

Isaac Marks Memorial Lecture

DOUBTING OUR CLAIMS TO DEMOCRACY*

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Last year, President Clinton received slightly less than half of the votes cast in the popular vote for president of the United States.¹ Since approximately one-half of the registered voters came out to vote, this means that he received the votes of about one-quarter of the registered voters.² But a lot of people, otherwise eligible, don't even register. Still more people aren't eligible to register and vote—persons under eighteen years of age, persons in mental institutions, and felons whose rights have not been restored.³ The number in these various latter categories is uncertain, but it is safe to say that President Clinton was elected to be the leader of the western world with a mandate from far less than one-quarter of his minions.

That has to raise some doubts about our democratic dimensions *ab initio*. What kind of majority is less than one-quarter? But if that oxymoron doesn't disturb you, let me ask you to contemplate what most Americans would consider an even more ridiculous oxymoron: was the United States Constitution *intended* to promote majority rule? Even if the turnout for presidential elections were higher, and more people registered, would we still be "wimpy" on the notion of majority rule? For those of you who want to go back to your books early, I can answer those questions quickly: no and yes. For those of you who want to stay on, let me elaborate.

The constitutional fathers sitting in Philadelphia (there were no mothers involved in Philadelphia or anywhere else in the constitutional process or in the electorate at the time) did not spend much time worrying about the composition of

* The notes accompanying this article are citations to authority and contain nothing of substance. See Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

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1. WORLD ALMANAC AND BOOK OF FACTS 33 (1997).

2. *Id.*

3. Charles C. Euchner & John Anthony Maltese, *The Electoral Process*, in CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY 153, 170 (Michael Nelson ed., 1989).

the electorate.⁴ There were considerable negotiations involving the distribution of political power between the states and the newly created federal government, and among the states.⁵ But the qualifications for voting were not prescribed in the Constitution, other than to say that the House of Representatives was to be chosen by voters whose qualifications were to be determined by the individual states in the same manner as each state determined the qualifications for electing the most numerous branch of its state legislature.⁶

The Senate, as you will recall, was created in the Constitution through "the great compromise" of 1787.⁷ The small states represented at the convention feared domination by the larger states under a population formula; they wanted each state to have equal representation in Congress.⁸ The larger states naturally desired a legislature based strictly on population, where their strengths, and interests, would prevail. The convention delegates split the baby in half, creating a population basis for electing the House of Representatives, and equal representation of two senators for each state.⁹ Senators were perceived to be ambassadors from the states, representing the sovereign interests of the states to the federal government.¹⁰

To elect these "ambassadors" our founders chose the state legislatures, rather than the people themselves. The argument prevailed that the legislatures would give more sober and reflective thought than the people at large to the kind of person needed to represent the states' interests to the federal government.¹¹ The Philadelphia delegates also thought that if the state legislatures selected these high federal officials, the states would take a greater interest in the fledgling and previously denigrated national government.¹² It bears remembering that the state legislatures had chosen the members of the Continental Congress and the Constitutional Convention itself:¹³ the procedure was familiar in Philadelphia in 1787.

In most other respects, the time, places, and manner of holding elections for the Congress were left to the states.¹⁴ And the states had some very exclusionary practices. Blacks and Indians did not vote. Indeed, the Federal

4. CHARLES A. BEARD & MARY R. BEARD, *THE MAKING OF AMERICAN CIVILIZATION 171-72* (1937).

5. WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF THE UNITED STATES* 42 (5th ed. 1946).

6. U.S. CONST. art. I, § 2.

7. See MUNRO, *supra* note 5, at 43.

8. BEARD & BEARD, *supra* note 4, at 170.

9. U.S. CONST. art. I, § 2, *amended* by U.S. CONST. amend. XIV.

10. Michael J. Malbin, *Congress During the Convention and Ratification*, in *FRAMING AND RATIFICATION OF THE CONSTITUTION* 185, 199 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

11. Lance Banning, *The Constitutional Convention*, in *FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 10, at 112, 119.

12. *Id.*

13. BEARD & BEARD, *supra* note 4, at 170; MUNRO, *supra* note 5, at 31.

14. U.S. CONST. art. I, § 4.

Constitution did not count Indians at all,¹⁵ and only three-fifths of the slaves were counted for purposes of determining the population of house election districts,¹⁶ not to vote, just to increase the base for others' votes to count more. Women did not vote, almost without exception. Of the white males, who were virtually the only electorate in the states, those without property did not vote,¹⁷ and those under twenty-one years of age did not vote.¹⁸ So who was left? Not many, and those who were left were not all voting types. In Connecticut in 1775, an election was held and almost nobody came.¹⁹ Out of a population of nearly 200,000, only 40,797 were white males over age twenty.²⁰ Of that 40,797, only 3447 voted—not quite two percent of the population.²¹ Not quite a democracy.

The historian Charles A. Beard estimated that approximately five percent of the population of the states voted on the question of ratification of the Constitution.²² Since many of those who did vote *opposed* ratification, this great touchstone document, almost 210 years old, was approved by some three percent of the population of this country.²³

One of the procedures ratified by this small piece of the population is a procedure that is understood by an even smaller piece of the population today: I refer to the selection of the president. Notice that I used the word "selection," not election. The Constitution specifically provided procedures that would protect both the selection of the Senate and the president from direct majority votes. As I have indicated, in the case of the Senate, the protective device was to use the state legislatures as the selectors. As to the presidency, the founders created an electoral college.²⁴

Like so much in the Constitution, the electoral college procedure was the product of give-and-take and compromises between large and small states.²⁵ History tells us that no issue held the attention of the framers longer, nor caused more debate among the delegates, than how the president should be selected.²⁶ James Wilson, a delegate from Pennsylvania, declared during the convention debates that "this subject has greatly divided [us] and will also divide the people.... It is in truth the most difficult of all on which we have had to decide."²⁷ The facts and circumstances that made the issue so divisive then survive as archaic—but as I

15. U.S. CONST. art. I, § 2.

16. U.S. CONST. art. I, § 2.

17. MUNRO, *supra* note 5, at 99.

18. Michael Nelson, *Constitutional Beginnings*, in CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY, *supra* note 3, at 3, 52.

19. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 242 (1944).

20. *Id.*

21. *Id.*

22. *Id.* at 250.

23. *See id.*

24. U.S. CONST. art. II, § 1.

25. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 94-98 (1990).

26. *Id.* at 86.

27. *Id.* at 95.

will point out later, dangerous—relics today.

The electoral college compromise was forged for many reasons.²⁸ The main struggle at the convention was between the large and small states.²⁹ More precisely, this evolved into a battle between the confederalists—those who sought to retain much of the Articles of Confederation—and those who advocated a large, primarily national, republic.³⁰ The confederalists fought hard to have the presidency selected by the state legislatures, or by some means that retained the primacy of the states as states.³¹ To fend off this confederalizing threat, the leading framers, Madison, Wilson, and Governor Morris, hit upon the electoral college device.³² Their own first choice was for a straight, national popular vote, but the “states’ righters” vehemently rejected it.³³ The compromise was the electoral college, with the device of popularly elected electors to the college.³⁴ There was an additional concession made to the less populous states, no matter how small their electorate, by assuring them of at least three electors in the college—two for their senators and one for their congressman.³⁵ (Each state was guaranteed at least one congressman, no matter how small the population.)³⁶

Even among the delegates from the larger states there was some opposition to the direct election of the president.³⁷ There was concern that the people lacked sufficient knowledge of the character and qualifications of possible candidates to make an intelligent choice.³⁸ After all, the whole idea of electing a “king,” which is how some people visualized this notion of the presidency, was radical. Eldridge Gerry warned that “the people are uninformed and would be misled by a few designing men.”³⁹ (Think how he would have sputtered if we had added in “designing women.”) George Mason explained that “it would be as unnatural to refer the choice of a [president] to the people, as it would, to refer a trial of colours to a blind man. The extent of the country renders it impossible that the people can have the requisite capacity to judge....”⁴⁰ (And that was even before Californians were included as voters.)

Actually, most of the delegates favored having Congress choose the

28. *Id.* at 81–83.

29. *Id.* at 120–22.

30. Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, in FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 10, at 132, 132–37.

31. *Id.* at 137.

32. See Judith A. Best, *The Presidency and Executive Power*, in FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 10, at 209, 216.

33. FARBER & SHERRY, *supra* note 25, at 83; see also Best, *supra* note 32, at 215–16.

34. See Best, *supra* note 32, at 216.

35. U.S. CONST. art. II, § 1.

36. U.S. CONST. art. I, § 2.

37. See Banning, *supra* note 11, at 125.

38. FARBER & SHERRY, *supra* note 25, at 87.

39. *Id.* at 90.

40. *Id.* at 87.

president,⁴¹ but, for a variety of reasons, they finally settled on the electoral college. The idea of selection by Congress has resurfaced over the years. In the last century, it was proposed that the Senate choose the president from among the senators. The then Speaker of the House of Representatives snorted and said that with the prima donnas in the Senate, there would be a stalemate in perpetuity—each senator getting one vote from his greatest admirer, himself.⁴²

In sum, we have to ruefully confess that this cherished document, our Constitution, started out with an incredibly undemocratic electoral process. The majority of the people could not vote, and those few who could and did vote, ended up choosing the House of Representatives, period.⁴³ *Vox populi*—my eye.

We have progressed from those undemocratic beginnings. The Fifteenth Amendment to the Constitution specifically removed race and previous conditions of servitude as disqualifiers. While that portion of the electorate has had a long road to travel, over one hundred years, before the franchise promised under the Fifteenth Amendment became a reality, the racial "outs" have been brought in. Many big cities have elected African-American mayors; there is an African-American woman in the United States Senate; there are thousands of office holders of color throughout the country. The Voting Rights Act of 1965 and its progeny may well be the most important civil rights legislation passed since the Thirteenth, Fourteenth, and Fifteenth Amendments.

We moved to direct elections of Senators in 1913.⁴⁴ It took a major scandal, or a series of them, to get the Seventeenth Amendment to the Constitution adopted.⁴⁵ As fate would have it, one of the more sensational cases of abuse came from my home state, Illinois. William Lorimer, a Republican, won his U.S. Senate seat on the ninety-ninth ballot taken by the Illinois Legislature in 1909.⁴⁶ A year after he had taken his seat, the Senate cleared Lorimer of charges that he had bribed his way to victory.⁴⁷ New evidence prompted another investigation, and in 1912, the Senate voted that Lorimer was not entitled to his seat.⁴⁸ The fallout from the Lorimer case led to the adoption of the Seventeenth Amendment.⁴⁹

Suffrage was confirmed to women by the Nineteenth Amendment in 1920, although many states had granted such suffrage earlier.⁵⁰ The age minimum was reduced to eighteen by the Twenty-Sixth Amendment in 1971, after a congressional effort to do it by legislation was struck down by the Supreme

41. MUNRO, *supra* note 5, at 148.

42. Anecdote made by Tip O'Neil, then Speaker of the House of Representatives, to the author.

43. U.S. CONST. art. I, § 2.

44. U.S. CONST. amend. XVII.

45. FARBER & SHERRY, *supra* note 25, at 340.

46. U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS 298 (1971).

47. *Id.* at 302.

48. *Id.* at 304.

49. FARBER & SHERRY, *supra* note 25, at 340.

50. *Id.* at 340-41; MUNRO, *supra* note 5, at 106-07.

Court.⁵¹ While the prerequisite of property ownership never was prohibited by the Constitution, the states voluntarily gave it up as time went on.⁵² The poll tax was used for a time to disenfranchise blacks and poor people,⁵³ but was prohibited by the Twenty-Fourth Amendment in 1964, as well as by laws passed by most of the states.⁵⁴

The results have been very good, legally speaking. We have enlarged the electorate from less than twenty percent of the population to over seventy-five percent of the population. They still don't show up in large numbers at the polls, as I indicated at the beginning of my lecture, but access is there. With a few small exceptions—relating to residency in mental institutions, or in our prisons⁵⁵—we have come as close to universal suffrage as any country in world history. We elect both houses of the Congress, and the elections are basically fair, open, and run on inclusive principles.

But we still select our president in a most dangerous manner. As I indicated previously, the guarantee to small states of at least three votes in the electoral college was a selling point to the small state delegates in Philadelphia. To this day, those few people in our country who know about the electoral college think that it gives the small states an edge. Wrong!

The electoral college operates on a "winner takes all" rule. This is an extra-constitutional provision that the candidate who receives the largest number of votes in a state receives all of that state's electoral votes. As a result, the voter who causes a presidential candidate to carry New York by one vote is a lot more influential than that same decisive vote in Alaska. The presidential voter in Illinois has more "clout" than a presidential voter in Arizona. It should not be surprising that presidential candidates run on platforms likely to appeal to big city, big population interest groups. They concentrate their campaigns in the big population centers, and at least as most politicians know, they stand or fall on the big state votes.

But the unfairness in favor of the big states is not what causes such worry about the present system. There would still be a bias in favor of big population centers even without the electoral college. Television and geography would still give them an edge. The concern about our present system is its capacity to turn losers into winners—to elect presidents who do not command support from the largest number of people who have voted in the election. Let me remind you of some of our grim history under this electoral system.

In 1860, Abraham Lincoln received less than forty percent of the popular vote.⁵⁶ While he did receive more votes than anybody else in that election, he was elected only because he received all of the electoral votes in the bigger states,

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- 51. FARBER & SHERRY, *supra* note 25, at 341–42
 - 52. Euchner & Maltese, *supra* note 3, at 170.
 - 53. Nelson, *supra* note 18, at 53.
 - 54. *Id.*
 - 55. Euchner & Maltese, *supra* note 3, at 170.
 - 56. See FARBER & SHERRY, *supra* note 25, at 252.

giving him fifty-nine percent of the total electoral vote.⁵⁷ While most historians find other reasons for the occurrence of the Civil War, it is not unreasonable to speculate that the war might have been avoided or tempered if a runoff election could have been held between the two candidates receiving the most votes. I am a fan of neither Stephen A. Douglas nor John Bell—the two moderate candidates who between them polled substantially more votes than Lincoln⁵⁸—but the election only exacerbated the tension that already existed. When over sixty percent of the people who voted in that election voted for someone else,⁵⁹ it is clear that Abraham Lincoln did not come in with many mandates to do anything.

In 1876, Samuel Tilden received over a quarter of a million more votes than Rutherford B. Hayes.⁶⁰ The electoral college vote was split and in sharp dispute. Congress finally declared Hayes the winner in a process that left many questions and diminished the enthusiasm for the political process generally.⁶¹ Unfortunately, people did not then, nor do they now, understand how the electoral college works or what it is.

In 1888, Grover Cleveland won the popular election by 100,000 votes, a full percentage point ahead of Benjamin Harrison, albeit neither received fifty percent of the vote.⁶² Harrison was declared president because of the electoral college vote.⁶³ In 1960, after all of the absentee votes were counted, Richard Nixon lost the popular vote by approximately 100,000 votes, with many challenged results.⁶⁴ John F. Kennedy became president because of the electoral college.⁶⁵

I said the electoral college was dangerous. It is dangerous because it is secret. It is secret because a majority of the American people don't even know it exists, let alone how it works. It is dangerous because some seventy-five percent of the American people would oppose it, if they knew about it, and *want* the direct election of the president, according to a recent poll.⁶⁶ It is dangerous because another election like Hayes–Tilden, or Lincoln–Douglas–Bell, or Kennedy–Nixon could precipitate a crisis that could threaten this constitutional government that we cherish. In a democracy, people do not like to see losers declared winners, and the electoral college allows that to happen. In a democracy, a small minority of the popular vote ought not be sufficient to select a president for all the people. Whatever caused the last Civil War, we should not let an anachronism like the electoral college give rise to the next one.

The direct election of the president by popular vote would require a constitutional amendment, with two-thirds of the Congress necessary to pass it and

57. *See id.*
 58. BEARD & BEARD, *supra* note 4, at 466.
 59. *Id.*
 60. FARBER & SHERRY, *supra* note 25, at 99.
 61. *See* MUNRO, *supra* note 5, at 151–52.
 62. FARBER & SHERRY, *supra* note 25, at 99.
 63. *Id.*
 64. Euchner & Maltese, *supra* note 3, at 311.
 65. *Id.*
 66. Nelson, *supra* note 18, at 45.

three-fourths of the states necessary to ratify it.⁶⁷ That has proved impossible to accomplish—I tried for five terms when I was in the Congress, and others have tried for far longer. We could ameliorate the present situation simply by changing the “winner-take-all” method of allocating electoral votes. The states could do that by changing their individual statutes. That is not likely to happen because no state is willing to give up their real or imagined clout unilaterally. Congress could do it by statute, I think, and I strongly think it would be worth doing. It would eliminate most of the losers-to-winners problems, and that is a big step. It would not solve all of the problems, but it would mark substantial progress.

The only change we have made in the structure of the electoral college was in the Twelfth Amendment to the Constitution, and that solved some trivial problems perceived at the time, 1804;⁶⁸ we have not addressed the electoral college in the Constitution since then. We really need to do something. There is a monstrous fissure in our Constitution's basement. Most people do not know it exists. The people who do know about it do not pay much attention to it. But someday, if there is a very bad storm, we can all lose our nationhood, our stability, the real democracy we profess and have. We ought to fix it while the weather is good, while our commonality is high.

E.B White said: “Democracy is the recurrent suspicion that more than half of the people are right more than half of the time.”⁶⁹ We ought to act on that suspicion and move to an even more perfect union. We ought to fulfill James Madison's trust, and repair to the high ground of democratically electing our presidents.

67. U.S. CONST. art. V.

68. FARBER & SHERRY, *supra* note 25, at 99.

69. E.B. White, *The Wild Flag*, reprinted in JOHN BARTLETT, FAMILIAR QUOTATIONS 703 (16th ed. 1992).