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Presidential Selection: Complex Problems and Simple Solutions

JUDITH A. BEST

For every complex problem there is a simple solution, and it is invariably wrong.

—H.L. Mencken

Our method of selecting a president is not entirely what the Framers of the Constitution envisioned in 1787. It has changed and developed in several ways, but it still is compatible with and supportive of the American idea of democracy. The American idea of democracy is complex, not simple; federal, not all-national; consensual, not strictly majoritarian. The political slogan “all power to the people” is not one our Founders would have endorsed. Their slogan was “all power to no one,” not even the numerical majority. As James Madison pointed out in *The Federalist*, No. 47, all power in the hands of the many is a form of tyranny. The goal of the Founders was liberty, and because they had decided on a democratic republic, they had to find a way to balance liberty and equality. Their solution to the problem of majority tyranny was a system of concurrent majorities that not only divides the powers of the national government by function, but also divides, shapes, and structures all governing majorities under a federal principle. This form of government seeks more than majority rule; it seeks majority rule with minority consent.

To gain that consent, it must give minorities of all kinds the opportunity to be a part of the majority. These opportunities are created in two ways: first,

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by dividing government into three different branches and further dividing the legislature into two chambers; second, every part of the government is based on separate and different kinds of majorities structured under the federal principle. To fill all our national elective offices, majorities must be formed either in each of the fifty states or in each of the 435 congressional districts or in some combination of the two. Thus, minorities have hundreds of opportunities to be part of a state and/or district majority.

The electoral college is but one part of this complex form of government. In fact, it has become the very model of our entire form of government because it is both democratic and federal. Though federal from the beginning, the electoral college has evolved, and today its distinctive element is not the office of elector but rather the federal unit rule (also known as the winner-take-all rule), which awards all of a state's electoral votes to the winner of a statewide popular vote plurality. Every state has as many electoral votes as it has representatives in the whole Congress. This establishes a balance between our policy-making bodies—the executive and the legislature. This balance is essential because the goals of the nation are complex. The Constitution lists six different goals in the preamble: union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty. As the goals for the whole complex government are multiple and interdependent, so are the goals for presidential selection.

THE GOALS OF PRESIDENTIAL SELECTION

The first and most obvious goal is to select a president who can govern this vast and heterogeneous nation. This means he must have a broad, cross-sectional base of support. Broad distribution of popular support is far more important than depth of support. To be able to govern, the president does not have to win states in all sections of the country, but he has to come close. A president who wins the office by running up huge margins of 80 percent to 20 percent in the eastern seaboard and the midwest and loses by similar margins in the south and the west is not a president who can govern. In fact, he may be a president who will face a civil war.

A president does not have to win a majority of the popular votes; George W. Bush is our seventeenth minority president. His predecessor, Bill Clinton, was twice a minority president. To be able to govern, a president does not even have to gain a plurality of the popular vote—if the election verges on a tie. The first of our two runner-up presidents, Benjamin Harrison, was chosen in 1888 in an election that was close to a dead heat—a margin of 0.9 percent. There was no popular outcry. George W. Bush became our second runner-up president in an even closer election. Once again, there was almost no popular concern about his runner-up status. Though he won thirty states, he lost the national popular vote by a margin of 0.5 percent—a margin smaller than the statistical margin of error. Despite this, in less than two years, he was able to achieve a sustained

and exceptionally high level of approval in the opinion polls. We need to remember that a presidential election is usually a snapshot, depicting the electorate on one day only. Presidents who do not have mandates on election day can build them in the weeks and months that follow. And presidents who do have mandates on election day can lose those mandates or even the office itself in the weeks and months that follow if they do not maintain widespread support. Richard Nixon, who won in a landslide in 1972, had to leave office under threat of impeachment.

The Framers wanted a president who could govern *precisely* because he would have a sufficiently broad, nonparochial, nonsectional base. As originally intended, the electoral college process was designed to nominate/select a continental character like George Washington, the people's presumptive choice—not a state's favorite son. While it was clearly possible that the college itself could make the choice—and did so in the very first presidential election—the general expectation of the time was that the House of Representatives would make the choice under the state equality principle—each state delegation would have one vote.

Since the adoption of the Constitution, the electoral college has been changed by the Twelfth Amendment (designed to reduce the possibility of a tie in the electoral votes), by state laws mandating popular elections, by the federal unit rule that has been adopted in all states but two (Maine and Nebraska), and by the development of the two-party system, which has taken over the original nominating function of the college and turned the electors into mere ciphers. The process has changed; the primary purpose has not.

On this point of selecting a president who can govern, the electoral vote system is undeniably healthy. Under it, the presidency has grown in power and prestige, and as a nation, we have set an example for the world in the peaceful transference of power. We have had only one true breakdown, the election of 1860, when Abraham Lincoln's name was not on the ballot in southern states—not that that would have made a difference. He won only 39.79 percent of the popular votes, several states seceded before he was inaugurated, and immediately after the inauguration, the Civil War began. In 1860, the country was so bitterly divided that, I believe, no electoral system could have prevented a civil war.

A second goal is to have a swift, sure, clean, and clear decision. The presidency is an office that may never go empty, and in our time, when the United States is the only remaining superpower, not only our stability but world stability makes this imperative. It is so imperative to fill the office quickly that we have had one president, Gerald Ford, who attained the office without winning any popular votes for president or vice president. Ford, who had been nominated by Richard Nixon to fill a vice presidential vacancy and confirmed by Congress under the provisions of the Twenty-fifth Amendment, became president when Nixon resigned. The uninterrupted flow of government has a higher priority than single-minded majoritarianism.

There are many lessons to be learned from the election of 2000, but surely there are at least two: first, a swift and sure decision is more important than a count that is 100 percent accurate and second, the electoral vote system quarantines fraud, error, and court challenges. Demands for recounts and court challenges will be confined to a few states. In 2000, without that quarantining system, the nation would have had fifty Floridas. Every ballot box in the country would have been subject to recounts and court challenges. The process could have gone on so long that on Inauguration Day, the Speaker of the House could have been sworn in as Acting President of the United States under the provisions of the Twentieth Amendment.

Unless it were only for a day or two, an acting president would be a calamity—a real constitutional crisis! What could an acting president actually do? Certainly not lead or govern. Every hour of every day the House of Representatives would have the power to name his legitimate replacement. Under such a circumstance, could he deal with foreign nations? Could he be an effective Commander in Chief? Could he name a functioning cabinet? Could he create a budget, or an energy plan, or a tax plan? In *The Federalist, No. 70*, Alexander Hamilton said, “Energy in the executive is a leading character in the definition of good government.”¹ An acting president would be both frail and feeble.

Delay is dangerous; recounts, court challenges, runoffs, and contingency elections are divisive. The final cause—the goal—of the election is to select a president who can govern; the accuracy of the vote is merely one part of the efficient cause—the means. The means should not destroy the end. Accuracy is important, but it is not more important than a fairly swift decision. An adding machine is not a political process. Recounts produce new totals that may not be more accurate than the original total. The statistical margin of error in machine recounts is more than 1 percent and is even greater for hand recounts. In close elections, the premium on fraud increases. No election system, including direct nonfederal election, can ever totally eliminate counting errors and fraud. On this point, the current system has been quite successful. Despite six elections in which the popular vote margin between the two major candidates was less than 1 percent, we have always had a president by inauguration day, and we usually know who the new president will be by the morning after election day.

A third goal is that the presidential selection process should preserve our moderate two-party system. The two-party system and democracy have lived in a symbiotic relationship for most of our history. Multiparty systems are notoriously unstable and would be particularly dysfunctional in our presidential system, with its separation of powers, where, once the government is formed, the coalitions are designed to be more institutional than purely partisan. The separation of powers requires first the formation of two coalitions, one in the House and one in the Senate. These two coalitions must then form into one in order to pass bills and present them to the president, who, though a fellow partisan

¹ Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961), 423.

with some members of the legislature, is independent of both chambers. He also has a larger electoral base—a base as complex as that of the whole Congress.

As the two-party system is a major contributor to our national stability and to our moderate politics, preserving it is an important goal. Most political scientists think that the cause of the two-party system is a single-member district, plurality election. A single-member district produces one winner within the district, and under a plurality election, the district winner is the man with the most votes, even if he does not win a majority. With the ratification of the Twelfth Amendment and the nearly universal adoption of the unit rule, there are forty-eight states that each form a kind of a single-member district; the forty-ninth is the District of Columbia.

Even if the electoral vote system is not a cause of the two-party system in presidential elections, more than 150 years of experience clearly indicates that not only is it quite compatible with the two-party system, it has strong biases in its favor. It is biased against all minor parties, national, sectional, and ideological. It is biased against extremist, self-nominated, and single-issue parties and candidates. These biases arise from the fact that under the federal principle, popular votes cannot be added across state lines and the unit rule prevents the division of electoral votes within a state. They also arise from the fact that the system converts popular pluralities into electoral vote majorities, thereby precluding contingency elections in the House of Representatives.

Not all presidential election plans share these healthy biases. Any system that abolishes the federal unit rule or has a runoff rule with a majority or substantial minimum requirement for victory will encourage the entry of multiple minor parties and will thereby undermine the goal of a swift decision. The incentive for interest groups to work in and through the moderate two-party system would be weakened. In presidential elections, we could see the black party, the Muslim party, the Hispanic party, the military party, the pro-life party, the no-death-taxes party, the anti-gun party, and the left-handed vegetarians party. Losing candidates for a party's nomination would probably continue their fights into the general election. If the two parties lost control over the crucial nominating function, they would cease to be major parties. The coalition building that takes place before the general election would break down and be postponed to the runoff. Runoffs would mean more recounts and court challenges, first to determine if any candidate had attained the required percentage and second to determine which two candidates would be in the runoff. Furthermore, it is possible that the runoff could be very close. The post-general election trading could harden positions, embitter the electorate, and lead to recounts and court challenges of the results of the runoff. So the loss of a moderate two-party system could corrode both of the prior goals: a swift, sure decision and the ability of a president to govern.

Fourth, an electoral system should provide politically effective representation—that means voices are heard, interests of all kinds are represented because they are consulted and can be part of a majority coalition. An election is

not like a census. An election is not designed to break down the population into separate, isolated individuals, to treat them as mere numbers. It is designed to bring together the largest possible support for the winner. American elections seek majority rule with minority consent; this requires a political process, not an arithmetical process. The political process mandated by the Constitution is federal. We speak of a “national election day,” but this is a misnomer. The correct name is concurrent (state-by-state) election day for national officers.

Under the electoral vote system, everyone’s vote does count the same—in the voter’s own state. The electoral system does not provide national arithmetical equality; it does not provide each voter with an equally weighted vote nationally. But neither do our elections for senators and congressmen. Critics of the electoral college talk of “lost” votes and “wasted votes.” The “lost” vote is a popular vote that does not produce any electoral votes. In fact it is not lost because, unless there was fraud or error, it was counted in your state. It simply means your candidate lost in your state, you didn’t lose your vote. The “wasted” vote is a vote in excess of the plurality a candidate needs to win a state’s electoral votes. This vote cannot be added across a state line to help your candidate in another state. And people know that they cast their votes as state citizens. The media report it this way: Bush won Texas; Gore won New York. So from a voter’s perspective, it could just as well be called an “insurance” vote or a “mandating” vote. From a candidate’s perspective, it is the incentive to create a broad, cross-national, inclusive coalition—to win in many states rather than to promise everything to the people in a few states and win them by a landslide. It is the incentive to build a concurrent majority.

We call our elections races; races are tests of skills. Why is the World Series champion the team that wins the most games rather than the team that scores the most runs overall? Sports fans will respond: winning the most games is a better test of the strengths and weaknesses of the contending teams. The president must win states because a vote distribution requirement is a better test of the candidates’ abilities to govern—to build and to sustain the broad critical mass of support needed to govern. If we change the rules, we will change the game, and we will change the skills and strategies needed to win. If we abandon the win-states requirement, we will undermine or destroy the candidates’ incentives to build concurrent majorities rather than majority factions.

Our entire political system is a system of concurrent majorities in which each organized interest has some access to the centers of power.

The principle of the simple numerical majority is not the American idea of democracy because it rests on a fallacy, the fallacy that the numerical majority are the people and that any restrictions or conditions set upon the rule of the numerical majority are restrictions on the rule of the people. Let us remember that the numerical majority is merely a part of the people. . . . The principle of the concurrent majority does set conditions on the rule of the numerical majority. It sets a distribution condition. It says numbers are not enough for legitimacy. It says we must take into account the fact of group formation and group alliance; we must take into ac-

count the intensity of preferences, we must take into account the geographic distribution of interests.²

The principle of the concurrent majority is, and has been, the American idea of democracy because the size of the popular vote is not sufficient to maintain liberty or to establish justice.

Fifth, a presidential selection system should preserve the separation of powers, not only to preserve the independence and energy of the presidency, but also to preserve the integrity, perceived or actual, of the legislature and the judiciary. Once Congress or the courts gets involved in the decision, suspicions of corrupt deals and of partisan “judging in one’s own case” arise, and there will be charges of stolen elections.

A decision for a separation of powers was the first substantive decision made in the Constitutional Convention. Because the Framers concluded that the legislature is the most dangerous branch of government in a republic, they were especially concerned about presidential independence. They spent months trying to find an alternative to Congress as the electing body. While they could not, they decided presidential independence meant that the president would have to be limited to a single, long term. Finally they found something they thought would work. The electoral college was created as a kind of surrogate Congress, but no member of Congress or anyone holding office under the United States may serve as an elector. The important point is that the college is not, like Congress, a continually existing body with enumerated and implied legislative powers. And it does not have the power to impeach and convict the president. It exists for only one day, and then the electors are out of office.

The one part of the original plan that does not serve presidential independence and the separation of powers is the contingency election in the House, but the original plan was changed with the Twelfth Amendment. Among other things, this amendment made House contingency elections very unlikely because it largely took away the nominating function of the college. It did so by requiring the electors to cast two separate ballots, one for president and one for vice president, rather than the original plan of casting two ballots for president, one for a candidate not from the elector’s state. The Twelfth Amendment, the rise of the two-party system, and the adoption of popular elections and the unit rule in the states have made contingency elections obsolete. The last House contingency election was held in 1824. In that election, there were four strong candidates without party designations; in six states, there was no popular vote and the state legislatures chose their state’s electors.

The adoption of the unit rule has been particularly important in supporting the separation of powers, thus serving presidential independence and energy because it converts popular pluralities into the constitutionally required elec-

² Judith A. Best, Testimony, U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Hearings: Direct Popular Election of the President and Vice President of the United States*, 96th Cong., 1st sess. (Washington, DC: U.S. Government Printing Office, 1979), 254.

toral vote majorities. It has a magnifier effect that keeps Congress out of the decision. In 1880, the closest election in our history—a margin of 0.1 percent—it converted James Garfield’s popular vote percentage of 48.3 percent into an electoral vote majority of 57.9 percent. In 1992, the magnifier effect worked again despite a strong challenge from third-party candidate Ross Perot, who won 18.9 percent of the popular vote and no electoral votes. Bill Clinton’s popular plurality of 43 percent was converted into an electoral vote majority of 69 percent. Even in years when minority party candidates won some electoral votes, the magnifier effect produced electoral vote majorities. The unit rule’s value is twofold: first, it makes electoral vote majorities the rule, effectively shutting the door on contingency elections in the House and giving us a swift and sure decision; and second, it radically reduces the possibility of a runner-up president, for, in every election but two, it has worked to the advantage of the undisputed popular plurality victor even in extremely close elections.

The bottom line is that the system evolved toward keeping Congress out of the selection process, and that supports the separation of powers. On the other hand, in close elections, congressional challenges to the statewide counts or even legal challenges are still possible. However, since no selection system can prevent close elections or fraud, there is no way to ensure that neither Congress nor the courts will have any role to play. The separation of powers principle was never intended to create impenetrable walls. Indeed, it is essential to be able to remove the president for cause by impeachment and conviction, and to have the power to provide for vice presidential vacancies and presidential disabilities. And because we must have laws against fraud and corruption, the courts must have the power to decide such cases and controversies.

Last and by no means least, a presidential selection system should preserve the federal principle. This goal is directly connected to the previous one because the separation of powers and the federal principle work in tandem—they are the two fundamental structural principles of the Constitution. They are the two load-bearing pillars. If we knock down the federal pillar, the separation of powers will fail. The states are not administrative agencies of a unitary government; they are the building blocks of the whole federal government. And because they are the ratifying agents for constitutional amendments, the content of the Constitution itself depends on them. In addition, the federal principle is the fulcrum of the entire government, and because it is, it serves to balance local and national interests while creating political rather than solely arithmetical majorities.

Because there are so many goals, the selection of the president is a complex problem. The evolved electoral vote system, though not perfect, has largely been a success in meeting those goals. It has prevented contingency elections and supported the separation of powers, usually given us a swift and sure decision, nurtured a moderate two-party system, quarantined fraud and court challenges, given candidates the incentives to build a broad, cross-national base so

the winner can govern, and given all kinds of minorities the opportunity to be part of a majority coalition.

Nonetheless, for over thirty years, the proponents of direct election of the president have claimed that it is a simple idea whose time has come. One of the many charges leveled against the electoral vote system is that it is complex. This charge, at least, is true. Arthur Schlesinger, Jr. was right when he said, “It is impossible to explain to foreigners. Even Americans don’t understand it.”³ But as Schlesinger clearly understood, its complexity is the cause of many of its virtues, not the least of which is that it is a part of, in Schlesinger’s phrase, “the complex balance of the whole constitutional system.”⁴ It may be impossible for foreigners to understand it, but I think Americans can. There is some evidence. While polls show that approximately 60 percent of Americans want to abolish the electoral college, a *Washington Post/ABC News* poll taken in the wake of the election of 2000 revealed that when people were asked if they would do so if it meant that candidates might pay less attention to smaller states, only 42 percent favored direct election. Americans can learn why a democratic republic is not enough, why a federal republic is essential to both our liberty and our stability.

THE STAR OF OUR SOLAR SYSTEM: THE FEDERAL PRINCIPLE

Because it can produce a “runner-up” president in elections that verge on a tie, and because it prohibits the aggregation of votes across state lines, over a thousand constitutional amendments have been offered to change the system. Most of today’s reformers support what they call a direct popular election. But as Martin Diamond pointed out, “The label given to the proposed reform, ‘direct popular election,’ is a misnomer; the elections have already become as directly popular as they can be—*but in the states*.”⁵ He was right. For nearly 150 years, we have had de facto direct popular elections of the president in all the states. De jure, of course, the popular votes are for each state’s electors, who are expected to be faithful. The casting of the electoral votes is now a mere ceremony. Out of over 21,000 electoral votes cast, only eight to twelve have clearly been cast by faithless electors. And none was intended to or did change the outcome. As I pointed out in a recent television interview, a faithless elector who did change the outcome had better have a seat on the next moon shot; otherwise no one could guarantee his safety.

What these reformers actually propose is direct, popular *nonfederal* presidential elections. They want to exempt the office of the president from the constraints of the federal principle. Recognition of the fact that this reform is an

³ Arthur Schlesinger, Jr., “The Electoral College Conundrum,” *The Wall Street Journal*, 4 April 1977.

⁴ *Ibid.*

⁵ Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington, DC: American Enterprise Institute, 1977), 7.

attack on the federal principle is important because the Framers proposed and the people, through their representatives to state constitutional conventions, ratified a constitution that created a democratic federal republic. The infrastructure of the entire government is federal. No national governing decision of any kind in this country (including the ratification of the Constitution itself) has ever been made by adding votes across state lines. We cannot consider the presidency as a totally separate institution because it is just one part of a governing process that is a complex whole. As John Kennedy said during a congressional debate on presidential elections in 1956, “It is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider the others.”⁶

When we look at just one planet in isolation, we may not see its dependence on the sun and the other planets. Michael Glennon says, “the convention unfortunately settled on a presidential selection system lacking a unified theoretical rationale. Even at the electoral college stage, it did not set forth a clear philosophy of democracy.”⁷ Perhaps so, for the Framers were not philosophers working in the abstract, but rather practicing politicians who had two working principles, union and balance. They had varying ideas about the latter: some thought in terms of a balance of classes, others of a balance of interests, and still others of a balance of powers. Because the Framers had to apply these two working principles in a very specific time and place, and among the people of thirteen different states, states with long-standing local traditions, cultures, and circumstances that could not be ignored if they were to achieve union, they had to adopt the Connecticut Compromise—state equality as the base for state representation in the Senate, state population as the base for representation in the House. Having adopted this compromise for the legislature in the last days of the convention, they turned to it again to tailor the selection of the president to the selection of the whole Congress.

I suggest that in so doing, the Framers stumbled upon a new theory of a balance and democracy—a new kind of federal republic—a new sun with a configuration of planets very different from those seen in the past. That they did not see the full ramifications of this new theory at the time is not surprising. Inventors and discoverers rarely, if ever, anticipate the full utility of their finds. Glennon is right; they were ambivalent about the presidential selection process: “On what theory of federalism should that process be based? Would the system reflect differences in the states’ populations, or would the states be considered equal sovereignties with each casting one vote?”⁸ In the end, they chose both, fused together. We call it the federal principle.

⁶ John F. Kennedy, *Congressional Record*, vol. 102, pt. 4, 84th Cong., 2nd sess., 1956, 5150.

⁷ Michael J. Glennon, *When No Majority Rules* (Washington, DC: Congressional Quarterly, 1992), 10.

⁸ *Ibid.*, 6.

According to John C. Calhoun, the hallmarks of all constitutional governments are “complexity and difficulty of construction.”⁹ He says such governments are the result “not so much of wisdom and patriotism, as of favorable combinations of circumstances.”¹⁰ They grow out of necessity; they are not constructed out of a “philosophically coherent theory.” Most of them, he says, have “grown out of the struggles between conflicting interests which, from some fortunate turn, have ended in a compromise by which both parties have been admitted, in some one way or another, to have a separate and distinct voice in the government.”¹¹ In our case, that compromise began with the Connecticut Compromise, often more aptly named as the Great Compromise because it is the gravitational base of all three branches of our government.

Alexis de Tocqueville said the federal principle of our Constitution “rests in truth upon a wholly novel theory, which may be considered as a great discovery in modern political science.”¹² Like many great discoveries, it was not the product of a clear, logical, systematic plan. Rather it was the product of necessity, the product of a “fortunate turn”—a pragmatic compromise. With the benefit of hindsight, Tocqueville goes on to explain why he thinks the federal principle is a “great discovery.” It unites the strengths of both large and small societies and avoids their weaknesses. Calling it “this great remedy,” he says: “Ignorance of this new species of confederation has been the cause that has brought all unions to civil war, to servitude, or to inertness.”¹³

In *The Federalist*, No. 39, Madison said our form of government “is, in strictness, neither a national nor a federal Constitution, but a composition of both.”¹⁴ Tocqueville said there was not a word to express this novel constitution; Madison suggested “compound.” I suggest “alloy”—the fusion of two different kinds of government. We are a nation of states—one society emerging from the fusion of many societies. This fusion created a new kind of star in the political firmament.

This star is the center of our governing solar system. Its gravitational and rotational forces, its processes, are the state equality rule and the federal districting rule—based on numbers of state citizens. These two processes are found in various combinations in all parts of the national government. The state equality rule is the basis of the Senate, the amendment procedure, and the ratification of the Constitution itself. The federal districting rule is found in the House. And the presidency and the judiciary are based on a combination of both.

In this solar system, there has been plenty of room for democratic adaptation and the evolution of a two-party system. Senators once selected by the state legislatures are now selected by the people in each state without damaging

⁹ John C. Calhoun, *A Disquisition on Government* (New York: Bobbs-Merrill, 1953), 59.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Alexis de Tocqueville, *Democracy in America* (New York: Random House, 1945), 162.

¹³ *Ibid.*, 164.

¹⁴ Rossiter, *Federalist*, 246.

the federal law of planetary motion and balance. From the outset, the presidential electors could be chosen in many different ways—by the state legislatures, by the state governors, or by the people. By 1832, all the states but one had popular elections for electors. The nominating function of the electoral college has moved to party conventions and popular primaries. Even the office of elector, but not the electoral votes, could be abandoned without destroying the balance of our federal solar system.

Many of the proponents of direct election say we can abandon federalism just in presidential elections. But if the federal principle is not legitimate in presidential elections, it is not legitimate in congressional elections. The objection to the federal principle is an objection that applies to all districted elections. Because our congressional elections are districted, the majority party is often over-represented in the House of Representatives. In House elections over the forty-six-year period between 1932 and 1978, in every election year except one, the Republicans had less representation than their percentage of the national popular vote for House members. And if we abandon the federal principle in presidential elections, surely we should abandon it for the Senate, where a state with half a million people has the same representation as a state with twenty million people!

In fact, logical commentators already make this argument. “Congress is better suited to represent diverse interests, and we might want an electoral system that produces a more representative Congress.”¹⁵ This statement is followed by an endnote that is even more explicit. “If so, we should probably abolish the highly unrepresentative Senate and develop a system of proportional representation to select members of Congress.”¹⁶

And if a nonfederal, all-national majority is the only legitimate principle, then why should each state have an equal vote on constitutional amendments? If the argument is that the people should vote in a national plebiscite for the president because he represents them all, why should we not do the same for constitutional amendments that rule and limit us all? And why should we not vote in a national plebiscite for Supreme Court Justices who interpret our Constitution?

The answer to these questions is majority tyranny. The answer is given by James Madison. In *The Federalist, No. 10*, after examining the “mortal diseases under which popular governments have everywhere perished,” he concludes that majority faction is the problem.¹⁷ His solution is a social and political system that increases the number, the variety, and the competition of minority factions. The social solution, the large republic, is designed to produce many minority factions and to use them to check one another, making it less likely that a majority faction will form. But he knew that one could still form. Even

¹⁵ Paul D. Schumaker and Burdett A. Loomis, eds., *Choosing A President* (New York: Chatham House, 2002), 184.

¹⁶ *Ibid.*, endnote 27, 206.

¹⁷ Rossiter, *Federalist*, 77.

today, in a vastly more heterogeneous society, it is possible that a majority faction could form (whites and/or Christians come to mind, but there are other possibilities).

Therefore, as he saw, it was necessary to prevent a majority faction that had formed from having the opportunity to act. This required a political solution, and the Framers supplied one with the separation of powers, checks and balances, and all the national offices based directly or indirectly on the federal principle. In fact, the whole solution is nicely summed up in *The Federalist, No. 51* in the famous “policy of supplying, by opposite and rival interests, the defect of better motives.” Madison continues, “the constant aim is to divide and *arrange* the several offices in such a manner that each may be a check on the other.”¹⁸ To “arrange” means to put in a suitable order. Whether the Framers anticipated this or not, the federal principle has turned out to be the key to this arrangement policy.

Calhoun said constitutional governments are organic arrangements that begin with suffrage, which is indispensable. To this must be added a provision to prevent abuse of the minority. “There is but one certain mode in which this result can be secured . . . and that is by taking the sense of each interest or portion of the community which may be unequally and injuriously affected, by the action of the government separately, through its own majority.”¹⁹ This is the federal principle of our Constitution.

Some suggest that we have outgrown the federal principle in presidential elections. As they see it, that principle may have been necessary during the founding period to resolve the large state–small state conflict and the slavery complication, to address Antifederalist fears about large republics, and to deal with then-pervasive parochial identities. But they say that the system and the country have changed, that we have lost our parochial state-citizen identification and now see ourselves as Americans, that the political parties have taken over the nomination and selection functions of the states, and that the party system and winner-take-all rules have changed the nature of state conflict from large states–small states to competitive–noncompetitive states.

This may all be true, but it does not follow that “in contemporary America, states may be less relevant ‘minorities’ than are various racial, ethnic, religious, gender, and other identities and interests.”²⁰ First, this argument ignores the fact that the federal principle is the barrier to the formation of a majority faction. Second, the federal principle is more relevant today precisely because these other kinds of minorities are the more dangerous factions—the ones based on principles or passions rather than the relatively docile ones based on the shared interests arising from common state citizenship. Principles, religious and political, cannot be compromised, and neither can passions—especially those based on loyalty. In *The Federalist, No. 10*, Madison said:

¹⁸ Ibid., 322, emphasis added.

¹⁹ Calhoun, *Disquisition*, 21.

²⁰ Schumaker and Loomis, *Choosing*, 64.

A zeal for different opinions concerning religion, concerning government . . . an attachment to different leaders . . . or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.²¹

These are the very dangerous factions, but he went on to point out that “the most common and durable source of factions has been the various [sic] and unequal distribution of property. . . . The regulation of these various and interfering interests forms the principal task of modern legislation.”²² And why? Because economic interests can compromise. Money, land, and even jobs can be divided.

The success of the “policy of opposite and rival interests” requires more than a heterogeneous society; it requires governmental institutions that pick and screen the contestants and structure and shape the contests. The rules must recognize and promote only the least dangerous kinds of factions—the kinds of factions that can and will compromise. The federal principle is the architectural structure because it prevents the dangerous factions from uniting their votes across state lines. It confines them within little republics and forces them to compromise early and often with their fellow state citizens. The compromises will differ from state to state because groups do not scatter themselves randomly across the nation. In one state, a nationally small minority may be quite large, and thus may be either the majority or the swing vote. This gives minorities many opportunities to be part of a statewide majority—to win something. It forces a political structure on the formation of majority coalitions.

The federal principle of basing all representation on common state citizenship uses public not private associations as the framework—public, meaning open to all, not closed to those who do not share the same race, ethnic ancestry, religion, gender, or occupation. These public minorities spring from an obvious common interest—membership in a heterogeneous yet smaller political community whose laws they must all obey, whose taxes they must pay. As state citizens, they share roads, parks, schools, climate, natural resources, and local economies. This is an effective base on which to begin to compromise and to move toward consensus.

The federal principle forces the creation of political majorities, not simply arithmetical majorities. The arithmetical majority, the mere head count, is the tyrannical form of democratic government. Not one but two powers are necessary for free government: first, the power of the ruled to control the rulers, and this is done by suffrage. But suffrage does not suffice because the majority to whom the elected representatives are faithful may be a tyrannical majority. Yes, the representatives will be faithful, but they will be faithful to a bad master.

²¹ Rossiter, *Federalist*, 79.

²² *Ibid.*

The second and equally necessary power is a power to compel the majority to be just, to consult, negotiate, and compromise with all affected interests.

The federal principle in elections necessarily shapes and structures our two-party system. Under it, we don't have truly national parties. So party cannot be the vehicle for carrying a majority faction into power. National parties are a myth of the media—they only appear once every four years for the week when each national party convenes to choose its nominee for the presidency. The result is that we have fifty state Democratic parties and fifty state Republican parties. This creates an internal check within the party system, and this is a good thing. As Calhoun pointed out, the rise of the party system produces the conflict of the In party versus the Out party. The party system can overcome the separation of powers because one party can gain control of the whole government. Publius Madison did not anticipate the rise of the party system. Calhoun, with the benefit of hindsight, saw the problem. “The advantages of possessing the control of the powers of government, and thereby of its honors and emoluments, are of themselves, exclusive of all other considerations, ample to divide even such a community into great hostile camps.”²³ But here the federal principle provides relief with a decentralized two-party system. Without that relief, the Out party is truly out and will get nothing. The In party could become a majority faction.

The relief is supplied by the fact that federal elections prevent votes from being combined across state lines. The result is that the Democratic party in Massachusetts is quite different from the Democratic party in Georgia, and the Republican party in New Jersey is quite different from the Republican party in Montana. Even though “one party” may control the whole government, that party is not actually one highly disciplined party. The decentralization of both parties means many more groups have a voice in Congress. On occasion, the In party may have to compromise with some members of the Out party. There are those who support highly disciplined parties, but I suspect they believe that their party not only is but will long be the In party. Experience as the Out party might temper their enthusiasm. As Alexander Bickel pointed out, in this country at least, “majorities do not arise spontaneously and are not found; they must be constructed and then maintained.”²⁴ That means we have a choice on how they are to be constructed. We have chosen to organize them along the principle of the concurrent federal majority because that kind of majority is more moderate and inclusive.

The electoral vote system is not perfect. It could be improved by abolishing the office of elector and casting the electoral votes automatically; and the House contingency election could be improved, perhaps by adopting the formula for filling vice presidential vacancies in the Twenty-fifth Amendment. That formula would give the decision to “a majority vote of both Houses of

²³ Calhoun, *Disquisition*, 14–15.

²⁴ Alexander Bickel, *The New Age of Political Reform* (New York: Harper and Row, 1968), 2.

Congress.” These are reforms that would not deform the Constitution because they would still be federally based decisions. These reforms are not likely to be adopted for two reasons: first, many think there is no pressing necessity for either. The electors have been overwhelmingly faithful, and we have not had a contingency election for more than 175 years. And second, there is no consensus among those who offer more radical reforms.

In a post-election 2000 study, thirty-seven political scientists compared the electoral college to six alternatives: the district plan, the proportional plan, the national bonus plan, a direct popular plurality plan, a direct popular majority plan, and the instant runoff plan.²⁵ On an approval ballot, the electoral college won 65 percent of the ballots. On a Borda count method, the college won again. On a collective choice method, the college won in six of the nine groups. “Under every system we have examined, the Electoral College is our top collective choice.”²⁶ There is deep division among those who would radically change the system. As a result, “pitting the Electoral College against each alternative to it in head-to-head competition . . . reveals that the Electoral College is our Condorcet winner, defeating each alternative by a margin of at least 2 to 1.”²⁷

One result of the election of 2000 is that from the reformers’ perspective, the sky fell, and very few people seemed to care. For years the reformers predicted that another runner-up president would produce a constitutional crisis. They believed this would energize the country and the movement to abolish the electoral college would pick up speed. Contrary to their predictions and despite the fact that George W. Bush is a runner-up president, the college actually came out a winner because of the spectacle of the Florida recounts and the multiple court decisions. Though dramatic and exciting in a macabre sense, the Florida mess opened many people’s eyes to one of the college’s many virtues—it isolated the debacle to one state. People began to imagine the chaos of a national recount, a potentially staggering number of lawsuits, and swarms of lawyers. As the nightmare continued, most Americans simply wanted it to end, and were relieved when it did. The public apparently gives a swift and sure decision a higher priority than a plurality president in a very close election. The electoral college beats the alternatives because it successfully addresses all of the goals for presidential selection. None of the alternatives do this.

THE ALTERNATIVES

Two of the proposed reforms, the district plan and the proportional plan, would not abolish the electoral college and so would not require a constitutional amendment. Any state may adopt either of these plans now. Under the district plan, currently used by Maine and Nebraska, one electoral vote is awarded to

²⁵ Schumaker and Loomis, *Choosing*, 176–205.

²⁶ *Ibid.*, 181.

²⁷ *Ibid.*, 182.

the candidate who wins the popular vote in each congressional district, and two electoral votes are awarded to the candidate who wins the statewide popular vote. This plan is subject to the odious possibility of gerrymandering because the dominant party in the state legislature draws the district lines. The district plan also makes it easier for minor parties to win electoral votes, and this could result in more frequent contingency elections in the House. *CQ Researcher* applied this plan to the ten elections prior to 2000. They concluded that the district plan would have given the 1960 election to Nixon and would have produced an electoral vote tie between Jimmy Carter and Gerald Ford in the 1976 election, thus sending the decision to the House.²⁸ George W. Bush would have won under the district plan in 2000.

Under the proportional plan, each candidate would be awarded electoral votes on the basis of the proportion of the state's popular vote that he won. In practice, proportional allocation would either yield fractions of electoral votes, or these fractions would have to be rounded off. Again, this plan makes it much easier for minor parties to win electoral votes. When *CQ Researcher* applied this plan to the results of the presidential elections from 1960 through 1996, they concluded that it would have thrown four of these elections into the House for a decision: 1960, 1968, 1992, and 1996.²⁹ In 2000, depending upon the method of allocating fractions, either Bush would have won, or the decision would have gone to the House. Most large states will not consider either of these two plans because they recognize that they get more attention because of their huge pools of electoral votes under the unit rule. Unless the large states switch, it is foolish for the small states to do so.

The other four plans would all require the passage of a constitutional amendment. The direct popular vote majority plan with a national runoff if no one gets a majority initially strikes most people as intuitively fair. As they see it, the plan establishes one voter, one equal vote; there would be no possibility of a runner-up president. The problem with this plan is that a majority requirement is too stringent. It would trigger a national runoff whenever no candidate won a popular vote majority, which would be often. (Even under the electoral vote system, we have had seventeen minority presidents.) So forget about a swift and sure decision. The electoral college does have a majority requirement, but because of the unit rule, it is actually a plurality system that almost always converts popular pluralities into electoral vote majorities, even in close elections.

There are two kinds of popular plurality proposals: one with no minimum— whoever wins a plurality wins the office, and one with a minimum—a runoff if the minimum is not met. Critics of the no-minimum plan fear that without some legal threshold, we could elect presidents with a plurality of 30 percent or worse—crippled presidents. On this point they are probably right. While it is

²⁸ *CQ Researcher* 10 (8 December 2000): 984.

²⁹ *Ibid.*

true that some presidents who were elected without a mandate have been able to build one, no president who has ever done so started from so deep a hole. This plan could shatter our two-party system, and an extremist candidate with a loyal following could win—to the deep dismay of a large majority of the people. Such a president would not have sufficient (if any) support in Congress.

The popular plurality system with a 40 percent minimum has been the leading contender against the electoral vote system. It has been proposed in Congress several times since 1960. After extensive hearings, in 1979, there was a floor vote in the Senate on such an amendment. A bipartisan group of Senators defeated the proposed amendment. The vote was 51 in favor, making it 15 votes short of the necessary two-thirds majority. It was a decisive defeat. Since then, no proposal has reached the floor of either chamber.

The 40 percent rule was chosen because only Abraham Lincoln ever achieved less (39.79 percent). Supporters think this will suffice to prevent runoffs because we have had many presidents who polled between 40 and 50 percent of the popular vote, and they have been able to govern. Those opposed fear that this plan would turn the general election into a primary, and runoffs would become the rule. Very probably, they are right. Forty percent has been sufficient under the unit rule, which magnifies the winner's electoral vote percentage because he has won states. In 1912, in a three-way race against Theodore Roosevelt and William H. Taft, Woodrow Wilson, who won only 41.8 percent of the popular vote, won 81.9 percent of the electoral vote. However, when you change the rules, you change the game. The unit rule and its magnifier effect would disappear. As I pointed out in my Senate testimony in 1992, "There is nothing magical about the 40% figure. It is the fact of a popular runoff process not a numerical percentage that changes attitudes about the general election."³⁰

The very existence of a popular vote runoff creates a "win something" psychology in minor parties and extremist candidates and a "second chance" psychology in voters. The runoff provision is an open invitation to a proliferation of parties. The more parties in contention, the more likely a runoff. In a runoff, a minor party can win something important (a Supreme Court nomination; a cabinet post; an agreement to support a position on school prayer, gun regulation, or abortion) in exchange for support in the runoff election. Extremist parties will have more leverage. This changed minor party psychology is buttressed by changed voter psychology. If you have a good chance of casting a second vote for the "lesser of two evils," why not vote your heart and "send them a message" the first time? Why compromise now? If that were not enough, the premium on fraud is increased because fraud can produce a "second chance," a runoff.

Several of the alternatives have runoff provisions. But runoffs are a bad idea. The "no minimum" people are right about that. Runoffs delay the deci-

³⁰ Judith A. Best, Testimony, U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Hearings: The Electoral College and Direct Election of the President*, 102nd Cong., 2nd sess. (Washington, DC: U.S. Government Printing Office, 1992), 94.

sion, weaken the two-party system, and are expensive. The electorate wears of elections. As it is now, most people do not pay much attention to presidential elections until October. If runoffs become the rule, many may not pay sufficient attention until the runoff.

The runoff problem has led some to support the newest reform fad, instant runoff voting, sometimes called the Irish Ballot. Instead of making a choice among the candidates, the voters would rank order their preferences (first choice, second choice, third choice, etc.) so that their ballots could be transferred from one candidate to another. If no candidate wins a majority on the basis of the first-place preferences, the last-place candidate is eliminated and the second-place preferences of those who selected this candidate are added to those of the remaining candidates. If no candidate wins a majority at this stage, the last-place candidate is eliminated and the preferences of those who selected this candidate are added to the remaining candidates. This continues until someone wins a majority.

Critics point out that preferential voting is undemocratic because it is a “some men two votes system.” And the men who have “two votes” are those who voted for the fringe candidates. This system would surely lead to a plethora of parties, many of them extremist, and it would empower their supporters. There are other problems. What if many people refused to mark a second preference, or suppose they stubbornly refused to make a different second choice and named their first choice as their second as well? If we adopted this plan, would we require people to make multiple choices? Because this plan will encourage the entry of more minor parties and independent candidates, the leaders in the first round may win very low percentages of the popular vote. We could need many rounds of transfers to achieve a candidate with a majority. How many choices will we require voters to mark—three, five, ten? Given a secret ballot, the only way to do this would be to reject ballots that are not in compliance. Even if most people do comply, there are all kinds of ranking games that voters and candidates might be tempted to play—most of which we cannot begin to anticipate. And given the difficulties many people had with a much simpler butterfly ballot in Florida, it seems likely that this system will produce many spoiled ballots. This plan is so cumbersome and confusing that people will wonder if the winner is actually the choice of most people.

Because the nonfederal popular vote plans sacrifice many of the six goals of presidential elections, in 1978, the Twentieth Century Fund proposed a hybrid system, the National Bonus Plan. Under this plan, the electoral vote system would be retained, though the office of elector would be abolished and the unit rule would be mandated. There would be a bonus of 102 electoral votes awarded to the winner of the national popular plurality. An absolute majority (321) of the new total number of electoral votes (640) would be required for victory. If no candidate won an absolute majority, there would be a runoff, under the same rules, to determine the winner.

One of the goals of this plan is to preserve the federal system in presidential elections. Ironically, it has no chance to be adopted because of the federal principle in the amendment process. There are enough small states to defeat it, and defeat it they will because it can marginalize them. Because the candidate who wins a plurality of the national popular vote will get 102 electoral votes, he only needs 219 of the state electoral votes. The eight most populous states have more than that. A candidate could run a campaign to maximize his support in those eight states and win the office. Under the current electoral vote system, the states that get the most attention are the competitive states, large or small. Even small states can be important. In 2000, Gore would have been victorious even if he had lost Florida, if he had won West Virginia or Tennessee or Arkansas or New Hampshire. In 2000, Californians were complaining that they were being neglected by both parties because they were not a competitive state. You change the rules, you change the game. If the bonus plan had been in effect in 2000, the bonus votes would have outweighed the combined electoral votes in twenty-two states and the District of Columbia. In close elections, this plan could also generate national recounts and accusations of fraud and end with multiple court challenges in all the states to determine who actually won the national popular vote contest. One hundred two electoral votes are a prize worth the effort! Think of how long it took in just one state, Florida, and forget the swift, sure decision. It would be a spectacle with all the dignity of jello wrestling.

While some of the reformers in the direct popular vote camp agree with some of the six goals for presidential elections, they do not agree with all of them. They want “one man, one equally weighted vote” and think this single goal trumps all the others. They do not value the federal principle or its role in building well-distributed majorities that can govern. They want to break down the nation into isolated individual voters, not to bring people together to form a critical mass of support for a president. They are interested solely in numbers of votes; they do not care about the distribution of the votes. Their commitment to this one goal in presidential elections is so great, they cannot see that, in effect, they are proposing a regime change. If their amendment is adopted, their monistic goal must be, and eventually will be applied to all parts of the national government. They offer a simple solution to the complex problem of selecting presidents. As a result, they offer no solution to the greater and more complex problems of how to prevent majority tyranny and how to build the kinds of majorities that will gain minority consent.

Those who, despite its flaws, support the electoral vote system, think presidential selection is a complex problem, with multiple integrated and interdependent goals, goals that contribute to the balance of an entire solar system of governmental power. So in the end, it all comes down to the federal principle. It will either continue to be one of the two structural principles of our Constitution, or it will disappear entirely. If it does, the separation of powers effectively will fall with it. We cannot base one part of the separated and balanced powers on a national plebiscite and not the others. We cannot base the Senate and the

House of Representatives on the principle of the concurrent majority and exempt the presidency. To do this could make the president a Caesar. Then we would indeed have an imperial presidency. He would be the only national officer who could claim to speak clearly and directly for the “people.” If the federal principle is illegitimate in presidential elections, it is illegitimate in all our national elections and in all our national decisions. Simple solutions rarely, if ever, solve complex political problems. This nation has grown strong, stable, and free under the federal principle. We are a nation of states, one supreme united society created out of many small societies. *E Pluribus Unum.*