

# FIXING THE PRESIDENTIAL NOMINATING SYSTEM: PAST AND PRESENT

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*For many centuries, political communities have contrived nominating systems that seek to attain similar goals across different countries—protecting the community from overly ambitious and powerful leaders, and uniting rather than dividing communities at election time around leaders with broad-based appeal. They have done so by resort to procedures that recur almost invariably—procedures framed to avoid plurality victories in multicandidate contests and to insulate nominators’ decisions from outside influence, including the influence of fellow voters’ decisions. One is struck by how painstakingly our forebears worked out the problems of nominations over time, with recurring themes and methods, which (ironically in this age of information) find no echo today in our own presidential nominating system.*

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## INTRODUCTION

The Florentine historian Francesco Guicciardini asked in the sixteenth century why it was that the Venetian government had remained stable for so many centuries (by then about five with almost another three to go). It was not, he said, because Venice lacked the hatred and enmity evident in other Italian cities, nor was it because Venice had a shortage of ambitious men who would sow civil discord themselves if they could.<sup>1</sup> Rather, it was because Venice had orders of government

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<sup>1</sup> Jay S. Coggins & C. Federico Perali, *64% Majority Rule in Ducal Venice: Voting for the Doge*, 97 *PUB. CHOICE* 709, 709 (1998) (citing Francesco Guicciardini, *Democrazia dei veneziani* [*Democracy of the Venetians*], in *LA REPUBBLICA* 186 (G. Maranini ed., 1973)).

that kept these destabilizing forces under control.<sup>2</sup> The electoral process was, in Guicciardini's view, crucial.

Today it seems more crucial than ever. Our presidential nominating system is overdue for a fresh review, and it pays to begin by comparing this system with nominating procedures in other epochs. History has no lessons for us, but neither has it dustbins. If we look at how our predecessors dealt with nominations for public office, we won't be told what to do, but we will find people in different times and different places thinking, sometimes deeply and creatively, about this vexing matter. If this backward glance does not prompt us to think more expansively and freshly about our own alternatives, at least it should temper our typical condescension toward the past, because none of the systems mentioned below was so ill-fitted to its purposes as our own system today.

## I

### THE GREAT DIVIDE

There is a great divide in the matter of nominating history between the pre-democratic era and the post-democratic era, between what one could call the hermetic model and the partisan model.

In the pre-democratic era, with the notable exception of fifth-century B.C. Athens (and no doubt other interesting exceptions that this author has missed), political elites tended to lodge nominating authority in a smallish subset of themselves and then bind the nominators tightly to elaborate and often complex procedures in order to insulate decisionmaking from influence.<sup>3</sup> What was feared? That a family or individual or faction might manipulate the electoral process and gain a monopoly on the powers and prestige of public office.<sup>4</sup> To head off this danger, pre-democratic procedures usually had some or all the following features:

- Isolation of the nominators in a designated place to bar them from communicating with the outside world.
- Timeliness, so that nominators were to convene and vote or cast lots at a specified moment, and not stretch out deliberations (if any) in such a way that they could be influenced by outsiders.
- The requirement of absolute majorities or supermajorities in selection of candidates to prevent someone's winning who

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<sup>2</sup> *Id.*

<sup>3</sup> See *infra* notes 5–32 and accompanying text.

<sup>4</sup> See *infra* notes 5–33 and accompanying text.

might come in first but not be preferred to all the other contenders.

- The use of sortition at some stage, either to select a group of nominators or a group of candidates.
- Rotation in office that was, though not part of nominating, part of the same effort as the nominating procedures to keep any one family or person from dominating political office.

The Venetian Doge<sup>5</sup> selection process contained most of these features from the thirteenth to the eighteenth centuries.<sup>6</sup> Immediately after the Doge died, the first random youngster encountered near the Palace was recruited to be the *ballotino*, whose job it was to draw lots from an urn.<sup>7</sup> Without further delay, thirty Great Council members were chosen by lot—and from these thirty, nine members were chosen, again by lot, whereupon these nine moved to an isolated room and nominated forty people, each of whom had to receive no fewer than seven votes—or a supermajority of nearly seventy-eight percent.<sup>8</sup> Thereupon another lottery promptly reduced these forty to twelve, which then convened and nominated twenty-five people, again with a large supermajority required for each nominee—and so forth: an iterative process of ten stages, keeping the *ballotino* busy, with alternating lottery and supermajority voting forming groups of nominees, until in the end, forty-one electors were left, who elected the Doge in an election requiring twenty-five votes, a supermajority of sixty-one percent.<sup>9</sup> Such was the system born of the “pathological fear that one family, one individual even, might somehow gain control of the Republic.”<sup>10</sup> It has not escaped the notice of quantitatively-minded political scientists that this labyrinthine voting system, involving supermajorities and approval voting, went far toward solving the conundrum the Marquis de Condorcet identified five centuries later, of hopeless and misleading results that follow from simple majorities or plurality wins in multicandidate fields.<sup>11</sup>

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<sup>5</sup> The Venetian Doge was the chief magistrate elected by the Venetian Republic.

<sup>6</sup> Coggins & Perali, *supra* note 1, at 712.

<sup>7</sup> JOHN JULIUS NORWICH, *A HISTORY OF VENICE* 166 (1982).

<sup>8</sup> *Id.* at 166–67.

<sup>9</sup> *Id.*; Coggins & Perali, *supra* note 1, at 713–15 (describing the procedure for electing the Doge).

<sup>10</sup> NORWICH, *supra* note 7, at 166.

<sup>11</sup> Coggins & Perali, *supra* note 1, at 715, 719; Miranda Mowbray & Dieter Gollman, *Electing the Doge of Venice: Analysis of a 13th Century Protocol*, 20TH IEEE COMPUTER SECURITY FOUND. SYMP. (2007), 295, 295–308 (emphasizing the approval voting feature of the Venetian Doge election system). Venice was not alone in the hermetic features (including supermajorities and use of sortition) of its voting system. See Arthur M. Wolfson, *The Ballot and Other Forms of Voting in the Italian Communes*, 5 AM. HIST. REV.

We should not be surprised by this fact—though with its usual condescension toward the past, posterity routinely marvels at the unexpected cleverness of our forebears—for others before the gifted Condorcet tackled the plurality vote problem. In the late thirteenth century (around the same time Venice perfected its Doge selection process), the Catalan Ramon Llull devised a system for electing a new mother superior of a monastery, when there were nine candidates (selected as nominees by the twenty nuns making up the monastery) and seven electors; instead of a single vote, he proposed there be multiple contests in which each nominee was compared with each of the others, and whoever won the most pairings was to be elected.<sup>12</sup> By this means, the mother superior who would emerge was not necessarily the most popular with a minority of voters but was the most preferred by all the voters. A century later, Bishop Cusanus tackled the same problem with a different solution, which he proposed for the election of the Holy Roman Emperor.<sup>13</sup> It entailed nominators ranking each candidate in order of preference and assigning one higher number for each higher ranking.<sup>14</sup> In the medieval papacy, the rules after the Third Lateran Council required that cardinals be sequestered *cum clave* (with a key, i.e., behind locked doors) from the outside world, vote in secrecy, and hold as many ballots as required until two-thirds of the conclave could settle on the new apostolic successor.<sup>15</sup> Such were three different, effective, medieval means of addressing the plurality vote problem.

In the very anti-Roman New England colonies, some but not all of these same hermetic nominating features appeared on occasion. One of the earliest American mentions of nominations occurred in the Massachusetts Bay Colony records in 1644, when the General Court provided that freemen were to meet in their towns and consider “whom they would nominate” for magistrates.<sup>16</sup> All votes were to be sealed and sent to shire towns, the couriers being instructed not to open the seals, and then to Boston where the paper ballots were to be

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11–14 (1899) (describing the complex election processes used in towns such as Parma and Bologna, as well as for papal elections).

<sup>12</sup> GEORGE G. SZPIRO, *NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT* 33–46 (2010).

<sup>13</sup> *Id.* at 50–53.

<sup>14</sup> *Id.* at 50–58.

<sup>15</sup> WILLIAM J. LA DUE, *THE CHAIR OF SAINT PETER: A HISTORY OF THE PAPACY* 113, 132 (1999). The longer the cardinals took in making an election, the more meager their rations became. *Id.*

<sup>16</sup> See 2 *RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND* 87 (Nathaniel B. Shurtleff ed., 1853).

opened, all at once, before two magistrates.<sup>17</sup> After counting the ballots, the magistrates were to identify the seven persons receiving the highest votes, and those seven names were to be sent back to the towns, where freemen were to choose among the nominated candidates.<sup>18</sup> Note the emphasis on secrecy, seals, couriers, and simultaneous opening of ballots from the different towns.

In 1683, East New Jersey devised a nomination scheme that had echoes of the Italian models.<sup>19</sup> Fifty freemen were to be chosen from each county by means of lots drawn from a box by a lad under the age of ten—the Jersey version of the Venetian *ballotino*. The fifty names were reinserted into the box and drawn again, and the first twenty-five were to be nominees, the remaining to be the nominators, who then elected two or three Council members from amongst the candidates.<sup>20</sup> By this system, the constitution combined a two-stage sortition-based process with an elective process to produce officeholders who presumably could not have gotten there by corrupt or interested means.<sup>21</sup>

All these hermetic nominating systems had one supreme goal, as Guicciardini observed: to contain the divisive forces that any polity has within itself, especially one with ambitious, proud, and wealthy families contending for posts of prestige, and to keep those forces from tearing the community apart.<sup>22</sup> They accomplished this goal with complexity, sequestration of nominators, and secrecy, often with sortition and supermajorities, and sometimes with approval voting.

Finally, in the centuries before the democratic revolutions, there is the great outlier: the hyper democracy of fifth-century B.C. Athens. We have few details about Athenian nominating procedures,<sup>23</sup> which is a peculiar lacuna since we have voluminous material about ancient political and voting systems. One nominating procedure that has come down to us involved *strategoï*, the board of generals, an all-important body in this era of nearly constant warfare. By the fifth century, *strategoï* candidates were nominated by local tribes, and generals were

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<sup>17</sup> *Id.*

<sup>18</sup> The very first mention of nominations occurs in 1642. *See id.* at 21 (laying out rules as to “the most able and fit men in this jurisdiction to bee put to nomination for magistrats”).

<sup>19</sup> *See* Francis Newton Thorpe, *The Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683*, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2574, 2574–75 (1909).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Coggins & Perali, *supra* note 1, at 709 (citing Guicciardini, *supra* note 1, at 186–87).

<sup>23</sup> E. S. STAVELEY, GREEK AND ROMAN VOTING AND ELECTIONS 102 (1972) (noting an absence of details about the Athenian electoral process).

then elected from amongst them by the polis-wide assembly.<sup>24</sup> This was an early version of what would later become a powerful system for conferring authority on officials by combining local nominations with national or community-wide election—first in medieval Italy, and later still in our own constitutional convention.<sup>25</sup>

Apart from *stratego*i and a handful of other officials, in the later fifth-century Athenians filled the vast majority of public offices by lot.<sup>26</sup> The administrative or executive body was the *boule* or Council, composed of 500 members chosen by lot from the ten tribes of Athens to sit on the Council for one year only; every month a different tribe had control of the *boule*, and every day a different individual held the presidency of the *boule*—all chosen by lot, rotating annually, monthly, and daily.<sup>27</sup> Even where the Council members sat in the *boule* chamber was chosen by lot.<sup>28</sup> It has been estimated that half or more than half of Athenian citizens were Council members for at least one year in their life.<sup>29</sup>

Why all this lottery and rotation? In the view of one specialist, the Athenian methods were devised to thwart corruption, fraud, and influence, and above all to ensure that no person or family should come to monopolize a high office and thereby become a threat to the sovereignty of the assembly.<sup>30</sup> In order to make sure that no official should attain great power, lottery made sure that mediocrity prevailed in public office.<sup>31</sup> Rather than competence, charisma, brilliance, vast experience, and prestige, Athens filled its offices with the blandness of your next door neighbor, and then only for a year. Brilliance was saved for the assembly and courts. Monopoly of public experience, specialties, great ability, and fame were carefully avoided by sortition and rotation.<sup>32</sup> The unique Athenian insight was that elections themselves were dangerous; better not to have them at all.<sup>33</sup>

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<sup>24</sup> *Id.* at 40–41.

<sup>25</sup> Hagen Keller, *Electoral Systems and Conceptions of Community in Italian Communes (Twelfth-Fourteenth Centuries)*, *REVUE FRANCAISE DE SCIENCE POLITIQUE (ENG. VERSION)*, 2014/6, at 29, 29–31 (Sarah-Louise Raillard trans.). For a discussion of the American Constitutional Convention, see *infra* Section II.

<sup>26</sup> JAMES WYCLIFFE HEADLAM, *ELECTION BY LOT AT ATHENS* 102–04 (1891).

<sup>27</sup> *Id.* at 49; STAVELEY, *supra* note 23, at 52–53.

<sup>28</sup> STAVELEY, *supra* note 23, at 95.

<sup>29</sup> HEADLAM, *supra* note 26, at 49.

<sup>30</sup> *Id.* at 31–32, 171–72, 176.

<sup>31</sup> *Id.* at 32.

<sup>32</sup> See, e.g., HEADLAM, *supra* note 26, at 32, 153, 176 (noting that the lottery system prevented any particular individual from wielding unchecked power and filled offices with mediocre occupants).

<sup>33</sup> *Id.* at 47–48. Staveley differs from Headlam in assigning the major role to rotation in office, not to sortition, and states that sortition was rather a necessary consequence of rotation, which itself was the key innovation. Whether one agrees (and there are grounds

Juries in classical Athens, which were as much political as judicial bodies, were also chosen by lot. But the method of jurors' voting, not their means of selection, was the courts' greater contribution to political innovation. By the fourth century B.C. at least, if not before, jurors (which sometimes numbered in the thousands) would cast secret ballots, and the result would not be known until all had voted and verdicts were announced.<sup>34</sup> What this momentous step did (after what appears to be the previous method of voting in public) was to insulate voters' or jurors' decisions from the decisions of fellow voters, to suppress the natural human instinct to be influenced by our peers and instead to keep intact the sovereignty of decisionmaking by each solitary individual. This goal was accomplished both by protecting ballot secrecy and by delaying the announcement of results until everyone had voted.

In the Roman Republic, the matter of who voted first and had their votes announced before others cast their votes was deemed so important that in the *comitia centuriata* (one of several voting assemblies) there was a *centuriata praerogativa* selected by lot from the first class of property owners which had the privilege of voting before the other 192 centuries.<sup>35</sup> Cicero opined that never did a candidate for consul fail to be elected who had been chosen by the *centuriata praerogativa*, so influential was this first vote.<sup>36</sup> All other classes voted in sequence, with a similar profound effect on the outcome, for which reason a movement of lower classes, or those acting for lower classes, attempted to change the voting by sequence according to class (a movement which failed).<sup>37</sup> As late as 54 B.C., there was an attempt to bribe the *centuriata praerogativa*.<sup>38</sup> When Augustus dismantled the Republic but kept its trappings, he made sure that no longer would the first century voting be chosen by lot: He created new centuries, named for his family members, that always voted first, making known to all the rest of voters the imperial preference.<sup>39</sup>

In the democracy of Athens, the secrecy of jurors' voting and the timing of announcing results were regulated to ensure the indepen-

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for skepticism), there is consensus that Athenians devised a system to protect the supremacy of the popular assembly and to prevent the rise of an identifiable, governing class. See STAVELEY, *supra* note 23, at 55. Although far from democratic, Venice's system, also using sortition, had a similar goal. NORWICH, *supra* note 7, at 166.

<sup>34</sup> ARISTOTLE, *THE CONSTITUTION OF ATHENS*, reprinted in *ARISTOTLE: THE POLITICS AND THE CONSTITUTION OF ATHENS* 209, 262–63 (Stephen Everson ed., 1996).

<sup>35</sup> STAVELEY, *supra* note 23, at 155.

<sup>36</sup> *Id.* at 252 n.296.

<sup>37</sup> *Id.* at 169.

<sup>38</sup> *Id.* at 205.

<sup>39</sup> JOHN R. PATTERSON, *POLITICAL LIFE IN THE CITY OF ROME* 72 (2000).

dence of individual decisions, itself a key to democracy. By contrast, the same voting mechanisms were regulated in Rome to weight the result toward the upper class centuries and then finally toward the emperor. In both places, sequencing or not sequencing of votes was understood to be crucial.

## II

### THE DEMOCRATIC ERA

The advent of representative democracy brought to an end the hermetic system for nominations. In America, the changes unfolded gradually, by fits and starts, in the early decades of the Republic. They did not begin with the Constitution itself; rather the era of Constitution writing and the first fifteen years of the new Republic form a hinge on which nominating systems swung between the pre-democratic and post-democratic eras.

Several themes dominated the Framers' lengthy discussions in Philadelphia in 1787 of the vexing problem of how to elect the President. One of those, on which there was no disagreement, was the need to shield the process from influence and manipulation—so-called “cabal” and “intrigue,” whether foreign or domestic<sup>40</sup>—wherefore, after a summer of repeated voting on the matter, the national legislature was ultimately *not* selected as the means for electing the chief executive.<sup>41</sup> The Framers also feared violating the separation of powers and making the President dependent on the legislature.<sup>42</sup>

Popular election was favored by James Madison, Gouverneur Morris, and James Wilson, but ultimately it too was rejected for several reasons—among them that, as George Mason put it, the act which should be performed by those who know the most about the candidates would be performed by those who know the least.<sup>43</sup> Popular election had one other distinct drawback: namely, it would be an election by free inhabitants, and such an election would deprive the slave states of the valuable bias they had successfully built into congressional representation (as part of the Great Compromise of the convention), whereby a slave counted as three-fifths of a free inhabitant for apportionment purposes. Madison himself drew attention to this drawback of popular election, a drawback that likely played a role in the continued survival of election by the legislature (accepted in multiple separate votes by mid-August), notwithstanding nearly

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<sup>40</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103, 500 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS].

<sup>41</sup> U.S. CONST. art II, § 1.

<sup>42</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 102–03, 112, 499, 501.

<sup>43</sup> *Id.* at 118–19.

everyone's fear of making the chief executive the pawn of the Congress.<sup>44</sup>

After a summer of impasses, on September 4, the Committee of Eleven (or of Postponed Parts) came back after a brief four days and proposed an Electoral College made up of electors who, chosen by whatever means states should choose, would each cast two votes for president, and if no candidate's total reached a majority of electors, the Senate should convene and choose the President from the top five vote getters (or break a tie).<sup>45</sup> After all the previous wrangling, the Framers surprisingly accepted this *de novo* mechanism almost instantly. Why? There is no easy answer to the question, but one of the obvious features of the mechanism was that it incorporated key features of the Great Compromise already agreed to in July, in two respects: First, *representationally* the Electoral College precisely duplicated the apportionment of seats in Congress—each state received as many electors as it had members in the House and Senate, and that apportionment gave to large states and to slave states a decided advantage; and second, *operationally* the new method balanced this bias toward large and slave states by assigning a contingent role to the Senate, which favored the small and the free (in much the same way that operationally the Senate served as a balance to the House in decisions of Congress). It was this replication of the key balancing compromises that had earlier saved the Convention from breaking up that very likely won the new proposal almost immediate acceptance.<sup>46</sup>

Indeed, by this stage in the Convention's deliberations, the Framers were as much in need of a compromise as they had been in July, for although the big-state-small-state fight was largely resolved, the slave-state-free-state fight was intensifying with each passing week. Not only did the delegates argue about the slave trade, they were also keenly aware of how different voting mechanisms, including voting for president, could advantage or disadvantage slave states versus free states.<sup>47</sup> By August 31, when the Committee of Eleven was

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<sup>44</sup> *Id.* at 111. For a good summary of the Electoral College decision, see Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 46–57 (1986). Slonim does not advance the argument that the Electoral College was a nominating venue.

<sup>45</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 494.

<sup>46</sup> Slonim, *supra* note 44, at 56. Slonim sees the Senate's contingent role as favoring slave states; although nothing in this matter is crystal clear, it would seem the weight of evidence points to delegates' regarding the Senate's role as favoring free states and as a balance to the Electoral College wherein citizens of slave states were disproportionately represented by virtue of the three-fifths rule. See *infra* notes 62, 71, 97 and accompanying text.

<sup>47</sup> In addition to the Madison observation above about popular elections disfavoring states with many slaves, other events in August included Luther Martin's complaining that

appointed to try to resolve the unresolvable matters, feelings were as raw as they had been all summer between Northern and Southern delegates.<sup>48</sup>

So when the Committee of Eleven came back on September 4 and introduced its novel solution,<sup>49</sup> the fact of its precisely replicating the earlier agreed upon compromises creating the Congress must have been greeted with a sigh of relief by the weary disputants. How the Framers intended the presidential election system actually to function is ultimately unknowable. Some delegates opined that the election would be decided in the Electoral College; more delegates said it would be decided in the second stage, in the Senate; and the bulk of the short debate that ensued over two days took as its assumption that the Senate would be the eventual elector of the President.<sup>50</sup> As Max Farrand said in another context, sometimes the delegates' motives remained hidden beneath the surface of convention proceedings,<sup>51</sup> and one must do one's best to assemble in one analysis the statements, the logic of measures being proposed, and the voting record of the varying state delegations in an effort to reconstruct the delegates' intentions. Using that approach, one concludes with near certainty that the Founders intended the Electoral College to be the first stage in a two-stage election process, or, in other words, to be the forum where candidates would be nominated, from amongst whom the President would be elected by the Senate.

The evidence for this conclusion is as follows: First, if the plan was so readily accepted after weeks of increasing contention because it duplicated the apportionment and the operations of Congress—and this seems unarguably the case—logically the Senate had to be

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the slave trade would be encouraged by the three-fifths rule, and John Rutledge's reply that the North should welcome an increase in the trade as it benefited Northern commerce. See 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 364. On August 24, just one week before the Committee of Eleven was appointed, Rutledge moved that the presidential election in the national legislature should be by joint, not concurrent, vote. *Id.* at 401–03. There would be no reason for Rutledge, hailing from a small state, to propose joint action, nor for two other small slave states (plus the big slave state Virginia) to back that—since concurrent action would have better protected the presidential interests of small states by requiring separate Senate approval—were it not for the fact that slave states, even small ones like Rutledge's South Carolina, were advantaged in congressional apportionment by the three-fifths rule that Luther Martin mentioned in connection with the slave trade. For additional instances of contention between North and South in the critical days before the Committee of Eleven went off to devise a presidential selection solution, see *id.* at 220, 306, 415–17, 445–53.

<sup>48</sup> *Id.* at 475.

<sup>49</sup> *Id.* at 493–94.

<sup>50</sup> *Id.* at 499–525.

<sup>51</sup> MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 103 (1913).

assumed to play a key role, not a contingent role, in electing the President. Any other result would not have duplicated the congressional representational compromise and would not have balanced the interests of large and slave states in one venue (Electoral College) with those of small and free states in the other (in the Senate). If it had been the assumption that the Electoral College be the final decisionmaking body, the small and free states would have given up in the choice of president precisely what they were unprepared to give up in the makeup of the Congress.

Second, if the Framers had intended the Electoral College usually to be the venue for choosing the President, it is hard to explain some very anomalous features of the plan. Article II provided for each elector casting two votes for president<sup>52</sup>—already, this strikes one as an odd way to elect a president: by voting for two people, without knowing which one or indeed who else might be elected. Elections are a choice; this feature was about creating many choices (five choices, in fact, to be sent to the Senate). Creating multiple choices was commonly a feature of nominating systems, but never of elections.<sup>53</sup> One of the more striking features of Article II is the absence of rules by which electors were to be chosen—they were to be chosen *by whatever means the legislatures decided*. It is hard to imagine that the matter of electing the President—the most nettlesome matter, and one of the most important, that the convention dealt with—was to be decided by electors the choice of whom the Framers left randomly to the whims of the different states. Leaving the methods of choosing electors to the discretion of states had more in common with electors as nominators than as deciders.

Third, a similar two-stage system involving states nominating candidates had earlier in the summer been proposed by John Dickinson. On July 25, Dickinson observed, “The greatest difficulty seemed to arise from the partiality of the States to their respective Citizens. But, might not this very partiality be turned to a useful purpose? Let the people of each State chuse its best Citizen,” and from the thirteen resulting favorite sons, who would all be candidates, the legislature should elect the President.<sup>54</sup> Dickinson was one of the most deeply experienced leaders in Philadelphia: former Governor of not just one but two states (Delaware and Pennsylvania), author of the first draft of the Articles of Confederation, and unanimous chairman of the

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<sup>52</sup> U.S. CONST. art. II, § 1.

<sup>53</sup> A famous example of nominators casting more than one vote to nominate candidates, but just one vote to elect the leader, is the process for choosing the Venetian Doge. See NORWICH, *supra* note 7, at 166–67.

<sup>54</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 114–15.

Annapolis Convention immediately preceding the Philadelphia Convention.<sup>55</sup> Five weeks after he made his state-nomination-national election proposal, John Dickinson was a member of the Committee of Eleven that came back with the Electoral College solution.<sup>56</sup>

Fourth, when the Framers debated the Committee of Eleven's new draft, with its double vote for president, it was believed that most electors would cast one vote for the state's favorite son and the other vote, as required by Section 1, for someone not a resident of the elector's state.<sup>57</sup> Indeed, this was one of the reasons for giving each elector two votes—because it was thought electors would most certainly waste one vote on a favorite son.<sup>58</sup> But to be elected, the winner had to receive votes from a majority of electors. Bear in mind that Article II required the electors to convene on the very same day each in their own state.<sup>59</sup> The journey time from, say, New England to Georgia was about three weeks by stage coach,<sup>60</sup> and therefore it was not easy to imagine collusion in electoral voting. Political alliances, let alone parties, had not formed yet in 1787; and apart from the figure of Washington, there were no major public figures known and esteemed across a country that was strikingly characterized by state pride and parochialism. As George Mason put it, pursuant to the Electoral College system, nineteen out of twenty times the election would be decided in the Senate.<sup>61</sup>

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<sup>55</sup> Jane E. Calvert, *Liberty Without Tumult: Understanding the Politics of John Dickinson*, 131 PA. MAG. HIST. & BIOGRAPHY 233, 234 (2007).

<sup>56</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 473 (discussing the appointment of the Committee of Eleven members). Note that Dickinson's proposal echoed the local nominations / national election mechanism employed by earlier polities. See *supra* note 25 and accompanying text. Even before Dickinson, in mid-July, James Wilson, citing the Massachusetts model, had also proposed a two-stage process wherein if voters could not agree by majority "in favor of one of the candidates," the national legislature should decide. "This would restrain the choice to a good nomination at least . . ." 2 FEDERAL CONVENTION RECORDS, *supra*, at 29–30. Wilson's proposal, however, was for a contingent election, rather than certain or likely election in the second stage. *Id.*

<sup>57</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 113–14.

<sup>58</sup> On July 25 at the Convention, Hugh Williamson first introduced the notion of three votes per elector; Morris quickly picked up the idea and amended the proposal to two, saying at least one had to be cast not for someone of his own state. *Id.*

<sup>59</sup> U.S. CONST. art. II, § 1. This was a feature stressed in subsequent debate, as an argument in favor of the Electoral College, as it would be difficult for any collusion or "undue influence" to capture a selection process which was dispersed to far flung states all voting on the same day. 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 347.

<sup>60</sup> HENRY ADAMS, *THE UNITED STATES IN 1800*, at 11 (1955). In 1800, it required three days for a "lightly equipped traveler" to transit from Boston to New York, at an average speed of four miles per hour. *Id.* at 8.

<sup>61</sup> See 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 500–01. He amended the odds to forty-nine out of fifty times during the ratification debate in Virginia. See FARRAND, *supra* note 51, at 167–68.

Finally, the most persuasive evidence comes from the mouths of the Framers themselves, who frequently described the presidential selection method as a compromise between large states, which did the nominating via the Electoral College, and small states, which did the electing via the Senate.<sup>62</sup> As the small state delegate Roger Sherman explained the bargain, trying to sell it to skeptical big state delegates, “if the Small States had the advantage in the Senate’s deciding among the five highest candidates, the Large States would have in fact the nomination of these candidates.”<sup>63</sup> Madison’s first comment on the proposal on the Convention floor was to say that the election would go to the Senate, that electors would occupy themselves with “making candidates” rather than choosing a president, and that by this means they would be “giving the nomination of the candidates to the largest States.”<sup>64</sup> Charles Pinckney likewise noted that the proposed method “threw the whole appointment in fact into the hands of the Senate.”<sup>65</sup> Mason objected that by requiring a majority of electors to elect a president, the proposal necessarily gave the final choice to the Senate and therefore he suggested that the election not require a majority of electors, to keep the decision from ever going to the Senate.<sup>66</sup> Hamilton agreed.<sup>67</sup> This amendment the Convention notably did not take up. In other words, having had it pointed out to them that a plurality win would make certain the Electoral College would be the decisionmaker, the Framers kept the threshold at majority, knowing this would likely refer the final choice to the Senate.<sup>68</sup>

During the final September debate on Article II, the critics of the draft did not protest the election’s being decided in the capital; they objected to its being decided in the Senate, which they had already empowered to approve the President’s cabinet and ambassadors and justices and foreign treaties, and now with the presidency being thrown in its lap, the President was set to become, as James Wilson put it, “the Minion of the Senate.”<sup>69</sup> And so it was that on September 6, two small state delegates crafted a clever fix to replace the Senate with the House, with the proviso that votes in the House should be

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<sup>62</sup> Founders generally made no mention of compromises between slave and free states; the word “slavery” nowhere appears in the Constitution. See *infra* note 97 and accompanying text for a later explicit reference to slave states in the Electoral College being balanced by free states in the House.

<sup>63</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 512–13.

<sup>64</sup> *Id.* at 500.

<sup>65</sup> *Id.* at 501.

<sup>66</sup> *Id.* at 512.

<sup>67</sup> *Id.* at 524–25.

<sup>68</sup> *See id.* at 525.

<sup>69</sup> *Id.* at 523.

counted by states (not by representatives), and this amendment was immediately agreed to, overwhelmingly. The bargain remained intact.<sup>70</sup> Voting by states in the House, the small and the free states would outnumber the large and the slave states.<sup>71</sup>

When first presenting the plan on behalf of the Committee of Eleven, Gouverneur Morris had argued that the Electoral College would in fact make the final decision because with the double vote, just a little more than one-quarter of votes was required to attain a majority.<sup>72</sup> One suspects he made this argument half-heartedly (to blunt immediate negative reaction to investing so much power in the “aristocratic” Senate).<sup>73</sup> In one of the most efficient retorts of the summer proceedings, Mason replied to Morris, “those who think there is no danger of there not being a majority for the same person in the first instance, ought to give up the point to those who think otherwise.”<sup>74</sup> Morris did give it up. Years later, when opposing the Twelfth Amendment, Morris argued for the double vote for electors (which the Amendment was to abolish) precisely because, he said, with it “the chance of an absolute choice is greatly diminished . . . and the decision among five candidates is preserved to the States.”<sup>75</sup> In the ratification debate in Virginia, Madison, who had come around to the compromise once the House replaced the Senate, noted that the solution should please small states, since “in the eventual election, the small states will have the advantage.”<sup>76</sup> And years later, in 1825, James Madison looked back on the compromise and, writing to Henry Lee, observed the Constitution “is regarded as the result of a compromise between the larger and smaller States, giving to the latter the advantage in selecting a president from the candidates, in consideration of the advantage possessed by the former in selecting the candidates.”<sup>77</sup>

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<sup>70</sup> *Id.* at 527.

<sup>71</sup> Large states were just three: Massachusetts, Virginia, and Pennsylvania; small or smaller were ten. Luther Martin referred to this division of three against the others. 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 151. Free states were seven: New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, and Rhode Island, outnumbering by one the six slave states: Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Allocating one vote per state in either chamber of Congress favored small and free states.

<sup>72</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 512.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Letter from Gouverneur Morris to Lewis R. Morris (Dec. 10, 1803), in 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 404–05.

<sup>76</sup> James Madison, Remarks in Virginia Convention, in 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 330.

<sup>77</sup> 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 464. Jonathan Dayton, among others, stated in the Senate in 1803 that the presidential election system was a compromise

Thus was created the Republic's first presidential nominating system, bearing the characteristics of older, hermetically sealed systems of the pre-democratic era—sequestered electors walled off from influence and from each other (state by state); simultaneous voting in far-flung state capitols, making impossible coordination and campaigns; an element of randomness or uncertainty as a result of the double vote; and a production of five candidates chosen by virtue of their reputation alone without the interference of canvassing or other forms of the dreaded “cabal and corruption.”<sup>78</sup> Sharing with northern Italian republics the same goal of suppressing politics in the production of candidates, the Electoral College shared also some of the mechanics— isolation, approval voting, multiple candidates, strict control over timing, and even a bit of unpredictability.<sup>79</sup>

What unfolded then was unexpected. Within ten years of Philadelphia, the country's political elites had split into warring factions of Federalists and Democratic-Republicans which worked overtime to get slates of essentially pledged electors chosen in each state that would vote for the faction's national candidates.<sup>80</sup> And this very

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between large and small states. 3 FEDERAL CONVENTION RECORDS, *supra*, at 401–02. It is a puzzle why many able commentators have not noted the creation of the Republic's first nominating system. Without naming it as such or explaining the matter, Max Farrand, the editor of the Federal Convention Records, did note in passing that the founders intended the election to be made in the House. FARRAND, *supra* note 51, at 167–68.

<sup>78</sup> 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 500.

<sup>79</sup> That the Framers were familiar with continental election systems there can be little doubt. The Doge was mentioned on the floor of the Convention. *Id.* at 102. Benjamin Franklin was acquainted with one of France's most accomplished experts in voting, the Marquis de Condorcet. See *Franklin Papers*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/about/Franklin> (follow “Franklin Papers” hyperlink on left; then add “Condorcet” to search bar and click “Go”) (last visited Aug. 9, 2018) (mentioning Condorcet in more than forty documents, including letters between Franklin and Condorcet); see also *The Preliminary Cumulative Index*, THE PAPERS OF BENJAMIN FRANKLIN, <https://franklinpapers.yale.edu/preliminary-cumulative-index> (follow “View PDF” hyperlink) (last visited Aug. 9, 2018) (showing entries for correspondence with Condorcet). Morris subsequently befriended Condorcet during his mission to Paris. 1 GOUVERNEUR MORRIS, A DIARY OF THE FRENCH REVOLUTION 220 (Beatrix Cary Davenport ed., 1939). Importantly, lottery, which had featured in European nominating systems, was proposed seriously in July by one of the more thoughtful delegates, James Wilson, as a means of selecting national legislators who would be electors. Morris was intrigued, saying “chance” was better than “intrigue,” in a sentence that could have been spoken by a Venetian or Athenian. 2 FEDERAL CONVENTION RECORDS, *supra* note 40, at 103, 105. Unpredictability, a valued feature of northern Italian city-state elections systems, was introduced by means of multiple nominees and multistage voting systems. See Keller, *supra* note 25, at 31–33, 37–41 (describing examples of complex voting systems, including a discussion of elections in Vicenza).

<sup>80</sup> LOLABEL HOUSE, A STUDY OF THE TWELFTH AMENDMENT, OF THE CONSTITUTION OF THE UNITED STATES 25, 32 (1901); TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 49, 57 (1994).

canvassing and organizing to elect a president and vice president, extending to state and local committees already in the 1790s, was the principal driver for the formation of parties.<sup>81</sup> By enfranchising a large part of the population and giving it a role, even indirectly, in choosing the President, the Framers unintentionally but ineluctably brought into being the need to organize that large and spread out electorate—and that meant parties. When parties began their campaign work, already in the 1790s, they ran smack up against the Venetian-like hermetic features of Article II, which were ill-suited to partisan activity; indeed, one historian has perceptively argued that these anti-cabal procedures actually gave an impetus to party organizing, since the electors were made to convene on the same day far from each other, leaving no way to consult or communicate unless one did so long in advance, which in turn required time, writing, and canvassing; in short, party-like organization.<sup>82</sup>

The Electoral College feature most at odds with the emerging partisan activity was the double vote of the electors, for it put the outcome of electoral voting outside the parties' control. If a party instructed its electors to cast both votes for the top two party candidates (say, Adams and Pinckney in 1796) and the other party instructed one or two of its electors to use one of their two votes in favor of the second ranked candidate of the opposing party, Pinckney could be elected president instead of Adams. Adams was keenly aware of this danger and instructed Federalists to throw away their second vote; enough of them followed orders that Jefferson, not Pinckney, became vice president.<sup>83</sup> If on the other hand, a party asked electors to vote uniformly for the party's top two figures, one of two unfortunate things could happen: There could be a tie, which is what happened in 1800,<sup>84</sup> or a candidate could suffer the fate Adams successfully avoided of being defeated by his own running mate.<sup>85</sup> In the tie of 1800, the Republicans felt themselves badly used by Federalists in the House, who came close to electing Aaron Burr (more repre-

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<sup>81</sup> See KURODA, *supra* note 80, at 27 (“It is a supreme irony that the Framers made a Constitution which sought to minimize the influence of political parties but actually required parties to make it work. The first Washington administration brought forth the beginnings of the Federalist Party and the opposition of the nascent Republican Party.”).

<sup>82</sup> See *id.* at 27. The beginning partisan activity did not even await the 1790s; already in 1789 in the New York struggles between Federalists and Anti-Federalists, the disputants saw electors as party loyalists, not as disinterested patriots left to their own best judgment. *Id.* at 49. Also see Rufus King's speech in the Senate in 1816, in which he laments the failure of Article II to achieve its goal of preventing “undue agency or influence” and coordination among electors. 3 FEDERAL CONVENTION RECORDS, *supra* note 40, at 422.

<sup>83</sup> KURODA, *supra* note 80, at 66, 70.

<sup>84</sup> *Id.* at 96–99.

<sup>85</sup> *Id.*

sentatives voted for Burr than for Jefferson), and thereupon resolved to change the Constitution.<sup>86</sup> Instead of the double vote for president, the proposed rule called for electors to cast one vote each for president and vice president, and for sending only the top three vote-getting candidates to the House, rather than five, in the event of no one's attaining a majority of the college.

Federalists, who had proposed similar changes after 1796,<sup>87</sup> strongly objected, and in the debates in Congress in 1802 and 1803 they said that under the original system, with the double vote and the role of the House, one did not know which person would end up as president and therefore electors were inclined to vote purely for two superior people, whereas with designation (as it was called) and no double vote, the majority party would control the electoral process.<sup>88</sup> They lamented that the safeguards against corruption and cabal in the current Article II would be blown away by ceding control to parties.<sup>89</sup> Moreover, said Uriah Tracy in the Senate, designation would "render more practicable and certain the choice by Electors . . . [whereas] nothing can be more obvious, than the intention of the plan adopted by our Constitution for choosing a President. The Electors are to nominate two persons, of whom they cannot know which will be President."<sup>90</sup> Tracy continued, saying that the proposed amendment "is avowedly intended to secure a choice by Electors, and to prevent a resort to the House."<sup>91</sup> He foresaw coming despotism: the sacrifice of small states now, but liberty later; and warned of the "potent magic of numbers and wealth."<sup>92</sup> He feared for the Republic itself, calling the Constitution, in a phrase he uttered six years before Lincoln was born, "the last, best hope of man."<sup>93</sup>

Although focusing on the injustice to small states, Federalists mentioned in debate at least two other grievances. First, that the majority party would dominate the process, whereas before, the lottery-like effect of the double vote combined with eventual election by the House saved some leverage for the minority party.<sup>94</sup> One can almost read "small states" to be a synonym for "the smaller party." Second, in objection to the Twelfth Amendment, Federalist Senator William Plumer of New Hampshire also complained that it would

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<sup>86</sup> HOUSE, *supra* note 80, at 39–44; KURODA, *supra* note 80, at 101.

<sup>87</sup> HOUSE, *supra* note 80, at 39–40; KURODA, *supra* note 80, at 72.

<sup>88</sup> 13 ANNALS OF CONG. 144 (1803); KURODA, *supra* note 80, at 131.

<sup>89</sup> 13 ANNALS OF CONG. 141 (1803).

<sup>90</sup> *Id.* at 162–64.

<sup>91</sup> *Id.* at 172.

<sup>92</sup> *Id.* at 179.

<sup>93</sup> *Id.* at 165.

<sup>94</sup> *Id.* at 155, 164.

strengthen the slave states' lock on the presidency.<sup>95</sup> Plumer was putting his finger on the other, less advertised component of the presidential selection compromise—the fact that the Electoral College mimicked congressional representation meant that it counted three-fifths of slaves in allocating electoral votes and, by Plumer's count, gave slave states an extra eighteen votes they would not have had but for the three-fifths rule.<sup>96</sup>

In the original Article II, this bias toward slave states was balanced by the ultimate presidential choice being made in the House (voting by states), where slave states as well as large states were outnumbered by free states and small ones. If, however, now, in 1803–04, the introduction of designated voting in the Electoral College and the elimination of the double vote meant that the House was to be deprived of its final say, it meant to Plumer and others in eastern states that slave states were to have a lock on the presidency forevermore. His was a prescient forecast: Nine of the first twelve presidents were slaveholders, and two other ante-bellum presidents, Franklin Pierce and James Buchanan, were helped into office by the electoral votes of proslavery states.<sup>97</sup>

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<sup>95</sup> *Id.* at 155.

<sup>96</sup> *Id.*

<sup>97</sup> For myriad sources discussing these early presidents' personal links to slavery, listed in chronological order by presidential term, see Diary Entry, George Washington (Feb. 18, 1786), NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/01-04-02-0003-0002-0018> (last visited Aug. 9, 2018), where Washington lists his slaves; DUMAS MALONE, JEFFERSON THE VIRGINIAN 32, 114, 390–91 (1948), discussing Jefferson's ownership of slaves, including that his first memory was of being borne on a pillow by a mounted slave, *id.* at 21; RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 619, 624–27 (1971), discussing the incongruence between Madison's reliance on slave labor and his antislavery views; Gerard W. Gawalt, *James Monroe, Presidential Planter*, 100 VA. MAG. HIST. & BIOGRAPHY 251 (1993), which details Monroe's management of his plantations and slaves; Mark R. Cheatham, *Andrew Jackson, Slavery, and Historians*, 9 HIST. COMPASS 326 (2011), addressing Jackson's slave ownership; FREEMAN CLEAVES, OLD TIPPECANOE: WILLIAM HENRY HARRISON AND HIS TIME 250 (1939), discussing Harrison's purchase of two slaves; John G. Deal & the Dictionary of Virginia Biography, *John Tyler (1790–1862)*, ENCYCLOPEDIA VA., [https://www.encyclopediavirginia.org/Tyler\\_John\\_1790-1862](https://www.encyclopediavirginia.org/Tyler_John_1790-1862) (last modified July 25, 2016), where Tyler is described as being a slaveholders throughout his life; WILLIAM DUSINBERRE, SLAVEMASTER PRESIDENT: THE DOUBLE CAREER OF JAMES POLK (2003), for a discussion of the fact that Polk owned slaves and of his stance on slavery-related issues; Holman Hamilton, *Election of 1848*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–2008, at 863, 874 (Arthur M. Schlesinger Jr., et al. eds., 2002), addressing Taylor's ownership and management of a Mississippi plantation; Roy Nichols & Jeannette Nichols, *Election of 1852*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–2008, *supra*, at 919, 934, 942–44, 948, which explores the effects of the Compromise of 1850 on Fillmore's fate at the 1852 Whig national convention and Pierce's ascension at that year's Democratic national convention and in the general election; and Roy Nichols & Philip S. Klein, *Election of 1856*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–2008, *supra*, at 1005, 1025, 1032, emphasizing the importance of Buchanan's views on slavery and southern support toward

Another Federalist speaker predicted that for similar reasons, the Twelfth Amendment would lead to an alliance of the South and West to dominate the executive branch and might lead to “a civil war . . . and a separation.”<sup>98</sup> More important for our present purposes than their prescience, the Federalists’ comments in 1803 drew attention to the fact there were two vital compromises behind the presidential selection system adopted in 1787—one mentioned often by Framers, between large and small states, and one less palatable and not often advertised, between enslaving states and free states—and that neither compromise would have been meaningful if the Framers had not conceived of the Electoral College as the nominating, not the electing, body.

In the elegiac and foreboding Federalist commentary on the Twelfth Amendment, one reads the last expression of the pre-party, hermetic ideal of how to nominate and elect a disinterested leader, as the age of parties took over.<sup>99</sup> The Amendment was ratified in 1804, in time for Jefferson’s re-election, in what can be considered the first time we reformed our presidential nominating system. In nominations henceforward, in theory as well as in practice, virtue was replaced by interest, pristine seclusion by canvassing and conventions, and disinterested citizens by party adherents.

### III THE PARTY SYSTEM

In the party system that took over nominations, voters, convening normally in caucuses at the county and congressional district level, would select delegates to a state convention, who in turn would select delegates to the national convention, to choose the party’s nominee. As conceived by Martin Van Buren, parties, by controlling the nominating system, were to contain the unregulated personal ambition of candidates, prevent demagoguery, and discourage the sectional divi-

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his 1856 victory. In the calculation above – nine of the first twelve presidents – Martin Van Buren is not included (who would make it ten if he were) because although the heir to slaves he could not be described as proslavery in his public life.

<sup>98</sup> 13 ANNALS OF CONG. 146 (1803). For brief summaries of the Twelfth Amendment debates, see HOUSE, *supra* note 80, and KURODA, *supra* note 80, at 131–43. Neither shares this author’s interpretation of the Electoral College’s intended function.

<sup>99</sup> As James Ceaser has made clear, the age of parties took a while to get fully underway, particularly in the years of the eclipse of the Federalist party following 1815. It was not until the 1830s or even 1840 that fully-fledged parties took over the nomination process for good. See JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 118 (1979). Ceaser, who kindly read a draft of this paper and saved the author from several errors, has a different interpretation of the Twelfth Amendment debate and of the intended function of the Electoral College from the one advanced herein.

sions that candidates, left to themselves, would be likely to exploit and worsen to advance their presidential prospects.<sup>100</sup> In conceiving parties so, Van Buren was pursuing the same goal as pursued by pre-democratic nominating systems, whether Venetian or Philadelphian: saving the Republic from ambitious men. But in a democracy, his choice was party.<sup>101</sup>

As historian Alan Ware has stressed, from the age of Jackson on, nominating politics were characterized by mass participation.<sup>102</sup> Although that system and ours today share mass participation of voters, there are differences between the two. In the nineteenth century, once national delegates emerged from the multitiered selection process, they were not pledged to a candidate (any more than electors were initially intended to have been).<sup>103</sup> Pledging was not logical when candidates did not campaign for the nomination but rather indicated their availability; nor did it come naturally to delegates who themselves were prominent citizens and party leaders (survivors of this filtered, layered selection process) “from society’s upper crust,” as historian John Reynolds has noted, “free agents required to do only what they thought best for the party and the public interest.”<sup>104</sup>

Because they were unpledged, delegates were subject to control by party bosses. That led to problems of corruption that eventually undid the system, but in the meantime it also led to party bosses using their clout to try to compromise the great, divisive issues, if they could.<sup>105</sup> Beginning before the Civil War and continuing for decades thereafter, the custom prevailed of seeking to contain the nation’s centrifugal forces through party politics. Candidates for president were not slow to pick up on this and on the fact that the more they tried to bridge the country’s yawning social and economic gaps, the better were their chances of being nominated. Few campaign pronouncements have been so effective as the pleasing straddle of the unprepossessing Zachary Taylor, “I am a Whig, but not ultra Whig.”<sup>106</sup> Democratic candidates were especially attentive to this

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<sup>100</sup> See *id.* at 135, 168 (summarizing Van Buren’s contribution to the positive regard for political parties).

<sup>101</sup> See *id.*

<sup>102</sup> See ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* 200 (2004) (describing the belief, from the Jacksonian period onward, that “if parties were at the center of political life, they should be highly participatory, providing access to the political system for all those who wanted it”).

<sup>103</sup> JOHN F. REYNOLDS, *THE DEMISE OF THE AMERICAN CONVENTION SYSTEM, 1880–1911*, at 61 (2006).

<sup>104</sup> *Id.*

<sup>105</sup> ALAN WARE, *THE DEMOCRATIC PARTY HEADS NORTH, 1877–1962*, at 24–27, 53 (2006).

<sup>106</sup> Hamilton, *supra* note 97, at 381.

integrative, unifying function of nominating politics because of the two-thirds rule, which from 1832 to 1936 required the nominee to attain a two-thirds majority of delegates.<sup>107</sup> Merely being the most popular, most famous, or richest candidate would not be a sufficient condition to be party leader. Rather, the successful aspirant had to be the least disliked and most broadly acceptable, among all candidates; not just the one with a plurality or even majority of convention votes, but the one who received a supermajority of at least two-thirds of votes. The two-thirds rule had a profound effect on candidates, requiring them to pick their way through a minefield of issues and present themselves as the most broadly acceptable—if not most beloved—candidate with the best chance of winning.<sup>108</sup>

As a result of these two conditions—unpledged delegates and the search for consensus—national party conventions in the nineteenth and early twentieth centuries were different from what we have been accustomed to in recent decades. They were places where party bosses bargained and delegates deliberated and chose. Rarely was it known who would be the nominee before the convention convened. In recent years, we dislike it when on those rare occasions the primaries do not produce a winner until near convention time, but for most of our history, by design, one could not know until convention time because the system made that impossible. Dark horses sometimes won. Often the convention held multiple ballots and finally chose someone who had not started off as the leader in the vote count but who by the end had become the architect and beneficiary of multiple compromises. The unlikely James Polk (twice-defeated governor of Tennessee) was the beneficiary in 1844 of Martin Van Buren's principled but fatal letter against annexing Texas.<sup>109</sup> The most protracted balloting in Democratic national conventions occurred in 1924, when western Drys battled urban Wets through so many ballots, lasting so many weeks, that one state leader told his delegates (in Theodore White's account) that on the next ballot they would either have to move to a more liberal candidate or to a cheaper hotel.<sup>110</sup>

This nominating system, organized on the principle of consensus, began to change around the turn of the twentieth century. As the population grew, it became harder for state party leaders to control the caucus and convention process. Simultaneously, Yankee reformers,

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<sup>107</sup> See FREDERICK W. DALLINGER, *NOMINATIONS FOR ELECTIVE OFFICE IN THE UNITED STATES* 40–41 (1897) (describing the two-thirds rule).

<sup>108</sup> See examples below of candidates doing this careful positioning.

<sup>109</sup> Robert W. Johanssen, *Prelude to War: James K. Polk*, PBS, [www.pbs.org/keramexicanwar/prelude/jp\\_james\\_k\\_polk.html](http://www.pbs.org/keramexicanwar/prelude/jp_james_k_polk.html) (last visited Aug. 9, 2018).

<sup>110</sup> THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 1960, at 147 (1961).

resenting the emergence of urban bosses who represented increasingly immigrant constituents, condemned the boss-controlled delegate selection system.<sup>111</sup> Ever-larger corporations (railroads and shipping companies especially) corrupted many state parties, and reformers like Robert La Follette settled on the direct primary as the tool to break the undemocratic nexus of business and party organizations.<sup>112</sup>

Reformers gathered at an unprecedented national conference in New York in 1898 to consider changes to the nomination system.<sup>113</sup> Most backed the direct primary, saying that it would raise turnout, reduce the influence of money, break the power of the machines and their paymasters, and produce better candidates.<sup>114</sup> Presciently, a few reformers at the conference questioned this emerging orthodoxy. The doubters, such as Thomas Johnson of Cleveland, said that open, direct primaries would be expensive and therefore favor rich candidates; they would be decided by largely uninformed voters; the party could not stop non-party members from participating; and there was no assurance that the winner of a primary would actually be favored by a majority, or supermajority, of voters, since in a multi-candidate field, a simple plurality prevails and one with a determined minority base of support could be crowned the winner.<sup>115</sup> The question was raised by, among others, Frederick Dallinger, the first historian of the nominating system: How would a direct primary system produce a majority winner and unite the party for the fall?<sup>116</sup> Dallinger, like many reformers around 1900, was a bigot; he feared that in urban areas direct primaries would be dominated by immigrants.<sup>117</sup> But bigotry aside, the drawbacks of direct primaries that he and Johnson named—cost, the bias toward the rich, lack of attention of the electorate, misleading plurality wins, and party fragmentation—were bound to pose difficulties, whether the electorate was made up of immigrants or not.

Notwithstanding doubts, in the first two decades of the twentieth century, more than half the states proceeded to enact direct prima-

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<sup>111</sup> DALLINGER, *supra* note 107, at 95–107, 109–10; *see also* REYNOLDS, *supra* note 103, at 180–89.

<sup>112</sup> *See* ROBERT M. LA FOLLETTE, LA FOLLETTE'S AUTOBIOGRAPHY 105–08, 111, 126–27 (Univ. of Wisc. Press 2013) (1911).

<sup>113</sup> REYNOLDS, *supra* note 103, at 158–60; WARE, *supra* note 102, at 81–82; *Primary Election Reform*, N.Y. TIMES (Jan. 21, 1898), <https://timesmachine.nytimes.com/timesmachine/1898/02/22/102489265.pdf>.

<sup>114</sup> WARE, *supra* note 102, at 81–82.

<sup>115</sup> *See* REYNOLDS, *supra* note 103, at 191–94; WARE, *supra* note 102, at 106, 114.

<sup>116</sup> *See* DALLINGER, *supra* note 107, at 146.

<sup>117</sup> *See* his comment attributing disturbances in city primaries to the “turbulent and excitable foreign element.” DALLINGER, *supra* note 107, at 96.

ries.<sup>118</sup> La Follette's promise—that through direct primary voting “the will of the people shall prevail”—was realized at last, at least briefly.<sup>119</sup> Jumping on the primary bandwagon a bit late in life, Theodore Roosevelt made the most of it contesting and winning newly created primaries in Illinois, Pennsylvania, California, and Ohio in 1912.<sup>120</sup> He nearly unseated his chosen successor, Taft, but Taft managed to purchase and suborn enough delegates by convention time to deprive the popular vote winner of the nomination.<sup>121</sup>

Then, just as suddenly, in the late teens and 1920s, states rebelled against the direct primary; eight of them repealed direct primary laws.<sup>122</sup> The arguments for repeal were similar to those of the doubters in 1898: Primaries produced unelectable nominees, impeded balanced tickets, and favored wealthy candidates.<sup>123</sup> After 1916 and through the next few decades, the proportion of states holding Democratic direct primaries declined from about half or more to fewer than a third of the states.<sup>124</sup> It is hard to think of many instances in U.S. history when we turned the dial down on democracy, but in the early twentieth century, with regard to nomination methods, we did.

#### IV THE HYBRID SYSTEM

What unfolded then was a curious, unplanned, hybrid system in which candidates sought to win the backing of party bosses and interest group leaders, and adapted political positions to woo these leaders, while at the same time needing to demonstrate to these bosses that they had one extra, essential quality: the ability to win votes. The handful of fifteen or so remaining primaries<sup>125</sup> became proving grounds, sample tests of electability. When some look back on the era of “smoke-filled rooms” and imagine bosses plotting who

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<sup>118</sup> See JAMES W. DAVIS, *PRESIDENTIAL PRIMARIES: ROAD TO THE WHITE HOUSE* 44 (1980) (“By 1916, presidential primary laws had been passed in twenty-five states . . .”).

<sup>119</sup> Cf. Robert M. La Follette, *Primary Elections for the Nomination of All Candidates by Austrian Ballot*, Address Delivered Before Michigan University, Ann Arbor, Michigan (Mar. 12, 1898), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071106788> (arguing that the people's desire to nominate candidates by the direct vote would ultimately prevail despite the efforts of the political machine).

<sup>120</sup> GEOFFREY COWAN, *LET THE PEOPLE RULE: THEODORE ROOSEVELT AND THE BIRTH OF THE PRESIDENTIAL PRIMARY* 140, 176–77, 179 (2016).

<sup>121</sup> See *id.* at 249–52 (explaining that Taft was renominated to be the candidate of the Republican party by a small margin and how he managed to procure those votes).

<sup>122</sup> DAVIS, *supra* note 118, at 41.

<sup>123</sup> *Id.* at 45; REYNOLDS, *supra* note 103, at 227–28; WARE, *supra* note 102, at 230–31.

<sup>124</sup> CEASER, *supra* note 99, at 227; DAVIS, *supra* note 118, at 41–42.

<sup>125</sup> See DAVIS, *supra* note 118, at 42 (charting the results of primaries from 1912 to 1976).

should be the nominee, they are imagining a conspiracy that rarely unfolded in so straightforward a fashion. Mostly, what the bosses did in this midcentury system was sit on the sidelines and watch. Stingy with their political clout, determined to avoid embarrassment, they would wait to see who could win votes. For example, the bosses of 1960—Governors Meyner of New Jersey, David Lawrence of Pennsylvania, and Pat Brown in California, as well as Richard Daley in Chicago, among others—were tempted by Senator Kennedy, and some of them were torn by their allegiance to Adlai Stevenson or fondness for Hubert Humphrey; but as tempted or as torn as they were, they wanted to see who could prove an able voter getter.<sup>126</sup> When Kennedy won the hotly contested Wisconsin primary, it was seen as a major victory against Hubert Humphrey, who hailed from neighboring Minnesota.<sup>127</sup> But as the vote was analyzed and the press and bosses learned that Kennedy's win was largely confined to the Catholic districts around the major cities, they discounted the Wisconsin win and it was on to West Virginia.<sup>128</sup> Kennedy won in that overwhelmingly Protestant state. He was no flash in the pan, misgivings dropped away, and the bosses could safely rally around a winner.<sup>129</sup> Primaries by themselves did not nominate the candidate, but they presented an unavoidable test that the candidate had to pass on the road to nomination.

The nominating system in the midcentury decades, although unplanned, accomplished a variety of key political chores. It provided an opportunity for party leaders to vet the major candidates, and they found a lot of them wanting. Many times in sixty years the two major parties nominated people who had not won the most primary votes—including William Howard Taft, Woodrow Wilson, Dwight Eisenhower, Adlai Stevenson, and Hubert Humphrey—because the primary winners in those years—Theodore Roosevelt, Champ Clark, Robert Taft, Estes Kefauver, and Eugene McCarthy—could not persuade the unpledged bosses that they were the best candidates to lead the party to victory in the fall.<sup>130</sup>

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<sup>126</sup> WHITE, *supra* note 110, at 96, 109.

<sup>127</sup> *Id.* at 96.

<sup>128</sup> *Id.* at 102.

<sup>129</sup> *Id.* at 100, 112.

<sup>130</sup> By James W. Davis's count, there were thirteen such occasions in the twentieth century. DAVIS, *supra* note 118, at app. A. Whether thirteen or fewer times, the major political parties often rated other qualities (electability, unifying talent, and other traits) higher than primary vote totals in choosing the party nominee. Davis's is a useful analysis of primary and caucus results. For a skillfull treatment of more recent history, see also ELAINE C. KAMARCK, *PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATING SYSTEM* (2009).

In addition to vetting candidates, this system (like that of the century before) forced candidates to modulate their positions to gain the support of, or at least not alienate, party leaders. For FDR to pursue his western strategy, he had to temper his support for the League of Nations and for repeal of Prohibition; doing so, he went into the 1932 convention with large southern and western support against not just Al Smith but also Texan John Nance Garner.<sup>131</sup> When Tennessee Senator Estes Kefauver began winning primaries in 1952, he alarmed southerners with his pro-civil rights stance, and both they and President Truman (who disliked Kefauver and privately referred to him as Cowfever) began casting around for someone to stop him and settled on Adlai Stevenson, who had not even campaigned in the primaries.<sup>132</sup> Because Stevenson was more moderate on civil rights than Kefauver (yet nonetheless acceptable to labor and urban machines), an unlikely coalition of southern, urban, and labor leaders fell in behind his candidacy in Chicago.<sup>133</sup> The midcentury, hybrid system required candidates to appease the party's factions and win widespread support, but it also usually required them to prove themselves electorally.

That hybrid system came to an abrupt end after 1968. Following the patently undemocratic result of the 1968 Democratic Convention in Chicago, when the party nominated Hubert Humphrey (who had won just two percent of the popular vote) instead of Eugene McCarthy (who had won thirty-eight percent of the vote), the Democratic Party passed a series of reforms that resulted in a sudden increase in primaries and caucuses.<sup>134</sup> Voter participation exploded from twelve million voters in 1968 to twenty million four years later.<sup>135</sup> By 1976, thirty states held primaries (versus an average of around fifteen in midcentury), and three-quarters of delegates were chosen in primaries (versus thirty to forty percent in midcentury).<sup>136</sup> The expansion of democracy has continued. By 2008 nearly every state had a primary or caucus choosing delegates, and the number of

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<sup>131</sup> See FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: THE TRIUMPH* 246–54, 276–77 (1956).

<sup>132</sup> JOHN FREDERICK MARTIN, *CIVIL RIGHTS AND THE CRISIS OF LIBERALISM: THE DEMOCRATIC PARTY 1945–1976*, at 104–06, 112–13 (1979).

<sup>133</sup> *Id.* at 98–111.

<sup>134</sup> DAVIS, *supra* note 118, at 47, 339.

<sup>135</sup> *Id.* at 48.

<sup>136</sup> *Id.* at 42.

voters rose to a staggering fifty-seven million.<sup>137</sup> The people veritably ruled, as La Follette had said they should do at the turn of the century.

## V

### WHERE ARE WE NOW?

This system has the merits of simplicity, transparency, and apparent democracy. It has led to millions of people participating in primaries.<sup>138</sup> But the reforms of 1972 have also played out in unforeseen ways with calamitous results. Parties have become bystanders to a process that incongruously results in the selection of their own leader. The so-called nominating convention, which used to be an occasion of decision—when people bargained, pressured, deliberated, and decided—now is no more than a televised spectacle.

In 2015, the RNC Chairman found himself chasing the Republican candidates to secure a pledge that each would support the eventual Republican nominee.<sup>139</sup> It used to be candidates who sought the endorsement of the party; now it was the other way around.

Today the main drivers of the nominating process are the candidates, who select themselves to run. This self-selection is a problem (as Van Buren and the Framers of the Constitution understood). The modern process of running for president—twenty-four months of non-stop fundraising, travel, and relinquished privacy—is so unpleasant and degrading that it requires something like a personality disorder to submit to it. When Ted Cruz's former college roommate said he would rather see someone plucked from the phone book as president than his former roommate,<sup>140</sup> he was putting his finger on a deeper problem than just one man's personality. Rather than a selection process, we have an adverse selection: The individuals volunteering for president are often precisely the person you would never want in that office.

That is the first unforeseen consequence of our 1972 reforms: a candidate-centric system that produces quirky, sometimes frankly odd, candidates. The second is that, for a system that purports to be

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<sup>137</sup> Thomas E. Patterson, *Voter Participation: Records Galore This Time, but What About Next Time?*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 44, 44 (Steven S. Smith & Melanie J. Springer eds., 2009).

<sup>138</sup> *Id.*

<sup>139</sup> Jonathan Martin & Maggie Haberman, *Republican Party Asks Candidates to Sign Loyalty Pledge*, N.Y. TIMES: FIRST DRAFT (Sept. 2, 2015, 5:42 PM), <https://www.nytimes.com/politics/first-draft/2015/09/02/republican-party-asks-candidates-to-sign-loyalty-pledge/>.

<sup>140</sup> Patricia Murphy, *Ted Cruz at Princeton: Creepy, Sometimes Well-Liked, and Exactly the Same*, DAILY BEAST (Aug. 19, 2013, 4:45 AM), <https://www.thedailybeast.com/ted-cruz-at-princeton-creepy-sometimes-well-liked-and-exactly-the-same>.

democratic, designed to prevent party bosses from overturning the will of voters, it is profoundly undemocratic.

In 2015, more than half a dozen candidates dropped out before a single ballot was cast.<sup>141</sup> So much for democracy. Now that campaigns have to address so many voters, money is vastly more important than it was in the mid-twentieth century. The 1972 reforms did not anticipate that in trying to empower average voters, they would ultimately empower hedge fund managers and casino owners. This would not have surprised Mr. Johnson and others who warned of precisely this danger in the 1898 New York conference on nominations.<sup>142</sup>

When voting does finally start, the problems get worse. After the first few contests, most candidates drop out, depriving later voters of having their say. In late February of 2000, after only a handful of primaries, George W. Bush became unstoppable after winning in South Carolina, and Al Gore after winning in Washington state, in both cases before the vast majority of voters had their say.<sup>143</sup> In 2004, John Kerry locked up the nomination on Super Tuesday, by which time less than three percent of the nation's electorate had voted for him.<sup>144</sup> In 2012, by the time Mitt Romney became the de facto nominee, he had won a majority in just three states, and yet to vote were New York, California, Texas, New Jersey, and Pennsylvania.<sup>145</sup> If

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<sup>141</sup> See *Who Is Running for President?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/us/elections/2016-presidential-candidates.html> (last updated July 26, 2016) (listing all of the presidential candidates and when they dropped out).

<sup>142</sup> See *supra* note 115 and accompanying text.

<sup>143</sup> See Richard L. Berke, *The 2000 Campaign: The Democrats; Some Bradley Backers Already in Mourning*, N.Y. TIMES (Mar. 2, 2000), <https://www.nytimes.com/2000/03/02/us/the-2000-campaign-the-democrats-some-bradley-backers-already-in-mourning.html> (describing the despair of Bradley supporters after Gore's Washington primary victory); Richard L. Berke, *The 2000 Campaign: The Overview; Bush Halts McCain in South Carolina by Drawing a Huge Republican Vote*, N.Y. TIMES (Feb. 20, 2000), <https://www.nytimes.com/2000/02/20/us/2000-campaign-overview-bush-halts-mccain-south-carolina-drawing-huge-republican.html> (providing an overview of the 2000 Republican primary results and describing Bush as the "unmistakeable front-runner for the Republican presidential nomination" after the early South Carolina primary).

<sup>144</sup> Patterson, *supra* note 137, at 50–51.

<sup>145</sup> See *2012 Primary and Caucus Calendar*, CNN.COM, <http://www.cnn.com/ELECTION/2012/primaries.html> (last visited Aug. 19, 2018) (showing Romney had won a majority of the Republican primary vote in only three states—Idaho, Virginia, and Massachusetts—by the end of March); Michael Falcone, *The Beginning of the End*, ABC NEWS (Mar. 29, 2012), <https://abcnews.go.com/Politics/the-beginning-of-the-end-the-note/blogEntry?id=16028045> (describing Romney's emergence as the presumptive nominee by the end of March 2012); CNN, *Mitt Romney Gets George H. W. Bush Endorsement*, YOUTUBE (Mar. 29, 2012), <https://www.youtube.com/watch?v=mJN1qW0l04> (video of George H. W. Bush endorsing Mitt Romney as Republican presidential nominee from his office in Houston).

democracy requires consulting more than a fraction of voters, our current sequential system is hardly democratic.

What makes this early culling of the field worse yet is that when you have more than two candidates in a contest, plurality makes a winner—but plurality victories are notoriously misleading. As we have known for centuries, in a race with multiple candidates and first-past-the-post rules, the winner is not much more likely to be the most preferred of all the candidates than if he had been chosen by lottery.<sup>146</sup> So one never can be sure if the persons who dropped out early were actually not more preferred, and whether the person catapulted to the nomination by early plurality wins was not in fact among the least popular. Sequential voting combined with plurality wins, a diabolical combination unique in history, makes for random, unreliable results.

Alexander Hamilton remarked about the new Constitution that at last, people could have imposed on themselves a government by “reflection and choice” instead of by “accident and force.”<sup>147</sup> We are back to accident and force, or more accurately, accident and money.

What is so frustrating about our predicament is that the analytical foundation for challenging the current system is hardly new. The unregulated ambition of individual aspirants, if unchecked by a system, has been well known for millennia—from the time of Athens, to Venice, to Philadelphia, to Van Buren—as the major threat to a republic. The extreme unreliability of single vote pluralities has also been known for a long time, yet we have not managed to apply this knowledge to the nomination system, and indeed we have compounded this old error by adding to it the uniquely unhelpful sequencing of primaries. Having all voters vote at the same time, or having them vote in sequence, was always a matter that politics devoted the utmost care to managing, from Athenian courts to Roman centuries to Venice to our own Electoral College, convening simultaneously in far-flung capitols. Today’s sequencing is thoughtless, the product of federalism (and the greed of states). Heedless as it is, primary sequencing skews the results in random ways every single quadrennial nomination contest.

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<sup>146</sup> See SAMUEL MERRILL, III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC 25 (1988) (“[W]ith [five] or more candidates, the [single plurality system] is no more likely to choose the Condorcet candidate than [is] a lottery.”).

<sup>147</sup> THE FEDERALIST NO. 1, at 89 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

## VI WHAT TO DO

The conventional reaction to this sad state of affairs has been to call for a reassertion of the party's role in the process, with superdelegates, or some sort of vetting of candidates by party officials.<sup>148</sup> But there is a disconnect between our vast scholarly anatomy of the decline of political parties on the one hand, and our continued focus on inserting these same, withered husks of parties back into the nominating process in order to fix it. The political organization that thrived on patronage and charity and corruption, and that linked millions of citizens to a sprawling national and local network of party committees and bosses and underbosses, has been long gone, blown away by civil service reform,<sup>149</sup> government welfare,<sup>150</sup> and the disintermediation of the party itself by the direct primary.<sup>151</sup> Once parties decided to hand over the nominating process directly to voters, they handed over with it their own operating license. A *New York Times* editorial characterized this knock-on effect in 1912 (at the time of an earlier roll out of direct primaries) as "Party Suicide by Primary."<sup>152</sup>

When we have sixty million people voting in primaries, what party instrument is it that we would insert into the nominating process to fix it? The handful of so-called superdelegates, or the few hundred national committeemen and women who jealously guard their sinecures enabling them to attend conventions and midterm convention meetings but apart from that represent no one? Why would voters accept the reversal of their primary vote by this body and then bother voting in the fall?

More importantly, why should they? What would be the principle behind such a nominating system?

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<sup>148</sup> The resort to superdelegates began in 1981–82 with the Hunt Commission of the Democratic National Committee and has continued in various forms ever since. See NELSON W. POLSBY ET AL., *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* 126–27 (13th ed. 2012) (explaining the creation and use of superdelegates by the Democratic National Committee).

<sup>149</sup> For one description of the civil service reform movement, see EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 405–08 (1979).

<sup>150</sup> Social Security was probably the first major social program (followed by more in the Great Society) that helped wean people from dependence on political machines. See FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 155–57 (1990).

<sup>151</sup> See REYNOLDS, *supra* note 103, at 61; WARE, *supra* note 102, at 117 (discussing states' increasing use of direct nominations in the early twentieth century). For a discussion of the negative effects party weakening has had on government, see DAVID S. BRODER, *THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA XX–XXI*, 1–3 (1971).

<sup>152</sup> COWAN, *supra* note 120, at 157.

We find ourselves in uncharted waters—in a hyper-democratic era but without strong parties, parties that were brought into being mostly because democracy required them precisely to organize national campaigns. We are almost back to the conditions of a pre-party era, but it is difficult to adopt wholesale the highly effective hermetic nominating systems that prevailed in that earlier era. The point of the hermetic system was to insulate the nominating process from influence, whereas the point of democratic campaigns is to amass influence.

We have several options. We can dial down on democracy again, as we did after 1916, and try to restore party officials to the core of the process. But parties that ask people to vote and then set aside the voters' verdict would be counting on unnaturally patient and credulous voters.

Or we can review the older hermetic systems and ask whether there may not be some mechanisms (not to mention goals) of the past that can be adapted to our democratic era. Such features include:

- Approval voting or preferential voting in multicandidate fields. Either such voting system would go some distance toward protecting the Republic from popular demagogues who muster strong and passionate support from a sizable minority.
- Reinstating for Democrats (and instating for Republicans) the two-thirds rule, which would not avoid the perils of plurality wins and sequencing, but would at least minimize the chance that a wildly unpopular candidate could become the nominee.
- Limiting the primary contests to just two candidates, chosen by national conventions that come before, not after, the primaries. Choosing between just two candidates would eliminate the acute problem of false plurality winners and reduce the problem of sequencing. As things stand today, conventions are useless, made obsolete by primaries, just as the nominating role of the Electoral College was made obsolete by conventions.<sup>153</sup>
- Eliminating sequencing, unless just two candidates were presented to the electorate, as could happen if conventions preceded primaries (but even then, as the *centuriata praerogativa* showed, outcomes early in the sequence cannot fail to influence outcomes later in the sequence). To be fair to voters and candidates alike, if sequencing is regrettably unavoidable in a federal system, the sequence should be established by lot, as in

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<sup>153</sup> It was evident to some around La Follette's time that direct primaries would make conventions redundant. DALLINGER, *supra* note 107, at 128 (stating that because of the direct primary system "the nominating convention is entirely done away with").

the Roman Republic, not by influence, as in the Roman Empire.

Any of these solutions would introduce complexity to what is now a notably simple system. But as we have seen in the pre-democratic era, nominating systems were sometimes complex—and effective; what we have today is simple—and dysfunctional. With scores of sequential plebiscites and with first-past-the-post rules, we have more and more people voting, with less and less meaning.

The national committees of the two major parties should appoint reform commissions to propose radical changes to the nominating rules. If through inertia or ignorance, the parties do not act soon, citizens should. In the Internet age, it should be possible for citizens to form a new party or parties for the express purpose of utilizing intelligent, fair, and meaningful procedures in order to find and nominate more broadly acceptable presidential candidates than have generally been delivered by the major parties.

It is a moment to be creative again. Although history gives us no roadmap, it makes sobering reading. It is apparent that many predecessors of ours spent more time and devoted more care to the problems of nomination than we have, and they also were unafraid to scrap their systems and try something new—in 1804, in 1912, and in 1972. It is past time to follow their example—to think again and make a change.