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Constitutional Stupidities: a Symposium

***143** A CONSTITUTIONAL ACCIDENT WAITING TO HAPPEN

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In the category, Most Mistaken Part of the Current Constitution, I nominate the electoral college. The ingenious scheme of presidential selection set up by Article II and refined by the Twelfth Amendment was a brilliant eighteenth century invention that makes no sense today. Our system of selecting Presidents is a constitutional accident waiting to happen.

I nominate the electoral college in part because some constitutional scholars might tend to overlook its flaws. Constitutional Law courses typically stress courts, cases, and clauses that get litigated. Despite the vast constitutional significance of the Presidency, it is woefully understudied in law schools today. (It gets far more attention in political science departments -- a vestige of the early twentieth century world in which academic study of the Constitution generally nestled in political science, while law schools stressed "private law" like contracts and torts.) Constitutional Law scholars may likewise prefer to focus on clauses that can be "fixed" by creative judicial interpretation. The electoral college can be fixed only by a formal amendment, and talk of constitutional amendment scares many law professors.

But amendment is exactly what is called for here; the reasons that made the electoral college sensible in the eighteenth century no longer apply. The Framers emphatically did not want a President dependent on the legislature, so they rejected a parliamentary model in which the legislature would pick its own leader as prime minister and chief executive officer. How, then, to pick the President? The visionary James Wilson proposed direct national popular election, but the scheme was deemed unworkable for three reasons. First, very few candidates would have truly continental reputations among ordinary citizens; ordinary folk across the vast continent would not have enough good information to choose intelligently among national figures. Second, a populist Presidency was seen as dangerous -- inviting demagoguery ***144** and possibly dictatorship as one man claimed to embody the Voice of the American People. Third, national election would upset a careful balance of power among

states. Since the South didn't let blacks vote, southern voices would count less in a direct national election. A state could increase its clout by recklessly extending its franchise -- for example, if (heaven forbid!) a state let women vote, it could double its weight in a direct national election. Under the electoral college system, by contrast, a state could get a fixed number of electoral votes whether its franchise was broad or narrow -- indeed, whether or not it let ordinary voters pick electors.

None of these arguments works today. Improvements in communications technology, and the rise of political parties, make possible direct election and a populist Presidency -- de facto, that is our scheme today. Blacks and women are no longer selectively disenfranchised, and states no longer play key roles in defining the electorate or in deciding whether to give the voters a direct voice in choosing electors. Direct national election would encourage states to encourage voters to vote on Election Day; but today, this hardly seems a strong reason to oppose direct election.

Ingenious, indirect, sophisticated arguments made on behalf of the electoral college by clever theorists these days are legion -- but almost all are make-weight: If the scheme is so good, why doesn't any U.S. state, or any foreign nation, copy it? A low plurality winner in a three- or four-way race is possible even with the electoral college; and could be avoided in a direct national election by single transferable voting (with voters listing their 2nd and 3rd choices on the ballot, in effect combining the "first heat" and "run off" elections into a single transaction).

The only two real arguments against abolition of the electoral college sound in federalism and inertia. Only federalism can explain why we should use an electoral college to pick presidents but not governors. But it's hard to see what the federalism argument is, today. The specter of the national government administering a national election, I confess, does not give me the cold sweats. A razor-thin popular vote margin might occasion a national recount, but states now manage recounts all the time, and new technology will make counting and recounting much easier in the future. (And today, a razor-thin electoral college margin may require recounts in a number of closely contested states even if there is a clear national popular winner.)

***145** Inertial, Burkean, arguments take two forms. First, the argument goes, a change in presidential selection rules would radically change the game in ways hard to foresee. Candidates wouldn't care about winning states -- only votes -- and campaign strategies might change dramatically and for the worse. But it's hard to see why; given that, historically, the electoral college leader has also tended to be the popular vote leader, the strategy for winning shouldn't change dramatically if we switch from one measure to the other. This sets up the second inertial point. The dreaded specter of a clear popular loser becoming the electoral college winner hasn't happened in this century: "Why worry?" But that's what someone might say after three trigger pulls in Russian Roulette. One day, we will end up with a clear Loser President -- clear beyond any quibbles about uncertain ballots. And the question is, will this Loser/Winner be seen as legitimate at home and abroad? If our modern national democratic ethos, when focused on the thing, would balk at a byzantine system that defies the people's choice on election day, true Burkean theory would seem to argue against the electoral college. If We the People would amend the Constitution after the Loser President materializes -- and I predict we would -- why are we now just waiting for the inevitable accident to happen?

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