, by its number of electors. See Nat’l Archives & Records Admin., 2000 Presidential Election: Electoral Vote Results, at http://www.nara.gov/fedreg/elctcoll/2000res.html (last visited July 16, 2001). The more usual calculation is not voters per elector but citizens per elector. Based on the 1990 census, Vermont had 187,586 citizens per elector, New York 545,165; a difference of about three to one. See id. (showing New York population of 17,990,455 and Vermont population of 562,758). The difference between the per-citizen and the per-voter numbers indicates a higher rate of voter registration and/or a higher rate of voting and/or a larger percentage of voting-eligible residents in Vermont than in New York.

13 146 CONG. REC. S1,618-19 (daily ed. Dec. 6, 2000) (remarks of Sen. Richard Durbin). It is often asserted that, because individual votes in small states are weightier in this sense, the small states benefit from the electoral college; indeed, popular coverage of the 2000 election focused almost exclusively on this purported bias in favor of small states. See Note, Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote, 114 HARV. L. REV. 2526, 2548 & n.109 (2001) (reporting that of 169 articles concerning the electoral college in the New York Times and the Washington Post appearing between September 1, 2000 and April 1, 2001, twenty-eight reported a small-state bias, one a large-state bias, and one conflicting small-state and large-state biases). In fact, the small states’ edge is rather theoretical. In every practical way, it is the larger states that benefit—they get the attention because they have the votes, and, almost always, as go the large states, so goes the election. See, e.g., The Electoral College and Direct Election of the President: Hearing on S.J. Res. 297, S.J. Res. 302, and S.J. Res. 312 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 102d Cong. 8 (1992) [hereinafter 1992 Senate Hearings] (prepared statement of Sen. David Pryor) (contending that “simple electoral math dictates that the candidates spend all their time campaigning in the eight to twelve largest states, because that is where the electoral prizes are” and that the system “not only encourages, but mandates, campaigns in only big states”). John Banzhaf was thought to have proved a large-state bias three decades ago,
college conflicts with prevailing assumptions about elections. As Senator Birch Bayh, another longtime opponent of the electoral college, succinctly put it at the beginning of a hearing on his proposal for direct election of the President: 

[UN]less someone does a superhuman job of persuading, I am going to remain convinced the direct election should replace our present system, because direct election is the only system that guarantees that every vote will count, that every vote will count the same, and that the candidate with the most votes will win. 14

The World Series metaphor speaks powerfully to the first, and most salient, of these two aspects of the electoral college. (It has something more indirect and complicated to add to our understanding of the second, as I shall discuss below.). Electoral college skeptics who assume the popular vote should determine the winner have to stop and think when they first hear the World Series metaphor. The electoral college seems odd; the World Series seems sensible. But these two venerable institutions operate in similar ways. The analogy works because it draws on our learned intuitions about one thing, baseball, to make us think differently about another thing, the electoral college, which seems counter-intuitive.

So, the first value of the metaphor is that it lends plausibility; it forces people to think more carefully; it lets them see that perhaps the electoral college could (not does—that’s asking rather a lot from a metaphor) make sense after all.

The World Series analogy should diminish concern over the winner of the popular vote not becoming President in a second way as well. Everyone understands and accepts that when a game is set up according to certain rules, the players act strategically in light of those rules. A manager who is trying to win the most games will adopt different strategies than a manager trying to

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see John F. Banzhaf III, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 VILL. L. REV. 304 (1968), although his analysis has also been attacked, see, e.g., Howard Margolis, The Banzhaf Fallacy, AM. POL. SCI. REV., Feb. 1983, at 321.

One reason the electoral college has survived the many efforts to abolish it may be that both small and large states think it benefits them, even though they cannot both be right. See BICKEL, supra note 1, at 9-10; Estes Kefauver, The Electoral College: Old Reforms Take on a New Look, 27 L. CONTEMP. PROBS. 188, 196 (1962) (noting that “[t]here were instances in our hearings where a witness would dismiss the practical chances of direct national election proposals as depriving the small states of their electoral vote advantage and then attack the present system as favoring the large states over the smaller ones”).

14 Direct Popular Election of the President and Vice President of the United States: Hearings on S.J. Res. 28 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong. 2-3 (1979) [hereinafter 1979 Senate Hearings] (opening statement of Sen. Birch Bayh).
score the most runs—a sacrifice bunt or a defensive replacement in
the late innings of a close game makes sense if it is important to
win games, but does not if all that matters is total runs. It is
impossible to look at the results of a contest played under one set
of rules and know what would have happened under a different set
of rules, because the game would not have been played the same
way.

Applied to the presidential elections, the point is that we do
not know who would have won the most total votes if total votes
were what the candidates were trying to maximize. Invoking the
World Series (of course), John McGinnis makes this point:

[T]he popular vote result has no electoral meaning because the
candidates were not in a contest for the popular vote. If they
had been seeking the highest popular vote, they would have
campaigned entirely differently. George Bush would have
campaigned more in Texas to run up his vote and Al Gore
would have campaigned more in California. Both would have
campaigned more in urban areas because it is easier to turn out
the vote there. They would have run their television
advertisements in different places and perhaps even run
different advertisements altogether. Given the less than four
tenths of a percentage point difference between Bush and Gore,
we cannot be certain who would have won the popular vote....
Accordingly, it is not entirely coherent to label those instances
in which the college winner loses the popular vote as
“misfirings” of the electoral college. 15

Speaking before the 2000 election, and anticipating a possible
Gore victory in the electoral college and loss of the popular vote,
Walter Dellinger made precisely the same argument in rejecting
the claim that such an outcome would undermine the winner’s
legitimacy: “There’s no real legitimacy argument. If the
presidency was decided by the popular vote, the two candidates
would have run different races. We simply don’t know who would
have won.” 16

This is inescapably true, at least for a relatively close election
such as that of 2000 (or 1888 or 1876). This is not to say that the
campaign incentives that the electoral college creates are the right

15 John O. McGinnis, Popular Sovereignty and the Electoral College, 29 FLA. ST. L.
REV. 995, 996 (2001). For further development of the point, with a reference to the 1960
World Series, see Michael Albert, Election Issues: Money, Structure, Manipulation, and the
Election College, ZNET DAILY COMMENTARIES (Nov. 13, 2000), at
16 Hunt, supra note 10, at A27 (quoting Walter Dellinger); see also Althouse, supra
note 1, at 1012-13. The outcome in a particular state being a foregone conclusion will
affect not only the candidate’s strategy, but also voter turnout. Supporters and opponents
alike may stay at home because they view their votes as purely symbolic.
ones. But the system creates certain incentives, and given those incentives we cannot know what the outcome would have been under a different set of rules; therefore the inconsistency between electoral and popular vote outcomes should bother us less than it otherwise would. The analogy to the World Series is useful because it helps make all this clear by invoking a setting where exactly the same dynamic operates and is understood and accepted.

II. THE ACTUAL, THOUGH ALSO HELPFUL, INACCURACY OF THE ANALOGY

In fact, the electoral college is not like the World Series, despite what everyone says. In the World Series, all games count equally. In the electoral college, state votes are weighted. A state’s electoral vote total is a function of, though not perfectly proportionate to, its population. The smallest states have three electoral votes; the biggest, California, has fifty-five. The closer analogy to the World Series, then, is the process by which the House selects the President and the Senate the Vice-President if the electoral college fails to produce a majority: one state, one vote. That system is a far greater departure from the just-count-the-votes principle than is the electoral college.

Interestingly, the World Series/12th Amendment model is a far greater departure on paper than in practice. The winner of the electoral college has almost always also won a majority of the states. The two exceptions were 1976, when Ford took twenty-seven states and Carter twenty-four, and 1960, when Nixon took twenty-five states, Kennedy twenty-two, and Byrd two, with Kennedy and Byrd splitting each of the remaining four. In other words, only twice has the difference between the World Series/12th Amendment approach and the electoral college approach actually made a difference in the outcome.

17 The point holds in the other direction, but more weakly. That is, because no candidate was trying to maximize total votes, we should not be reassured when the electoral college winner is also the popular vote winner. Perhaps if the dual loser had been trying to maximize popular votes, he could have done so, even though an electoral college victory was out of reach.

18 See U.S. CONST. amend. XII (“But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. . . .”).

19 Of course, in the three elections in which the electoral college chose the popular vote loser—2000, 1888, 1876—it was the popular vote loser who won a majority of the states. So there have been five elections in which the popular vote winner would have lost in a true “World Series” system.

20 The fact that the overall winner nearly always wins an actual majority of the states is
Although this difference has rarely been of consequence in presidential elections, it is significant nonetheless. The one-state-one-vote rule has been roundly criticized. Consider James Madison:

[W]ith all possible abatements the present rule of voting for President by the H. of Reps. is so great a departure from the Republican principle of numerical equality, and even from the federal rule which qualifies the numerical by a State equality, and is so pregnant also with a mischievous tendency in practice, that an amendment of the Constitution on this point is justly called for by all its considerate & best friends.21

With Sanford Levinson leading the attack, modern writers have also been fiercely critical.22 But the point is that they are attacking not the electoral college, but the fall-back provision for selection by the House. To use Madison’s terms, the electoral college is an example of the “federal rule.” While that is shy of the “Republican principle of numerical equality,” it is quite different from the World Series/12th Amendment model of counting all games equally. The World Series analogy usefully reminds us that the electoral college is tied to the popular vote in a way that it

an almost complete response to the objection that one defect of the electoral college is that someone could become President by winning only a dozen or so of the biggest states. See CONGRESSIONAL QUARTERLY GUIDE TO THE PRESIDENCY 233 (Michael Nelson ed., 1989) (pointing out that winning twelve states could bring a candidate overall victory); 125 CONG. REC. 5182 (Mar. 15, 1979) (statement of Sen. Carl Levin) (“[A] candidate can win the Presidency by carrying the electoral votes of only 11 states. Yet, surely, no one would want to see a President who felt particularly obligated to represent the attitudes of only those States or even appear to so represent.”). Like many of the unacceptable outcomes the electoral college could produce, such a scenario is altogether theoretical. It is hard to imagine a real world candidate who is consistently, but exclusively, popular in the larger states.

22 With typical bluntness, Levinson writes:

Why in the world should the House of Representatives vote by state instead of by member? Even if one rejects... [the] denunciations of the Senate’s malapportionment, it seems inexplicable that anyone would accept, let alone glory in, the possibility that a majority of state delegations in the House of Representatives, representing far less than a majority of the national population, would inflict their choice upon the rest of the country.

Sanford Levinson, Presidential Elections and Constitutional Stupidities, 12 CONST. COMM. 183, 185-86 (1995). See also 138 CONG. REC. S7993 (daily ed. June 11, 1992) (remarks of Sen. Slade Gorton) (introducing constitutional amendment to provide for a run-off in case no candidate has a majority in the electoral college and observing that “I do not exaggerate when I say that I tremble for the future of our country and its system of government when I imagine the reaction of the American people if Congress, under the current 12th amendment, chose someone for President who had not received the most votes”); Sanford Levinson & Ernest A. Young, Who’s Afraid of the Twelfth Amendment?, 29 FLA. ST. L. REV. 925, 970 (2001) (labeling the one-state, one-vote rule the Amendment’s “ultimate stupidity”).
need not necessarily be, and in which the World Series is not tied to total runs. Though the electoral college looks like an aberrant institution, it is not as wacky as it might be.

III. SALVAGING THE ANALOGY

Notwithstanding its weighted approach, the electoral college does of course operate something like the World Series. While electoral votes are tied to population, the electoral vote does not duplicate the popular vote. Almost always, the divergence increases the gap between the two candidates; in general, a modest edge in the popular vote translates into a much more significant advantage in the electoral college. But the fact that electoral votes do not track popular votes also can conceivably result in an electoral college tally closer than the popular votes or, as in 2000, in the popular vote winner losing the electoral college.

The divergence of popular and electoral votes has four basic causes. First, and most important, voting is by (state-wide) districts, and forty-eight states have adopted the “unit rule,” or winner-take-all approach to picking electors. Winner-take-all districting allows one side to win a bunch of districts narrowly, lose a smaller number grandly, and end up with an electoral college (or legislative) majority despite having fewer popular votes. Call the games of the 1960 Worlds Series legislative districts, and call the Yankees and Pirates political parties, and one sees how a party or a candidate that receives only a third of the total votes can still have a majority in the state legislature, or the state’s congressional delegation, or the electoral college. Were every state to adopt

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24 This is thus far only a theoretical possibility. No candidate who prevailed in both the popular vote and the electoral college has had a wider margin in the former than the latter.

25 The possibility of a particular party gaining a majority of votes but a minority of seats within the legislature or within the state’s congressional delegation seems to bother people less than the winner of the popular vote not being President. It also bears noting that the accumulation of such results can mean that the composition of the House of Representatives as a whole conflicts with national vote totals. And the possibility of such
the proportional approach used in Maine and Nebraska, this effect would be diluted but not eliminated since (a) two electors would still be selected state-wide in each state and (b) selection would still be by districts, just smaller ones, so a state’s slate of electors would be disproportionate to total votes if electors for one candidate win narrowly and lose grandly district by district.

Second, the electoral votes are not allocated exactly in proportion to population. For one thing, every state gets two votes (corresponding to its two Senators) regardless of size. In those states with only a single representative, especially those with a population less than that of the theoretical ideal House district, an electoral college vote represents many fewer popular votes than in larger states. At the extremes, Wyoming has 165,101 people per electoral vote; California has 616,924. In addition, state populations are not all perfect multiples of 1/435th of the total number of U.S. citizens. Therefore the citizens per representative ratio (and so citizens per electoral vote) varies from state to state.

an outcome is built in to the two-per-state structure of the Senate. The electoral college’s potential for disparity between the outcome and the popular vote totals thus looks like more of an aberration than it is. See Diamond, supra note 23, at 53-55 (asking, rhetorically, “why is it not a loaded pistol to our democratic heads when control over our lawmaking bodies can fall, and has fallen, into the hands of the party that lost in the national popular vote?” and stressing the advantages that flow from districted elections).

Interestingly, the two “senatorial” votes have almost never made a difference in the outcome of an election. Had each state had the same number of electoral votes that it had representatives, the outcome in every election but two would have been the same. The first time the senatorial votes mattered was in 1916, when Woodrow Wilson defeated Charles Evan Hughes by a margin of twenty-three electoral votes, 277-254. The electoral vote gap represents the senatorial votes from twelve states. Wilson carried exactly twelve more states than Hughes did. Thus, had each state had only the number of electoral votes as it had representatives, the gap would have been narrowed by twenty-four votes, and Hughes would have won by one vote.

The second time the senatorial votes mattered was in 2000. George Bush carried thirty states; Al Gore took twenty-one (including the District of Columbia). That’s a difference of nine, or eighteen senatorial votes. Bush needed almost all of them, prevailing 271-267. (The official tally was 271-266 as one Gore elector abstained in protest; throughout this Article I treat Gore as having won 267 electoral votes.)

Note also that, because many factors other than the existence of senatorial votes can contribute to a variance between the electoral vote and the popular vote, the senatorial votes do not necessarily create that variance; they may eliminate it. In 2000, the popular vote would have aligned with the electoral vote but for the senatorial votes. But in 1916, the two were aligned because of the senatorial votes. Wilson took the popular vote, 9,131,511 (49.3 percent) to 8,548,935 (46.1 percent). Without the senatorial votes, the popular vote winner would have been the electoral college loser.


A stark example of this disparity gave rise to an unsuccessful challenge by the state
The third cause of disparity between popular and electoral votes is that states vary in their rates of registration, of voting by registered voters, and of voting-eligible citizens within their population. For the electoral college to reproduce the results of a direct popular election, electoral votes would have to be allocated not by population but by voters.

Finally, while total population and total voters are of course connected, the population figures that form the basis of the allocation are out of date the first time they are used, and increasingly so in subsequent elections. For example, if electoral votes in the 2000 election were allocated according to the population figures of the 2000 census, George Bush would have an electoral college margin of 278-260.

These factors are familiar and well-understood. At first blush it is odd that there have been so few instances in which the electoral college winner was the popular vote loser, given the numerous ways in which the allocation of electoral votes fails to correspond with actual votes. The explanation is three-fold. First, these factors will only matter in very close elections, and most elections are not very close. Second, the most important of these factors is the unit rule, which generally magnifies rather than eliminates the gap between winner and loser. Third, as we have seen, these different features can cancel each other out. For example, in 1916, Wilson won because of the Senatorial votes; without them, the unit rule would have led to a victory for Hughes.

of Montana to the method of allocating representatives. See United States Dep’t of Commerce v. Montana, 503 U.S. 442 (1992). The 1990 census gave the total population as 249,022,783; thus an “ideal” congressional district would have been home to 572,466 people (i.e., 249,022,783 ÷ 435). Montana was given a single House seat for its population of 803,655; a district that was 231,189 people larger than the ideal. (It unsuccessfully argued that it should have been given two seats, which would have meant two districts each 170,638 persons smaller than the ideal but closer to it than the one district it was given.) In contrast, in Alaska, Vermont, and Wyoming, the three states with total populations below that of the ideal district, every vote was more valuable than the national average. Id. at 463. Wyoming’s “apportionment population” in the 1990 census was 455,975, making its citizens’ votes almost twice as strong as those of Montanans.

For an illustration, see supra note 12 and accompanying text.

The Census Bureau’s apportionment tables show shifts in the following states from 1990 to 2000 (2000 victor is indicated parenthetically): Arizona (Bush) +2; California (Gore) +1; Colorado (Bush) +1; Connecticut (Gore) -1; Florida (Bush) +2; Georgia (Bush) +2; Illinois (Gore) -1; Indiana (Bush) -1; Michigan (Gore) -1; Mississippi (Bush) -1; Nevada (Bush) +1; New York (Gore) -2; North Carolina (Bush) +1; Ohio (Bush) -1; Oklahoma (Bush) -1; Pennsylvania (Gore) -2; Texas (Bush) +2; Wisconsin (Gore) -1. See U.S. Dep’t of Commerce, supra note 27. While these shifts compounded the gap between electoral college and popular votes, the movement easily could have been in the other direction; the point is only that the out of date census figures reduce the accuracy of the proportional allocations of electoral votes. (Interestingly, the eighteen-vote margin would correspond exactly to Bush’s edge in Senatorial votes; a purely proportional electoral college would have produced a tie under these numbers.)
the popular vote loser. Thus, one divergence from pure proportionality offset another. Similarly, if in 2000 Gore had won, say, New Hampshire, giving him a bare electoral college majority to go with his popular majority, then we might have said that the inaccuracies caused by obsolete census data balanced out the inaccuracies produced by the unit rule, preserving the electoral college victory for the popular vote winner.

In any event, these four factors preclude exact proportionality between electoral college and popular votes and so explain outcomes like that of 2000, when the popular vote winner loses the election. They make the World Series analogy plausible notwithstanding its imperfections.

IV. SPINNING OUT THE ANALOGY

Accepting that the World Series analogy applies, the question then becomes whether it is useful. I think it is, because it helps us to ask the right question about the electoral college and it helps us to understand its operation and consequences. In baseball, a game is a relevant unit. Under the rules, assumptions, and structures of baseball, it makes sense to proceed game by game when determining the champion. The World Series analogy implicitly asserts that in presidential elections a state is a relevant unit. The question becomes why games matter in baseball, and whether there are equivalent reasons for making states matter in presidential elections.

A. Maybe Games Don’t Matter in Baseball

It could be, of course, that games don’t matter in baseball—or, more precisely; that the choice to proceed game by game (rather than inning by inning, or adding up total runs, or total hits, or total bases, or by giving zero points for a strike out, one point for a ball hit in the infield, two for a ball to the outfield and three for what we now call a “hit”) is wholly arbitrary. Baseball, like all games, is a self-contained collection of random and meaningless rules. So viewed, baseball is a setting in which we are concerned only with what John Rawls calls “pure procedural justice.”\(^{31}\) In such a system, we do not know, or have abandoned the effort to define, the correct outcome; instead, whatever outcome the process

produces is by definition fair. Rawls's example is gambling: the outcome of a spin of the roulette wheel cannot be justified other than by the fact that it was the result of certain procedures, but that alone is enough to make the outcome just. This model, however, is inappropriate for elections, where the "correct" outcome can be described according to an independent, substantive criterion. The exact nature of that criterion is a matter of debate; for present purposes it suffices to say that elections should "promote democracy," or accurately express popular preference. The task is to devise procedures that will accomplish that goal, that will reach the correct outcome. In devising electoral schemes, we seek what Rawls calls "perfect procedural justice," understanding that the best we can hope for is "imperfect procedural justice" (as in, to use Rawls's example, the criminal trial). By definition, procedures developed in a setting of pure procedural justice can hold no lessons when we seek to achieve perfect (or even imperfect) procedural justice, i.e. when there is an external standard by which to evaluate the correctness of the outcome.

This argument is a powerful one, and I will return to it in the conclusion. However, it does not entirely undercut the value of the World Series analogy. Unlike, say, roulette, where the only meaningful criterion for identifying a victor is that the victor was produced by agreed-upon arbitrary rules, baseball provides a set of procedures to identify the better baseball team. To be sure, the goal is not to identify the team that is better in any larger sense—moral, intellectual, popular—but just to identify the team that is better at baseball. Thus, we risk tautology. Being "better at baseball" is not an external standard; what could it mean other than the ability to win baseball games? Nonetheless, there is a difference between a game of skill and a game of chance. The rules of baseball are designed to give victory to the team with the full range of skills that go into baseball; the fact that those skills are arbitrarily selected (why throwing and not kicking?) does not mean that the rules themselves are arbitrary. Like law generally, they must be coherent and make sense within the limited context in which they apply. They are refined in light of the "felt necessities of the time" (the strike zone changes, the height of the mound is adjusted, aluminum bats are allowed in college but not in the majors, etc.) and receive constant scrutiny from an engaged "citizenry."

A separate but related objection would be that the rules of
games are by their nature not only arbitrary but trivial; because the stakes are so low, we can live with all sorts of oddities in the rules of sports that would be intolerable in other settings. Soccer players cannot use their hands; we would not tolerate that rule for surgeons. It is wrongheaded to transplant approaches adopted in settings where it does not matter to settings where it matters very much indeed. Professor Akhil Amar made this argument when pressed on the World Series analogy during congressional testimony:

Mr. [Robert C.] SCOTT [R. Va.]: I would ask Professor Amar whether you were outraged when major league baseball awarded the New York Yankees last year’s [i.e. the 1996] World Series, when they scored 18 runs in the series and the Atlanta Braves scored 26 runs in the series?

Mr. [Walter] BERNS: He does not know anything about baseball.

Mr. AMAR: I know a lot about baseball, Walter. And one of the things I know is that, although it is the great American pastime, at the end of the day, wait until next year, it does not matter very much who wins the World Series. So the arbitrariness of certain rules that define a game is less troubling if, in the end, the game is just a game.33

Amar’s point is well-taken, but it is not a complete response (indeed, it was not his complete response during that testimony, as I will discuss below). First, if the question is not what matters in some ultimate sense, but instead what matters to people, the World Series ranks pretty high—higher, for some, than the presidential election. Many baseball fans, the politically apathetic and alienated, and Ralph Nader would all counter Amar by saying that what does not matter very much is who becomes President.34 More important, a lack of consequences does not necessarily produce an incoherent system. Amar is surely right that arbitrariness or error is easy to live with in inconsequential settings. But that does not mean that arbitrariness and error characterize inconsequential settings. Within the artificial and arbitrary system that a game creates, the component rules must have some sort of coherence and sense. And it is at least possible that that coherence and sense can be applied to other settings.

33 1997 House Hearings, supra note 7, at 78.
34 Unless it’s Ralph Nader.
B. Counting Games Ensures that Victory Is Not a Fluke

The World Series runs seven games and the season 162 in order to control against the chance that a team’s victory in a single game was a fluke. A funny bounce, the ball that goes just over the outfield wall or just out of reach of the infielder’s glove, the superstar pitcher’s only wild pitch of the season, and the like can produce a result in an individual game that is inconsistent with the actual relative strengths of the two teams. While this is indeed a justification for a World Series (at least one of those words is accurate), it has no bearing on the electoral college. The analogy to a one-game World “Series” would be having one state elect the President. Not surprisingly, that proposal is not on the table.

Moreover, the choice between counting total runs and counting total games in a series has nothing to do with avoiding flukes. It was not at all a fluke that the Yankees scored more runs than the Pirates in 1960. They had Mickey Mantle and Roger Maris and Moose Skowron; of course they scored more runs. And it is not a fluke if one Presidential candidate receives more total votes than the other. So this just returns us to the original question—why would we deny victory to the candidate/team with more votes/runs?

C. Discounting Unusually Large Victories

One reason to count games is that to sum total runs would give too much weight to a team’s overwhelming success in a single game. Many have invoked the World Series or other sports analogies to argue that direct election of the President would similarly overvalue a candidate’s enormous success in his home state or elsewhere where that candidate is unusually popular. They make three overlapping points.

1. Overcounting Narrow Talents or Support

In baseball, overwhelming victories are misleading. Maybe a team is just “on” one day, or it is beating up on the other team’s only bad pitcher, or, the game having been lost, the losing manager takes out his best players to avoid injury. Counting a blowout equally with a squeaker avoids overvaluing this isolated and misleading triumph. That a team had a particular advantage on a given day does not mean it is a better team altogether. Proceeding
game by game minimizes the advantage resulting from that momentary edge. By the same token, if a candidate is overwhelmingly but uniquely popular in a single state, that does not mean he is a “better” candidate overall. In 2000, for example, George Bush surely could have done better in Texas than he did. Because the state was comfortably his, he did not need to campaign extensively there. Had he paid more attention to his home state because what counted was total votes, we might be unimpressed that he won a national election on the strength of intense local popularity. This point turns the usual complaint about the non-national character of the electoral college on its head, suggesting that the electoral college ensures broad national appeal by discounting intense local popularity.

One author makes the point this way:

In sports, we accept that a true champion should be more consistent than the 1960 Yankees. A champion should be able to win at least some of the tough, close contests by every means available—bunting, stealing, brilliant pitching, dazzling plays in the field—and not just smack home runs against second-best pitchers. A presidential candidate worthy of office, by the same logic, should have broad appeal across the whole nation, and not just play strongly on a single issue to isolated blocs of voters.35

For supporters of the electoral college, this is the moral of Benjamin Harrison’s victory over Grover Cleveland in 1888, the last time, before 2000, that the winner of the popular vote lost the presidency. The standard account is that Cleveland ran a one-issue campaign, supporting a reduction in tariffs that was extremely popular in the South but nowhere else. Cleveland beat Harrison so emphatically in the South that he prevailed in the popular vote, but Harrison, with broader appeal, won everywhere else, handily taking the electoral college 233-168.36 For supporters of the electoral college, 1888 shows the strength of the system, not

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36 See, e.g., JUDITH A. BEST, THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE 25-26 (1996). Harrison received 5,445,269 votes (47.8 percent) to Cleveland’s 5,540,365 (48.6 percent); two other candidates totaled 404,205 popular, and no electoral, votes. LONGLEY & PEIRCE, supra note 23, at 182. The standard account is in fact somewhat misleading; Cleveland’s support was not quite so narrow and deep as all that. Cleveland took the entire South, plus New Jersey and Connecticut; Harrison took the remaining northern states and such western states as existed at the time (California, Oregon, Colorado). Cleveland took eighteen states, Harrison nineteen. Thus, support was quite evenly divided geographically. What really hurt Cleveland in the electoral college was not that he won only a few states—he did not—but that he lost all five of the biggest states (including the biggest, his home state of New York).
its weakness. Of course, the real impact of the system is seen not in the isolated instance viewed ex post, but in the constant ex ante incentives it creates for the parties in selecting candidates, for the candidates in campaigning, and for the President in governing. The system selects for those with broad geographic appeal, just as the World Series tends to select for team with a range of skills and strength through the lineup.

Indeed, there is a direct "geographic" aspect to the World Series. Teams are sometimes built to take advantage of peculiarities of the home ballpark. Also, most teams enjoy a home field advantage unrelated to talent. The World Series is set up to minimize these advantages; the team with three games (assuming a seven-game series) at home must win at least one game in its opponent's park; the team with four games at home might conceivably only prevail at home, but it is impossible, given the need for an odd number of total games, to avoid that. As a result, the winning team must have some success away from its home field. Spectacular success at home—which might reflect only a narrow set of talents or factors other than talent (fan support, being able to sleep in one's own bed, psychological comfort, etc.)—does not amount to more than it should. Obviously, there's no precise equation for determining how much success at home "should" count, but the win-games approach is a rough proxy for that idea.

2. Not Running Up the Score

The second reason to minimize the potential gain from a single contest that might be applicable to both the World Series and the electoral college concerns the incentives that the total games approach creates. Candidates focus on the states that are in play; they do not waste time and resources in states where victory is safe or impossible. Using football rather than baseball (but the point is the same), Judith Best explains:

[F]ootball coaches don't try to run up the score in a game they have good reason to believe they have already won . . . [and] they don't leave in their starting quarterback and great fullback when they are ahead late in the fourth quarter by at least three touchdowns. These essential players might get hurt for nothing, and thus running up the score in this game may cost them victory in other games. It is more important to win other games than to boast of beating this team by five touchdowns. Coaches know the rules for getting into the Super Bowl; they know that trying to run up the score in this game could result in hurting
their chances to win in other games. Candidates and political parties know the same kind of thing in presidential elections; they do know the rules of the electoral vote system; they will try to win the most states rather than a few states by overwhelming margins.37

As discussed above, because no one is trying to maximize the popular vote, tabulations of the popular votes are far from a conclusive indicator of whom a majority of American voters prefers. But here the point is normative: the system should prevent candidates from capitalizing on local advantages. Breadth of support, or talent, is as important as depth. Knowing nothing was to be gained in Texas, George Bush directed his attention elsewhere and became President only because he was able to find sufficient support when he did so.

3. Every Game Is Different

A third justification for proceeding game by game in baseball is that every game is different. The critical importance of the pitcher has a lot to do with this. But, in addition, each game has its own particular shape and developments. Teams cannot store up hits or runs because hits and runs do not have the same meaning the next day.

This notion of course resonates with defenses of the electoral college that look to the principle of federalism. On this account, the strength of the electoral college is that it forces presidential candidates to build broad cross-national political coalitions. Thereby it produces presidents who can govern because of their broad cross-national support. In politics as well as in physics there is such a thing as a critical mass. In presidential elections numbers of votes are necessary but not sufficient. To create the critical mass necessary for a president to govern, his votes must be properly distributed. This means he must win states and win states in more than one region of the country.

....

If we abandon the federal principle in presidential elections we will be abandoning a national consensus building device by allowing candidates to promise everything to the populous Eastern megalopolis, or to promise everything to white Christians, or to suburbanites who are now half of all voters.38

37 BEST, supra note 36, at 25.
38 1997 House Hearings, supra note 7, at 25 (prepared statement of Judith A. Best); see
Supporters of federalism tend to be supporters of the electoral college; federalism skeptics tend to be electoral college skeptics. In an editorial following the 2000 election, The New York Times invoked federalism in arguing for retention of the electoral college thus:

The Electoral College . . . was and is one of those safeguards of a balanced federalism—much like the allocation of two senators to each state, regardless of size. And by offering the promise that even the smallest states could tip the balance in close elections, the system made it impossible to ignore them. This, in turn, required presidential candidates to build alliances across ideological and geographical lines.

It is true, as the system's critics suggest, that the rise of mass communications and modern transportation has knit the country together in ways unforeseen by the founders. But that does not mean that we are one homogeneous, undifferentiated mass, at least not yet. There are still definably Midwestern interests, or Northwestern interests, as opposed to, say, Eastern interests. There are still definably rural interests, just as there are urban interests.\(^{39}\)

The World Series analogy perhaps helps in evaluating this argument. Again, in the World Series it is understood that a game is a relevant unit. The question is whether a state is a relevant unit when we elect the President. Two steps should be distinguished: (1) dividing the nation into districts, and then (2) drawing the district boundaries along state lines. The Times's argument supports the first step but undercuts the second. Districting can require that a candidate appeal to more than just a single, majority constituency (unless that large constituency is spread evenly through all districts). But the Times says nothing about why district lines should be drawn along state boundaries. Indeed, its own rationale suggests they should not. If different interests are what matter, then the districts ought to encompass discrete interests; the boundaries might be regional (Midwestern versus Eastern), or rural versus urban, or not geographical at all. If, or

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when, Internet voting becomes secure and reliable, districts could be drawn along the lines of profession, or wealth, or any self-selected criterion; people could set up their own districts, which others would be allowed to join until they are full. Such ideas no doubt would have many shortcomings. But the basic point is that state boundaries are very, and increasingly, artificial. Much more than in 1787, and increasingly as time goes on, they do not define communities of interest. As the *Times* implies, a New York yuppie and a Chicago yuppie, or a rural New York farmer and an Illinois farmer, have more in common than do the two New Yorkers or the two Illinoisans.

This view is of course contested. That is a discussion for another day, with consequences far beyond the electoral college. And, as a practical matter, it is hard to imagine ignoring state lines in drawing districts for presidential elections. For historical reasons, if nothing else, districts will continue to reflect state boundaries. It may therefore be enough to argue for a distilled system, with the understanding that such a system would perforce follow state lines. For present purpose, the only point is that the World Series analogy, and much writing about the electoral college, argues for districting but is silent as to whether the district boundaries should be state boundaries.

D. Increasing the Impact of Individual Performance

The World Series analogy has one more aspect. Proceeding game by game increases the chances that any particular player will make a critical contribution to the outcome. Bill Mazeroski stands out as the hero of the 1960 World Series because he contributed the most important hit; but it was important only because he came up at the right time—a moment when a single hit could determine the outcome of the entire contest, which had come down to a single game. The win-games approach has allowed many players to make absolutely critical contributions—not always ones that the players or the fans cherish the way they do Mazeroski’s home run. The inglorious individual contributions of Fred Merkle, \(^{40}\) Micky Owen, \(^{41}\) and Bill Buckner \(^{42}\) were made possible by the same isolation and heightened impact of the individual action that made


\(^{41}\) Number 23 on *The Sporting News*’s list. SMITH, supra note 3, at 156.

\(^{42}\) Number 8 (ridiculously) for *The Sporting News*. Id. at 60.
Mazeroski’s home run what it was. Such circumstances arise only because to win the World Series a team must win four separate games, not just score the most amount of runs. A single run, scored at the right time in the right game, can change the whole outcome. So can a single mistake, made at just the wrong time in just the wrong game. (That is the nuance of Yogi Berra’s wiser-than-it-seems remark about making the “wrong mistakes.”) The odds that a single run or a single mistake will have such an impact are far smaller if we just add up total runs; under that approach Mazeroski’s home run is irrelevant.

The same dynamic operates with regard to districted elections. By subdividing the electorate and adding votes within these subdivisions, the odds that a single vote, or group of votes, will change the outcome greatly increase. For a single vote, or voting bloc, to affect the outcome, the election must be closely contested. The smaller the district, the more likely it will be close.

This may not be a good thing. Critics of the electoral college decry how minute changes in votes cast could have changed many election outcomes (and produced a divergence between the popular and electoral vote winners). So, for example, if 1,983 voters in California had voted for Hughes rather than Wilson in 1916, Hughes would have won the election; a change of 11,424 votes, across five states, would have given Richard Nixon the White House in 1960; and a shift of 9,246 votes in Hawaii and Ohio would have sufficed for Gerald Ford to defeat Jimmy Carter in 1976. These possibilities are in the nature of a districted, state-by-state system, just as they are in the nature of a win-games system for the World Series.

For electoral college critics, it seems self-evident that having election results hinge on such narrow differences is problematic. (In general, these arguments begin with the premise that it is unacceptable for the popular vote winner not to become President;

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43 The more obvious and direct legal application of Berra’s explanation for the Yankees’ 1960 loss is to the rule of harmless error. See William D. Araiza et al., The Jurisprudence of Yogi Berra, 46 EMORY L.J. 697, 762-63 (1997).

44 See, e.g., 1992 Senate Hearings, supra note 13, at 159 (comments of Sen. Paul Simon) (describing minor vote shifts that could have changed the outcome and given the White House to the popular vote loser and observing that “[t]hat strikes me as not being healthy”); id. at 178-79 (prepared testimony of Amy Isaacs, National Director, Americans for Democratic Action) (characterizing the possibility of a popular vote loser becoming President as “the most compelling argument for abolishing the electoral college,” noting “close calls” in numerous elections, and arguing that we should stop “playing ‘Russian Roulette’ in the selection of our President”).

45 A full description of elections in which minor changes in the votes of specific states would have sent the election to the House or resulted in a different winner can be found in LONGLEY & PEIRCE, supra note 23, at 36-37, tbl. 5 (identifying 22 “hairbreadth elections”). For criticism of such analyses, see BEST, supra note 36, at 26-28.
since that has rarely happened, the argument is bolstered by pointing to the instances in which it almost happened.) But the World Series analogy draws attention to the fact that the salient fact may be not that the popular vote winner can lose the election, but that the election's outcome can be determined by such small numbers of voters. The electoral college system increases the likelihood that a single individual, or a single group, will cast the deciding vote or votes. It increases the circumstances in which, like the Mazeroski home run, an individual can have a disproportionate impact.

The 2000 election was a case in point. Never in recent memory, perhaps never at all, has the American electorate had a stronger sense that every vote mattered. It all seemed to come down to Florida, and there the election was excruciatingly close. And it only came down to Florida because of almost as close tallies in a number of other states, in any one of which a slight shift could also have changed the overall outcome. But the national election was not excruciatingly close, nor is it likely ever to be simply because the electorate is so large.

Some defenders of the electoral college see this characteristic as its greatest strength. Alan Natapoff, an MIT physics professor with a sideline in the electoral college, and a particular fan of the World Series analogy, endorses the current system because it enhances the potential for individual impact. His argument that the electoral college maximizes individual impact is convincing but incomplete in two ways. First, Natapoff never explains why the goal of an election system should be to maximize individual impact. One possible justification would be that it increases turnout, though Natapoff does not say that. He does imply that it increases the excitement of the election, the way it increases the excitement of the World Series, but that seems a peculiar, or at least marginal, goal for an electoral mechanism. Second, while the odds of an individual casting a decisive vote are higher with the electoral college system than they would be in a national direct election, they remain vanishingly small. Ten times zero is still zero. No individual will ever cast the single, deciding vote for President.

A variant of the same point, however, is a longstanding and important justification for the current system. The electoral college is generally understood to increase the political power of certain discrete political minorities—farmers, or African-

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Americans, or the elderly—because they might form the swing voters in a critical state. A generation ago, Alexander Bickel defended the electoral college precisely because it gave racial and ethnic minorities enhanced strength as the swing votes in large states.47 Bickel's basic argument against abolition of the electoral college was that, while one could not predict the consequences "with absolute assurance,... the probabilities are that popular election of the president would work a diminution of the political power of racial and other minority groups in the nation's urban centers."48 This tendency to promote the political strength of ethnic voting blocs has been a central argument for retaining the electoral college,49 although some have seen it as a shortcoming rather than a virtue.50

Without entering into that debate, it does seem fair to say that the electoral college will make particular voting blocs critical to the outcome, but it will do so in unpredictable ways. While it is often suggested that the electoral college enhances African-American voting power, Longley and Peirce suggest that, in fact, African-Americans are consistently disadvantaged by the electoral

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47 See BICKEL, supra note 1, at 13.
48 Id. As Bickel saw it,

The question about the electoral college, then, should not be whether it is inevitably and purely majoritarian. It is not, although it is very considerably more so than our other national institutions. The question should be whether or not the electoral college tends to enhance minorities rule; whether it tends to include or exclude various groups from influence in the institution of the presidency, and whether if it assigns somewhat disproportionate influence to some groups, they are the ones which are relatively shortchanged in Congress, so that the total effect is the achievement of a balance of influence? Practical men should disenfranchise themselves from the romance of pure majoritarianism.

Id. at 17. See also Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 YALE L.J. 1567, 1595-96 (1985) (tying Bickel's approval of the electoral college to his general doubts about "uncompromising majoritarianism" because of its destabilizing effects).

49 See, e.g., 1992 Senate Hearings, supra note 13, at 129 (prepared testimony of Curtis B. Gans, Comm. for the Study of the Am. Electorate) (objecting that "[d]irect elections would permit those who conduct a campaign to effectively ignore the needs and desires of significant minorities in our society," including African-Americans, who "constitute an ignorable 12 percent of the national voting age population" but "a potentially determinative minority" in certain states); 1979 Senate Hearings, supra note 14, at 163, 164-68 (testimony of Vernon E. Jordan, Jr., Black Leadership Forum) (arguing that direct election of the President would significantly harm the black electorate).

50 For example, some years ago Representative Ed Gossett (D. Tex.) asked, rhetorically,

Is it fair, is it honest, is it democratic ... to place such a premium on a few thousand labor votes, or Italian votes, or Irish votes, or Negro votes, or Jewish votes, or Polish votes, or Communist votes, or big-city machine votes, simply because they happen to be located in two or three large, industrial pivotal states?

BICKEL, supra note 1, at 20.
college system (as are rural voters), while Hispanic, foreign-born, Jewish, and urban voters are advantaged.\textsuperscript{51} This is a matter of continuing dispute. In the 2000 election, one might reasonably say that the voting group that ultimately decided the election was the very conservative Cuban-American population of south Florida. In 1996, 37 percent of Cuban-Americans in Florida voted for the Clinton/Gore ticket; in 2000 only 20 percent voted for the Gore/Lieberman ticket.\textsuperscript{52} That difference was enough to give Bush Florida and the White House. On this account, Clinton cost Gore the election, but the source of the problem was not Monica Lewinsky but Elian Gonzalez.\textsuperscript{53}

The possibility of a political minority affecting the outcome of the election, and the difficulty of predicting how or where, in fact tie in well with the World Series. In 2000, Cuban-Americans played the role of Bill Mazeroski. But one could not have predicted either in advance. Therefore, it would have been a mistake for the Yankees to build a defense designed precisely to guard against a Mazeroski home run, and it would have been a mistake for the candidates to pitch their campaign exclusively to Cuban-Americans. Not only might it have been a mistake because they might not have been as critical as it turned out they were, but focusing on just Mazeroski or Cuban-Americans would have meant ignoring other players and voters, who might then have behaved differently than they did in the actual event.

The disproportionate impact of a single brilliant or calamitous play has one other application to the electoral college. A standard defense of the electoral college is that it makes it much easier to

\textsuperscript{51} Longley & Peirce, supra note 23, at 154-61. Longley and Peirce’s methodology is not straightforward. They do not focus on whether a particular group might provide the swing votes in a swing state. Rather, they calculate which states have the most voting power (by their methodology, the six most populous states have greater than average voting power; all other states have less than average voting power), then look to see where members of different groups live. Because blacks are less concentrated in the six most populous states than in the nation as a whole, they are “disadvantaged” by the system. This approach is problematic. For example, if blacks were a critical voting bloc in any of the six most populous states, and assuming some commonality of “black” concerns nationwide that would make, say, blacks in California a proxy for blacks generally, it would not matter that a disproportionately high number of blacks live in the forty-five less populous states.

\textsuperscript{52} Dahleen Glanton, Hispanics Turn Florida into More of a Swing State, CHI. TRIB., Nov. 26, 2000, at A2.

\textsuperscript{53} This is the view of Joe Garcia, Executive Director of the Cuban American National Foundation. See Alex Veiga, A Year Later, Elian’s Echoes Linger, WASH. POST, Nov. 26, 2000, at A2. Of course, the loss of Cuban-American support was no more or less decisive than dozens of other phenomena of equal size. No vote or bloc of votes within a winning total is more or less “decisive” than any other. The baseball analogy here is not the World Series but the sport’s short-lived and appropriately abandoned use of the “game-winning run batted in” statistic.
handle allegations of fraud, other voting improprieties, or simple mistakes. In a close nation-wide direct election, the losing side would insist on a nationwide recount, claims of fraud around the country would have to be investigated, and the outcome of the election thrown in doubt for weeks. By proceeding state by state, such inquiries are localized and made much more manageable.\textsuperscript{54}

The baseball equivalent is the spit that goes unnoticed or the blown call.\textsuperscript{55} But proceeding game by game does not necessarily isolate and reduce the impact of the blown call. To the contrary, like Mazeroski’s home run or Buckner’s error, the impact of the blown call can be magnified by the fact that we do not sum total runs to determine a winner. Red Sox fans continue to be sure that their team lost the 1975 World Series because the umpires failed to call interference when Ed Armbrister stood in Carlton Fisk’s way as the latter tried to get to Armbrister’s bunt in the 10th inning of the tied third game. Many Democrats have similar feelings about Florida. Thus, the standard argument about the advantages of a districted election with regard to contested outcomes is valid, but incomplete. There is an offsetting downside—mistaken or illegal voting in a single state can determine the entire outcome in a way that would be impossible in a general, direct election.

**CONCLUSION—A CAUTIONARY NOTE**

The analogy between the World Series and the electoral college works in many ways. It at least helps us understand the workings of the electoral college—its relative closeness to a purely majoritarian system, the incentives it creates for candidates, and the way in which it discounts intense local enthusiasm, requires a breadth of support, and increases the voting power of individuals and, more importantly, blocs. It also highlights the central question of whether states are a relevant unit in picking a president. (Though it cannot be denied that many have managed to stumble upon that question unguided by the light cast by this metaphor.)

The analogy is also helpful because the comparison makes


\textsuperscript{55} Other sports provide better analogies to vote fraud—the basketball foul that goes unseen, or the illegal block in football, or use of banned substances in track and field. One of baseball’s many advantages over other sports is that it provides so few opportunities to cheat.
clear that the key characteristics of the electoral college, and the
area of overlap with the World Series, arise from the fact that it is
a system based on *districts*, not that it is a system based on *states*.
Just about every aspect of the connection has nothing to do with
the fact that the districts also happen to be states. Indeed, states
may be pretty poor proxies for the units of commonality
federalism arguments invoke. That insight prompts a heretical
thought: perhaps we should have districted presidential elections
while ignoring state boundaries. The suggestion is a political non-
starter, but perhaps one benefit of working through analogies is
that doing so prompts heretical thinking.

At bottom, however, the World Series analogy begs the
question whether it makes sense to set up the World Series and the
presidential election along similar principles. One should be wary
about drawing normative conclusions from the comparison. There
is no necessary reason why the World Series and the election of
the President ought to correspond, and several reasons why they
might not.

First, a particular mechanism or aspect of the system might be
found in both settings, but we may value it for different reasons, or
even wish to maximize it in the one setting and minimize it in the
other. Consider the fact that counting states (or games) maximizes
individual voting power in the one instance and the possibility of
an individual player’s decisive action in the other. The analogy
helps us to see that that is so but it does not tell us *why* that is a
good thing. Professor Natapoff, for example, takes it as a given
that the best voting system maximizes individual voting power.
But he does not explain why. Perhaps it is because it creates the
strongest incentive to vote, perhaps it just keeps things interesting,
perhaps it creates an incentive for candidates to be broadly
appealing because they cannot predict who will cast a decisive
vote. Similarly, we might seek to maximize the individual player’s
influence for corresponding reasons (to create an incentive to play
hard and be ready, increase suspense, stimulate overall quality), or
perhaps for other ones. The reasons need not be the same.
Certainly in games we often accept or even embrace an element of
pure chance or luck with which we are less comfortable in
elections.

Second, there may be important concerns present in the one
setting but absent in the other. Most importantly, as Professor
Amar put it, one might reject the World Series analogy “[b]ecause
all runs are not created equal. But the deep principle in the ethos

56 See *supra* text following note 39.
is... that all men and women are created equal."\(^57\) A system in which many runs turn out to be irrelevant or less weighty than others violates no independent constraint; a system in which many votes turn out to be irrelevant or less weighty than others arguably does violate an independent constraint. So for some the complete argument against the electoral college is that it is inconsistent with this principle.\(^58\) That objection to the electoral college system may ultimately not carry the day, but it is no answer to point to the World Series as a response.

Third, one should be wary about treating baseball, or any other human construction, as possessed of some intrinsic truth. The point is much like the standard objections to the nineteenth-century, Langdellian notion of law as science. Langdell's essential error was to treat a human creation as having an extra-human, Platonic existence.\(^59\) Similarly, there is a real risk of getting carried away with finding normative lessons in sports. For example, Professor Natapoff has a sophisticated and mathematically complex defense of the electoral college, but discovers too great a normative lesson in baseball:

Major sporting championships can and do turn on individual errors or flashes of brilliance at a critical moment of a critical game. These dramatic crises are regarded as memorable treasures, and (implicitly) as validation of the sport's rules and tradition. By analogy, a few key votes in a close state can turn a whole presidential outcome. That lesson to candidates is the moral of this sport.\(^60\)

Sports do not hold "morals" for constitutional structures. Nor should we design constitutional structures to maximize competition, excitement, or the memorableness of outcomes. Nor does a particular arrangement make sense for presidential elections because it makes sense for baseball.

In short, the analogy is illuminating and fun. At the end of

\(^{57}\) 1997 House Hearings, supra note 7, at 79 (testimony of Akhil Amar).

\(^{58}\) Writing in support of Senator Bayh's proposal for direct election of the president, the staff counsel of the ACLU put it succinctly:

The ACLU believes that the electoral college should be abolished and the President of the United States should be chosen by direct popular election. Our position is based on the principle that each individual is entitled to have his or her vote equally weighed in the nation's most important election.


\(^{60}\) See Natapoff, supra note 46, at 272; see also Hively, supra note 35, at 85 (quoting Natapoff as saying, with regard to the 1960 World Series: "Everybody regarded it as one of the most glorious World Series ever. To do it any other way would totally destroy the degree of competition and excitement that's essential to all sports.".).
the day, though, the electoral college and the World Series each must be evaluated on its independent merits.