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POPULAR SOVEREIGNTY AND THE ELECTORAL COLLEGE

JOHN O. MCGINNIS*

In this brief Comment I want to consider the relation of popular sovereignty to the Electoral College. First, I consider the often expressed claim that George W. Bush's failure to receive a plurality of the popular vote undermines his legitimacy as President. I completely reject this notion: because presidential candidates attempt to win a majority of the Electoral College, not the popular vote, the popular vote totals are epiphenomenal and, in the close elections where the popular vote may diverge from the Electoral College result, do not undermine the electoral legitimacy of a candidate who won through playing by the rules. Next I consider whether the failure of the United States to use direct election undermines or in any way vitiates the political legitimacy of its system of government. I reject this claim as well on several grounds. First, given the fickleness and inattention of voters, all we can expect an electoral system to do is to make certain that a candidate has substantial popular support. We cannot expect an election to measure the popular will in any transcendental sense, if by that we mean a stable will of a national majority. Given this fact, it makes sense for an electoral system to have other goals, like assuring a clear winner through minimizing the possibility of requiring a national recount. Second, even if it were possible to measure a stable majority, an electoral system designed to distill the will of a national majority would have a tendency to lead to notions of social democracy that are foreign to the American experience and are harmful to prosperity and liberty.

Both of the fine Articles I address in this Comment touch on the legitimacy of our presidential election system.¹ I will necessarily concentrate on the parts that relate to my thesis, where I have some disagreement with the Articles. I thus pass over the many interesting and persuasive observations that Professors Sandy Levinson and Ernest Young have made about whether the decision of the Texas electors to vote for both George W. Bush and Richard Cheney violated the Habitation Clause of the Constitution.² In their paper, however, Professors Levinson and Young also label as the Twelfth

* Professor of Law, Benjamin N. Cardozo Law School. I want to thank Mark Movsesian and the participants in symposia at the Florida State University College of Law and at Cardozo for their comments. I am also grateful to Jim Rossi for his hospitality.

1. See Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, The Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879 (2001); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001).

2. See Levinson & Young, *supra* note 1, at 932-54.

Amendment's "ultimate stupidity" its decision in the event no candidate gains a majority in the Electoral College to select a President through a state-by-state vote in the House rather than through a member-by-member vote.³ I will examine only one aspect of this claim—their objection that a state-by-state selection will make it less likely that representatives will take into account the identity of the winner of the popular vote in selecting the President. One of the premises of the Levinson-Young argument is thus that winning the popular vote in our electoral system as it is currently run provides electoral legitimacy to the winner.⁴

This assumption is incorrect. In the close elections where the result of the Electoral College and the popular vote are different, the 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 the 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 had the candidates been aiming for a popular majority. Giving any consideration to the popular vote in this context is like suggesting we should pay attention to the total number of runs a team got in the World Series rather than the number of games won.⁵ 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. The fact that a candidate lost the popular vote while seeking an Electoral College majority does not tell whether he would have won the popular vote if he had sought to win the popular vote, particularly because such misfirings occur only in close elections. The interesting question of legitimacy is not whether losing the popular vote in an Electoral College system undermines the standing of the winning candidate given that system, but whether popular sovereignty demands that we have some form of direct election rather than the Electoral College.

3. *Id.* at 970-73; see also U.S. CONST. amend. XII ("But in choosing the President, the votes shall be taken by states, the representation from each state having but one vote . . .").

4. See Levinson & Young, *supra* note 1, at 950-54.

5. The World Series analogy has been previously appropriated by defenders of the Electoral College. See, e.g., Jeff Greenfield, *The Hidden Beauty of the System*, TIME, Nov. 20, 2000, at 66. For a delightful discussion of the strengths and limitations of the World Series metaphor, see Michael E. Herz, *How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. (forthcoming 2002).

The paper by Professors Luis Fuentes-Rohwer and Guy-Uriel Charles considers whether the Electoral College is illegitimate in this broader political sense, because it fails to include a mechanism of a popular vote.⁶ They conclude that the political legitimacy of the Electoral College is bound up in our feelings about the legitimacy of federalism. I believe they are on the right track. Surely it is strange to consider the Electoral College system illegitimate because of inconsistency with one-man, one-vote, given the more substantial departures from that principle in our other governmental institutions. Most glaringly, the Senate's 100 votes are awarded on a principle of geographic rather than popular representation, and the Senate is fully one-half of the most powerful branch of government. Moreover, the principle of representation embodied by the Senate is enshrined in the Constitution as the only provision that cannot now be amended.⁷ Compared to this affront to popular sovereignty at the national level the Electoral College seems a minor concern.

I would, however, add one important caveat to their discussion. The Senate advantages voters in small states by giving the voices of their representatives greater weight than the population of their state would warrant.⁸ The Electoral College is often thought to create the same kind of advantages because it awards a candidate a two electoral vote bonus regardless of size. Nevertheless, this assumption is wrong: so long as states retain the unit rule (the rule awarding all electoral votes to the victor of the state), its overall effect advantages voters in large states.⁹ The reason is that the vote of large state voters is more likely to be decisive because large states with their substantial electoral vote have a greater chance of being decisive in the Electoral College.¹⁰ Thus, on deeper inspection, federalism as represented by equal representation in the Senate and the Electoral College are alike only at the abstract level, in that they both flout one-person, one-vote. The imbalance that they create, however, moves in different directions. The Senate gives more power to voters in small states, but the Electoral College gives more power to voters in large

6. See Fuentes-Rohwer & Charles, *supra* note 1, at 880.

7. See U.S. CONST. art. V. ("Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.")

8. The disproportionate representations of small states in the Senate gives them substantially greater power than large states to shape legislation. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL'Y 21, 23-29 (1997).

9. Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 241-42 (2001) (arguing that the Electoral College advantages voters in large states).

10. Professor John F. Banzhaf calculated that in 1968 a voter in a large state was 3.312 times more likely to determine the outcome than a voter in a small state. John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 313 (1968).

states.¹¹ Indeed, a neglected argument in favor of the Electoral College as it currently operates with the unit rule is the compensation it provides for the extra leverage that small state voters enjoy through the structure of the Senate.¹²

But the Electoral College can be defended on more fundamental grounds than federalism. It satisfies the two criteria that any election system should meet in a democracy. It measures what can be measured of popular will and it enables democracy to fulfill its core function—impeding rulers from governing in their own interest or in other narrow interests rather than in the public interest.

First, in terms of measurement, all any presidential electoral system can assure is that the President is supported by a substantial plurality chosen by rules that everyone understands and that will reflect major changes in popular sentiment. It is really impossible in close elections (and close elections are the only ones where the results of a direct election and the Electoral College could realistically diverge) to make sure that any political figure is supported by a stable majority of the electorate.

Second, in America, as opposed to some other societies, the expectations of what democracy can deliver are fairly limited. For most of our history, the United States has embraced what David Held has called the protective idea of democracy.¹³ Under this conception, democracy is simply a mechanism that assures that government interventions will not be used to advantage a distinctive class of rulers. Democracy diffuses the power of governance throughout society so that politics will not interfere with the source of real happiness—exchanges within the market and the family.¹⁴ For this conception to

11. Judith Best explains who is advantaged by the Electoral College system as follows:

It gives an advantage to intrastate majority and plurality voters; to voters in large states . . . , to tightly organized highly disciplined special-interest groups in large urban states; to voters in states that are losing population; and finally, to voters in low-turnout states.

JUDITH BEST, THE CASE AGAINST THE DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 124 (1971).

12. Interestingly, the advantages of the Electoral College for voters in large states and disadvantages for small states are so misunderstood that small state Senators oppose any modification in the amendment. See, e.g., *Hands off: The Electoral College Has Served the Nation Well; There's No Need for Major Changes*, SUNDAY NEWS, Nov. 12, 2000, at P2 (discussing Senator Daschle of South Dakota's support for the Electoral College because of the help he believes that it gives to small states). Their opposition points to a problem that should be more studied in political and legal theory. Rules may be so complicated that political actors misperceive their own interests and thus it is confusion, as well as self-interest, that moves legislators and other lesser political actors.

13. See DAVID HELD, MODELS OF DEMOCRACY 99 (2d ed. 1996).

14. Held recognizes that the protective concept of democracy grows out of the classical liberal tradition and favors democracy because it is conducive to allowing individuals to pursue their own goals, free from government interference. *Id.* at 96.

become a reality, one simply has to make sure that rulers who are unduly rewarding their coalition at the expense of the majority are thrown out. The Electoral College accomplishes this goal as well as direct election of the President.

Let me take these points in order. First, given the realities of modern democracy, the best an electoral process can do is assure that we sift candidates with some support rather than measure stable majoritarian support. An election that is so close that a direct electoral vote would not accord with the Electoral College vote is an election where the margin of error is greater than a stable measure of popular support.¹⁵ Indeed, if the weather patterns had been different across the country we would well get different results in a close contest, regardless of whether we used a direct election or the Electoral College. If the election were held a few days later by the accident of the calendar we also might get a different result. Indeed, if the 1976 election had been held a week later Gerald Ford would perhaps have defeated Jimmy Carter in the Electoral College.¹⁶ The sad truth is that many swing voters make up their minds based on accidents and presentations of personality around the time of the election and, given this weak attachment, will likely change their minds about the candidates when elected for similarly frivolous reasons.¹⁷

Accordingly, in a democracy with a fickle and rationally ignorant electorate, our presidential selection system, however devised, cannot choose a clear winner between closely matched candidates in a meaningful sense of a candidate with a clear and stable support. What our Electoral College system accomplishes as well as a popular vote system is to eliminate candidates without a substantial basis of support, such as Pat Buchanan and Ralph Nader, from any serious prospect that they will become President.¹⁸ It also assures as well as a direct election that any substantial shift in voter sentiment is measured election from election.

The appropriateness of the Electoral College also rests on the limited function that democracy can reasonably play in legitimizing our

15. Cf. John Allen Paulos, *We're Measuring Bacteria With a Yardstick*, N.Y. TIMES, Nov. 22, 2000, at A27.

16. See GERALD R. FORD, A TIME TO HEAL 437 (1979) (discussing the good economic news that came out a week later and that might well have made a difference in the very close contest).

17. See STANLEY KELLEY, JR., INTERPRETING ELECTIONS 144-56 (1983) (discussing the uninformed nature of marginal voters and their influence on electoral outcomes).

18. I recognize that the Electoral College permits the House of Representatives to choose the candidates receiving the third largest number of electoral votes and, thus, it might be argued that formally we could have gotten Buchanan or Nader, assuming that the Constitution was interpreted to allow the House to choose a candidate who tied for third by receiving no votes. The fact remains that through 200 years of American history the Electoral College has never resulted in the choice of a candidate without substantial support in the population.

system of government. The Framers' defense of democracy was that it better restrains arbitrary government action than aristocracy or monarchy and therefore better protects liberty.¹⁹ It is liberty that in large part legitimizes society by generating material and spiritual progress. Madison summed up the objective of sound constitutional mechanisms, including democracy, as devices "[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and form of popular government"²⁰ Mancur Olson has put a more modern gloss on this idea. In his recent book he suggested that political systems were justified insofar as they empowered the encompassing interest of society because that interest, rather than special interests, was less likely to use the government to expropriate resources for themselves.²¹ This kind of democracy facilitates the exercise of private rights and the creation of conditions for prosperity.

From this perspective of protective democracy, the Electoral College certainly fares no worse than direct election of the President. Both guarantee that whoever wins the Presidency will have to be restrained by popular will. George Bush cannot rule in the interests of a narrow group because he and his successor must win very substantial support. Both assure that major shifts in public sentiment will, over time, affect government policy.

The Electoral College may in fact contribute better to the goals of protective democracy than direct popular election of the President in three other respects. First, political stability contributes to prosperity and the exercise of individual rights, and nothing harms stability more than disputes about elections. The acrimony and bitterness flow from the simple fact that politics is a zero-sum game. One candidate and his coalition must win at the expense of the other candidate and his coalition. Social order, a *sine qua non* of prosperity, can begin to unravel. The aftermath of the recent election should emblazon this truth onto the annals of political science, as it showed all kinds of groups seeking to influence an unclear or doubtful electoral count.

For instance, as soon as it became clear that the vote was close, Vice President Gore's camp began making charges of illegality about the butterfly ballot.²² Jesse Jackson led a march of Democratic partisans in Tallahassee, comparing the confusion with infa-

19. For further discussion of this concept of democracy, see John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 526 (2000).

20. THE FEDERALIST NO. 10, at 48 (James Madison) (Clinton Rossiter ed., 1961).

21. MANCUR OLSON, POWER AND PROSPERITY, OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 14-17 (2000).

22. See Charles M. Madigan, *Battle for the White House*, CHI. TRIB., Nov. 10, 2000, at 1.

mous racist attacks in Selma, Alabama.²³ Republicans sent Capitol Hill staff to Florida in an attempt to influence the deliberations of canvassing boards. A cascade of partisan accusations followed.²⁴

Political principles—another system of beliefs that contributes to social order—also tend to disappear when the stakes become high. For instance, the Democrats demanded that every vote count while, at the same time, they tried to exclude military ballots.²⁵ Republicans believed that technicalities should not bar military ballots, but they did not extend this laxity elsewhere.²⁶

Given that lack of clarity in high stakes politics dissolves social harmony, it is actually more important that a close election have a clear result than that it pick the candidate with the most votes.²⁷ Of course, the lack of clarity in this last election was unfortunate, but think of how much worse it would have been if there was a close national vote with recounts in every state, not just Florida. At least the unpleasantness was localized. The Electoral College has advantages over direct election because it contributes to localization and containment of potentially destabilizing electoral disputes.²⁸

23. Thomas B. Edgall, *Rage Sharpens Conservative Rhetoric*, WASH. POST, Nov. 22, 2000, at A19 (recounting Jackson's comparison).

24. Paul Lamatire, *GOP Sent T-Shirt Team of Redicated Infiltrators*, PALM BEACH POST, Dec. 1, 2000, at 1A.

25. Steve Wilson, *Gore's Actions Don't Match His Lofty Words*, THE ARIZ. REPUBLIC, Nov. 30, 2000, at A2 (noting inconsistency between the Gore campaign's position on counting military votes and counting other ballots).

26. *Two-faced in Florida*, THE DES MOINES REG., Nov. 27, 2000, at 12 (accusing Republicans of hypocrisy for applying strict standards to domestic ballots and lenient standards to military ballots).

27. The recent election also contained lessons about the appropriate nature of government. In contrast to the social acrimony that politics always threatens to engender, market transactions can make both sides better off, leading to more cooperation and social peace. Happily, the Framers bequeathed to us a commercial republic with a federal government granted only enumerated powers and restrained by the separation of powers, and state governments constrained by competition for people and capital. See generally John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195 (1997) (discussing how the Framers' system limited government). That system, as weakened as it has been by excessive centralization and the loosening of property rights, is what stood between us and real chaos in the streets this November. Although the President is the most powerful actor in our government, his authority remains highly circumscribed by other governmental institutions and the market. Even when the outcome of the presidential election was unclear and subject to partisan pressure, most people, other than committed partisans, could go about their business confident in the stability provided by other governmental institutions and by commerce.

The moral of the Florida unpleasantness is therefore that our essential task as a people is to maintain the decentralization of power in America through preserving a republic where commerce is strong and government power is held in check. The travails of the 2000 election season, as trying as they were, will have been worth enduring if citizens emerge with a keener appreciation of the limits of government.

28. See BEST, *supra* note 11, at 193 (suggesting that the Electoral College insulates the nation from infection by local fraud).

Second, because an Electoral College system forces candidates to speak more widely in the country than in direction election, the concerns of a more diffuse population will be addressed. For instance, the concerns of rural voters who dominate some states are more likely to be discussed. Addressing the hopes and fears of the entire electorate is the therapeutic side of an election. Citizen whose concerns are addressed (even if not satisfied) are less likely to cause social unrest. The irenic catharsis engendered by an electoral system that focuses on disparate issues thus promotes the stability.

Finally, and most importantly given that the Electoral College system has been around for 200 years, its results are more likely to be accepted without question. One of the most striking facts of the 2000 election was that the citizenry, in general, readily accepted that the winner of Florida, and thus the Electoral College, would become President, rather than the winner of the popular vote.²⁹ That is due not only to the longevity of the Electoral College but also to its results. The United States is a prosperous and powerful country—perhaps the most prosperous and powerful country on earth. Millions of people want to immigrate here each year and, even if they cannot immigrate, billions more want to emulate as much of our culture as possible.

Of course, it is entirely possible that a direct presidential election system may not fundamentally change the political system that has contributed to our prosperity. Nevertheless, it is difficult to know *ex ante* exactly what rules would replace the electoral system and thus whether they would serve us as well in practice, particularly given the complex relation of the Electoral College system to its other rules like the composition of the Senate.³⁰ The Burkean argument for retaining the status quo for fear that we will not be able to understand the secondary and tertiary effects of change is here particularly strong.³¹ Changing complex rules in a highly reticulated system regulating the distribution of political power is an enterprise where we should especially consider the warning spoken by the character of Ulysses in *Troilus and Cressida*: “[U]ntune that string, [a]nd hark what discord follows.”³²

29. See Ann Althouse, *Electoral College Reform: Deja Vu*, 95 NW. U. L. REV. 993, 1011 (2000).

30. For instance, I suggested above that the advantage the Electoral College gives to voters in large states may compensate for the additional leverage small states voters obtain through the composition of the Senate.

31. Cf. ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION AND THE PARTY SYSTEM* (1971) (making similar argument against changing fundamental rules in the complex American political system).

32. WILLIAM SHAKESPEARE, *HISTORY OF TROILUS AND CRESSIDA*, act I, sc. 3 (A. Harbage ed., 1969).

Nevertheless, if one believes in the model of social democracy or what David Held in his canonical book on the models of democracy calls “participatory democracy,” the Electoral College may still seem very unsatisfactory.³³ Oversimplifying a bit, under this model, individuals meet in politics in a process of continuous social reform to solve all sorts of problems that are deemed to be collective rather than those of individuals.³⁴ Under such a model, the legitimacy of all social institutions depends ultimately on voting. Thus, even if it is impossible to capture a stable majority will, it may be important to appear to do so for reasons of symbolism.

Accordingly, it is not surprising that as the United States flirted with more social democratic ideas, courts became more sympathetic to one-man, one-vote notions as the touchstone of the democracy.³⁵ In fact, during the late 1960s and early 1970s, at the height of social democratic stirs, hearings were held on abolishing the Electoral College.³⁶

But in my view, the model of social democracy is so deficient that the Electoral College’s rejection of the symbolism of unmediated popular sovereignty is one of its greatest virtues. In my view, the notion of popular sovereignty as the ultimate and sole legitimating force on our social arrangements has had a corrosive effect on society. This is a subject as large and important as any in political science, and I can give my reasons only briefly in this Comment. Originally introduced as useful restraint on the absolute power of kings, the concept of popular sovereignty has metamorphosized into a dangerous concept of social democracy for two reasons.³⁷ First, popular sovereignty has tended to make it harder to recognize that society is legitimated not by majority will but by its accordance with certain principles of natural justice, like the right to liberty and property. Indeed, historically, popular sovereignty has been often more effective at destroying the customary structures and mediating institutions that protect natural rights than monarchs, because monarchical authority was hedged in by customary law and other restraints

33. HELD, *supra* note 13, at 271.

34. *Id.* at 270-73.

35. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964) (interpreting the Equal Protection Clause to require one-man, one-vote).

36. See LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 139-78 (2d ed. 1972) (detailing progress and ultimate failure of Electoral College reform).

37. See Bertrand De Jouvenal, *ON POWER, ITS NATURE AND THE HISTORY OF ITS GROWTH* 265-67 (1948) (discussing the original usefulness of the English parliament).

where popular sovereignty was thought to have fewer or no constraints because it was rooted in the people themselves.³⁸

Second, popular sovereignty has also historically given rise to the notion that the government collectively is responsible in an unmediated way for the welfare of its citizens. Government, however, cannot accomplish such an ends in an unmediated way, because government lacks the motivation and information to help individual citizens directly. The best government can do most of the time is to establish an infrastructure of the rule of law to allow its citizens to better exercise their rights of liberty and property—structures which collect the information and elicit the complex cooperation necessary to generate wealth and human flourishing. Historically, the United States has done better than other modern industrial societies, like those in Europe, in realizing this more modest and paradoxically more successful vision of government.

Of course, I am not claiming that the Electoral College by itself has been entirely responsible for preventing the corrosive effects of popular sovereignty transmuted into social democracy. Other aspects of the United States have contributed our advantage over European democracies in this respect. But the Electoral College does play an important symbolic role. For instance, in retaining an important role for federalism, the Electoral College expresses American preference for decentralization over a single point of collective sovereignty. In a larger sense, by including within the election of our nation's leader the principle of subsidiarity, which is itself a principle facilitating the exercise of natural rights, we are reminded correctly that the legitimating principles of society cannot be reduced to a momentary exercise of the general will. Instead, popular consent is simply an instrument to protect the deeper and more enduring principles that make us a free and prosperous people.

38. *Id.* at 288-91 (discussing the manner in which popular sovereignty sweeps away other institutions); see also Brian C. Anderson, *The Melancholy Liberalism of Bertrand De Jouvenal*, 143 PUB. INT. 87, 93 (2001) (summarizing De Jouvenal's thesis).