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WHAT COMES AFTER JANUARY 6? ON THE CONTINGENT CONGRESSIONAL PROCEDURE

*William B. Ewald**

INTRODUCTION

Most criticism of the system of presidential election focuses on the Electoral College, and most criticism of the Electoral College focuses narrowly on the shortcomings of the Electoral College itself. The objections are well known. The most basic is an objection of political principle. The Electoral College, on its face, deviates from the democratic principle of one-person-one-vote and gives the vote of a citizen in Wyoming approximately the same weight as 3.5 votes in California. The result is an unequal distribution of political power, both between citizens and among states. We can call this the *3.5:1 problem*.

There are also pragmatic worries about things that could go wrong. There is the risk that the winner of the national popular vote will not be the winner in the Electoral College: the *wrong winner problem*. There is the risk that one or more of the human electors will, in a moment of independence, seize the opportunity to vote contrary to their pledge: the *faithless elector problem*. Forty-eight states award their electoral votes as a block, creating an additional democratic imbalance: the *winner-take-all problem*.¹

These shortcomings, and others like them, are the subject of a vast literature, and the Electoral College is, by a considerable distance, the clause

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¹ These problems have been known for more than two centuries. A recent overview is JESSE WEGMAN, *LET THE PEOPLE CHOOSE THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* (2020). The remarkable compilation by JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (2013), is comprehensive to the point of obsession and immensely useful. Its ten chapters and thirty-four appendices run to 1,117 pages, systematically classifying virtually every argument ever made, on either side, about the Electoral College, and can be freely downloaded at <https://www.every-vote-equal.com/> [<https://perma.cc/KDW5-U5QJ>].

of the Constitution that has generated the most proposals for amendment.² Let me stipulate the obvious: the criticisms seem to me valid, and reform is desirable.³

But the Electoral College may not be the most urgent problem. This symposium was held shortly after the events of January 6, 2021, which demonstrated the necessity of paying attention to other parts of the system of presidential election. The Electoral Count Act of 1887 has come in for scorching criticism, as has the administration of elections inside the states.⁴

² Alexander Keyssar, in his comprehensive history of the Electoral College, estimates that 800 amendments proposing abolition or reform have been introduced in Congress since 1800. He notes that the exact number is impossible to pin down and is likely higher. ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 5, 398 (2020).

³ A vast number of solutions have been proposed. The most obvious would be to amend the Constitution to provide for a direct popular vote. The political difficulties in implementing such an amendment are thoroughly chronicled in KEYSSAR, *supra* note 2. Other solutions have been suggested. One is the National Popular Vote Compact, which would accomplish the same result by a collaboration among the states rather than by constitutional amendment. The idea was first suggested by Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001), and elaborated by Akhil Reed Amar & Vikram Amar, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001). KOZA ET AL., *supra* note 1, favor this solution and provide massive documentation of the arguments it has generated.

Ned Foley, in contrast, thinks it would be better to focus reform efforts elsewhere. He would (reluctantly) leave the Electoral College in place, but encourage states, on Jeffersonian principles, to award their electoral votes to the winner of the *majority* of the state popular vote (as opposed to the *plurality* winner). The existence of a majority winner would be guaranteed either by a runoff election or, better, by some form of ranked-choice voting. EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* (2020).

For the sake of simplicity, I shall assume that the alternative to the Electoral College is a national popular vote, adopted by constitutional amendment and with a runoff election if the leading candidate does not meet some threshold in the first round. Much of what I have to say can readily be adapted to other reform proposals.

⁴ This statute, famous for its poor drafting, is now the object of scorching criticism and intense reform efforts. *See, e.g.*, Susan Collins, *Our Democracy Shouldn't Rest on a Rickety Law*, THE N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/opinion/politics/susan-collins-eca-reform.html> [<https://perma.cc/8Q84-3XHW>]. A comprehensive introduction is Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004). As for the administration of elections by the states, the literature on such things as partisan gerrymandering and voter suppression is all but unsurveyable. JAMIE RASKIN, *UNTHINKABLE: TRAUMA, TRUTH, AND THE TRIALS OF AMERICAN DEMOCRACY* (2022) provides a memorable view from Congress; DAVID PEPPER, *LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES* (2021) provides a view from inside statehouse politics.

Those are major problems but have received so much recent attention that I shall leave them to one side.

I wish to call attention instead to a different but overlapping and equally severe group of problems. The Electoral College is embedded within a process that starts well before the Iowa caucuses and continues, if necessary, to what happens after the electoral votes are counted on January 6: that is, to the “contingent procedure” in the House of Representatives. Proposals for electoral reform often take a narrow focus, tacitly assuming that the College itself can be eliminated while leaving the rest of the system unchanged. That may be correct, but it cannot be taken for granted, and questions need to be asked about potential effects elsewhere, and especially on the outer extremities of the process. Alexander Bickel made that observation in a trenchant book he published fifty years ago; the issues he raised need further exploration.⁵

I shall discuss three questions: (1) What is the relationship of the Electoral College to the early stages of the election campaign? (2) What would be the effect of abolishing the Electoral College on the two-party system? (3) What is the relationship of the two-party system to the very last step in the process, the contingent procedure in the House of Representatives? These are not, of course, the only questions that could be asked about the interactive effects of the Electoral College with other parts of the process, but they provide a useful point of entry.

The crucial link here is the two-party system. Indeed, it is important to emphasize that, among the world’s constitutional democracies, the United States is anomalous in two ways: it is the only one to employ anything resembling the Electoral College, and it is the only one to have a deeply

⁵ ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 21–29 (1968). At the time Bickel wrote, efforts to abolish the Electoral College (led by Senator Birch Bayh, with strong bipartisan support, including support from President Nixon) seemed likely to succeed. Bickel was arguably the most insightful of the opponents. I discuss his argument about the two-party system *infra*, Section III. It is worthwhile to note that Bickel, already in 1968, clearly understood the need to examine the interactive effects of the Electoral College and devoted a full chapter to the impact of the Electoral College on the party conventions, which is hardly an obvious topic. *Id.* at 37–78.

entrenched two-party system.⁶ Are these two things connected? Historically, without a doubt. Bickel thought they were *structurally* connected as well: that if you lose the Electoral College, you also lose two-party democracy. I do not think his argument succeeds, but the problem is exceptionally difficult.

As I shall explain, the three questions are interdependent, and the answers are anything but clear. The effect of abolishing the Electoral College on the national presidential campaign—that is, the campaign *after* the nominating conventions—can perhaps be guessed at, but the effect on the party primaries is hard to estimate and could have profound consequences for the nature of the political parties themselves. As for the two-party system, its roots, both historical and theoretical, seem to me extremely poorly understood. The system has been around for so long that it is taken for granted as almost an immovable object. But nothing in the Constitution or in the laws of political science mandates two parties, and the entire construct is (I think) more unstable than is commonly supposed.

Whether, in general, two-party democracy is to be preferred to multiparty democracy is not a question I attempt to decide. Multiparty democracy works extremely well in some of the world's most stable democracies. Perhaps it would work here, too. But my point is a different one. The consolidation of the two-party system is the principal reason the contingent congressional procedure has not been used since 1825 – a time when Jefferson, Adams, and Madison were still alive. Although there have been a couple of close shaves, the two-party system has ensured that one of the two candidates wins an outright majority in the Electoral College.⁷ Calls for reform of the congressional procedure have therefore been rare. Why worry about a problem that never occurs? But if the delicate balance were to be disrupted—if (as the Framers expected) presidential elections were routinely sent for resolution to Congress—the consequences would be cataclysmic. That is my principal point. January 6 came perilously close to

⁶ Documentation (with references to the statistical surveys) is provided in LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 206–210 (2020). See also Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?* CARNEGIE ENDOWMENT FOR INT'L PEACE, (Jan. 18, 2022), <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190> [<https://perma.cc/U79S-EHXL>].

⁷ See *infra*, Section III.

sending us along that path.⁸ Reform of the Electoral College itself can perhaps be postponed. Reform of the contingent congressional procedure cannot.

* * *

It will be helpful to begin with some distinctions. The U.S. presidential election system is an extraordinarily ramshackle construction. There are, in fact, two distinct sequences involved in electing the president: a constitutional sequence and an extra-constitutional sequence. The second sequence is awkwardly cantilevered on top of the first and distorts its functioning. The result is a remarkable degree of confusion.

The constitutional sequence is the one originally designed in 1787.⁹ It can be divided into two phases: the *Electoral College phase*, followed (if necessary) by the *contingent congressional phase*. The Electoral College phase consists of three principal steps: (1) the state legislatures determine how their allotted number of electors are to be chosen; (2) the electors meet and cast their ballots; (3) the ballots are certified, transmitted to the President of the Senate, and counted in the presence of Congress. If a candidate secures an absolute majority, we are done: if not, we proceed to the congressional phase.

This system, as originally conceived, scarcely endured long enough to fall apart. In 1787, the Framers expected the elite group of human electors to engage in a process of active deliberation. They were to meet, exchange ideas, and vote for the person they thought best qualified. The Framers,

⁸ One of the strategies canvassed in the infamous memo of January 3, 2021, by John Eastman was as follows:

VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector votes, throwing the election to the House. IF the Republicans in the State Delegations stand firm, the vote there is 26 states for Trump, 23 for Biden, and 1 split vote. TRUMP WINS.

Memorandum from John Eastman, Professor, Chapman Univ., on the January 6 Scenario (Jan. 3, 2021), available at <https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html> [<https://perma.cc/LJ8W-L8L4>] (click on the “complete memo” hyperlink in the article to access the memorandum).

⁹ The apparatus is set forth in U.S. CONST. art. II, § 1; I have omitted minor details. After the electoral debacle of 1800, the procedure was modified by the Twelfth Amendment, ratified in 1804. The changes principally concern the balloting for Vice President and are largely irrelevant here. I shall refer to Article II and the understandings of 1787 unless there is specific reason to mention the 1804 changes.

moreover, expected most elections to culminate in Congress. (George Mason's estimate, a good one, was that this would occur "nineteen times in twenty.")¹⁰ They furthermore did not foresee the emergence of political parties, and political parties emerged almost at once. The human electors quickly became superfluous ornaments, pledged to vote for their party's candidate. As early as 1796, a Federalist voter was outraged when a supposedly Federalist elector voted for Jefferson: "[I did not choose] Samuel Miles to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States," he complained. "I choose him to act, not to think."¹¹ State legislatures moreover saw that they could increase their state's impact by adopting a winner-take-all rule for the awarding of electoral votes. This "unit rule," a highly dubious policy, was severely criticized by Jefferson and Madison, but has been standard practice since 1796.¹² It was only gradually that state legislatures began to allow the voters to determine the state's electoral votes: popular election did not become firmly established until 1828.¹³ None of these things—political parties, pledged electors, winner-take-all, popular participation—were foreseen in 1787.

To accommodate the processes of national democracy, a second sequence of laws and regulations was therefore necessary. It was awkwardly superimposed on the constitutional framework. Its details are intricate, and the system has fluctuated greatly over time, but the basic skeleton can be broken down into five stages: (1) a *preliminary* stage (when states and the parties enact their procedures); (2) the *party nomination* stage (consisting of primaries and caucuses and intra-party debates, and culminating in the national party conventions); (3) the *presidential campaign* (culminating in the

¹⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., 1911). The calculus changed with the emergence of political parties and explicit *ex ante* coordination among the electors. If the individual votes of all the electors from thirteen states had been taken without prior coordination, the likelihood of any candidate receiving a majority would be slim.

¹¹ BICKEL *supra* note 5, at 56.

¹² These criticisms are central to Ned Foley's project of reviving a "Jeffersonian" Electoral College and are discussed comprehensively in FOLEY, *supra* note 3. The core objection is that in a close election, the votes for the trailing candidate are effectively discarded rather than being represented proportionately in the number of electors: various distortions of the electoral process then follow.

¹³ KEYSSAR, *supra* note 2, at 17–115. His tabulation showing the historical changes in the methods of election adopted by the states is particularly helpful. *Id.* at 32.

vote on Election Day); (4) an *intermediate stage*, during which the state popular votes are tallied, electors are certified, the Electoral College meets and cast its votes, which are then transmitted to the President of the Senate for the formal count: this stage is in part governed by the nearly indecipherable, and now notorious, Electoral Count Act of 1887. If the Electoral College does not produce a majority, we move to (5) the *contingent congressional backstop*.

At each stage of this process, there are a bewildering number of layers of law and political authority. At the top are the Constitution and the decisions of the Supreme Court. Then there are federal laws and regulations. Next come fifty bodies of state laws and regulations, followed by the various bylaws and procedures of the national political parties (the DNC and the RNC), and then the bylaws and regulations of the state parties. Within the parties, there are competing sources of authority among the rank-and-file party voters, the permanent party bureaucracy, and politicians who have been elected to state or national office.

In other words, it is a ramshackle and rickety mess: arguably the most haphazard electoral system in the developed world. The events of January 6 show the dangers. There is no central administration; the responsibility for conducting the election often rests with partisan state officials; everything depends on their integrity in carrying out such mundane tasks as basic integer arithmetic. If they cannot be relied upon, the entire system falls to pieces.

It is tempting to describe this system as terribly designed. It is more accurate to say that it was not designed at all. Certainly it would be calumny to ascribe it to the Founders. They foresaw essentially nothing of the extra-constitutional process. As for the constitutional process, its operations are so distorted from what they contemplated as to be almost unrecognizable.

II. THE ELECTION CAMPAIGN

Let us now consider how the Electoral College interacts with the wider system, and start by asking: what would be the effect of abolishing the Electoral College on the beginning stages of the election process? The problem divides into two parts: the effect on the national campaign (which is reasonably clear) and the effect on the primary season (which is anything but).

A. *The National Campaign*

It is often argued in defense of the Electoral College that it forces the candidates to pay attention to small states that would otherwise be ignored. Call this the argument from *geographical dispersion*. It is remarkably persistent, and at first glance it is plausible. The Electoral College, after all, gives a vote in Wyoming 3.5 times the weight of a vote in California, so surely the result is to amplify the importance of Wyoming.

But this plausible reasoning is contradicted by reality. The statistics leave no room for doubt. Presidential campaigns focus essentially the entirety of their attention on a handful of states that satisfy two conditions: (1) they could go either way, and (2) they offer a significant number of electoral votes. Every other state is ignored, regardless of its size.

The reason is clear enough. There is little point in expending resources on a state where the outcome is not in question. Republicans need not fear losing Alabama, and Democrats need not bother attempting to win it. They should spend their energies and their money and (most significantly) their campaign promises elsewhere.

In 2012, for instance, Obama held public campaign events in eight states. Romney visited those same eight states and added two more. That means 80% of the states were unvisited. It is perhaps not surprising that Vermont and North Dakota were ignored, but so were the two largest states, Texas and California. Not a single visit, even by the vice-presidential candidates.¹⁴

What would happen if the Electoral College were replaced by a direct popular vote? I have not seen the question systematically examined, and presumably there would be a period of experimentation and guesswork. But the basic contours can be inferred from the way elections are conducted in other contexts. One can look at elections for Governor or Senator in states with a mix of rural and urban, blue and red counties. In those elections, the general rule appears to be this: candidates go where their voters are.¹⁵ If the state's Democratic voters are 70% urban and 30% rural, Democratic candidates, *ceteris paribus*, will spend about 70% of their time in urban areas and the rest outside. (There might of course be reasons to vary the strategy,

¹⁴ The statistics for 2008 and 2012 are usefully gathered by KOZA ET AL., *supra* note 1, at 434–450.

¹⁵ *Id.* at 478.

and this rule is only a first approximation). But it would be unorthodox for a gubernatorial candidate to write off 80% of the counties in the state.¹⁶

It is not hard to see that something similar would occur on the national stage. The target would no longer be states, but voters, and when you look at the distribution of *voters*, maps of the United States are not neatly divided into red and blue, but into varying shades of purple. A Democratic candidate could no longer afford to write off the many Democratic voters of Mississippi: the Republican voters in California may be a minority, but they are nevertheless a large number of people. The entire conceptual frame of analysis would shift, no longer tracking state borders, but regions and demography.

Obviously, candidates would spend time campaigning in cities. What about rural areas? Would they be ignored? If the gubernatorial model is any indication, they, too, would receive their share of attention—not, to be sure, one small town at a time, but through other devices: a state fair in Nebraska, a rodeo in Wyoming—something to draw a crowd. And there would be advertising. The national political parties have a product to sell, and Coca Cola, after all, does not ignore rural regions.

Would there be losers under a direct popular vote? Under the present system, a handful of states receive an extortionate amount of attention that they would only reluctantly give up. There might be resistance from compact regional subgroups—Cuban voters in Florida, Jewish voters in New York—worried that their voting strength might be diluted.¹⁷ There would also likely be a shift in the *kinds* of issues that candidates found it expedient to focus on: less about beach erosion in Florida and more about issues that affect the entire United States. The consequence would be to turn the campaign into a national event, with all parts of the land being spoken to, and not just a few battleground states.

¹⁶ *Id.* (observing that there are “examples from every state with a significant city of Republicans who have won races for Governor and U.S. Senator without ever carrying the big cities of their respective states”).

¹⁷ This was a significant issue in the debates over Electoral College reform in the 1960s and 1970s, with African-American organizations and Jewish organizations taking a complicated variety of positions. KEYSSAR, *supra* note 2, provides an extensive discussion at 282–307.

B. The Party Primaries

So much for the impact on the national election. But what if we push the analysis back a notch? What if we ask about the impact of the Electoral College on the party primaries? There the analysis is far less straightforward.

Notice, to begin with, that the effect of the Electoral College on the primaries is almost the opposite of its effect in the general election. During the primary season, a scramble of candidates is forced to campaign in Iowa and New Hampshire, then Nevada, then South Carolina, then to dash through the Super Tuesday states: next come Idaho and Michigan, followed by Florida and Illinois, and so on until the situation finally resolves itself. In stark contrast to the general election, every region of the United States, if not every state, gets visited and, at least briefly, listened to. That presents a worry. How can we be certain that in improving the conduct of the general election, we do not sacrifice some of the advantages of the primaries?

What explains the asymmetry? The parties are free (within certain broad constitutional limits) to choose their nominating procedure. They are free to choose the weights they give to certain state delegations. They can choose how to apportion the pledged delegates, and they may permit “superdelegates” to vote. Nevertheless, the nominating process in both parties roughly tracks the weightings of the Electoral College—naturally enough, since the party strategists are focused on winning the presidential election.¹⁸

The consequence is an asymmetry. In the primary season, the voters of South Carolina matter immensely (and effectively secured the 2020 nomination for Joe Biden).¹⁹ In the general election, however, the state is all but ignored.

¹⁸ BICKEL, *supra* note 5 at 37–78, devotes a detailed and insightful chapter to the influence of the Electoral College on the party conventions.

¹⁹ After Biden lost Iowa, New Hampshire, and Nevada, his campaign seemed finished. In South Carolina, however, he received the endorsement of Jim Clyburn, and his overwhelming victory among African-Americans caused most of the rival candidates to drop out. See Alexander Burns & Jonathan Martin, *Winning South Carolina, Biden Makes Case Against Sanders: ‘Win Big or Lose’*, THE N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/us/politics/joe-biden-south-carolina-primary.html> [<https://perma.cc/E82E-KBR5>].

What would be the effect on the party primaries of replacing the Electoral College with a national popular vote? I have seen no sustained analysis. No doubt in the beginning, the force of inertia would keep the existing system in place, at least for an election cycle or two. But the underlying target would have changed: and once you change the target, the strategies will change, too. The unit of analysis would no longer be the familiar red and blue electoral map. The states would have been removed from the equation. The goal would no longer be 270 electoral votes, but the largest total number of individual votes. What is more, the strategic question in organizing the primaries would no longer be about the best strategy for an individual *candidate*, but the best strategy for the political *party*. The considerations are complex, but it is possible to speculate.

Plainly, the party would hope to generate enthusiasm from its national base, building a sense of excitement and drama. How is that to be done? One way is to encourage active participation. One can imagine various possibilities on the model of sporting events: perhaps a tournament-style sequence of debates, with the audience posing questions by internet and voting on whom to eliminate.

Another strategy might be to hold an entirely open national primary. The Democratic party, for example, might decide to let American voters, regardless of party affiliation, help select the Democratic nominee, on the theory that that procedure would produce the candidate most likely to win in the general election. But one can equally well speculate about other possibilities. A vehement, single-issue party might emerge—organized, say, around climate change or immigration—determined less to seek compromise than to force attention to the strength of its convictions.

If one wants an analogy, the situation is somewhat similar to the impact on television news after the loosening of broadcast regulations and the introduction of cable television. The outcome could not easily have been predicted. In 1980, television news was firmly in the hands of the three traditional networks, just as politics today is in the hands of the two traditional parties. A decade later, CNN was a major force: by 1996, Roger Ailes had launched Fox News. This example should make us wary of predicting the consequences of adopting a national popular vote. The point is not merely that the primary season would be affected in unforeseeable

ways, but that changes to the broadcasting rules changed not only the number of networks, but their very nature. The political parties that emerge from a change to the electoral rules would look very different from the parties of today. This is an area where even speculation is difficult.

III. THE TWO-PARTY SYSTEM

Not only would the national political parties look very different: there might also be more of them. And that takes us to our next topic.

Among the world's leading constitutional democracies, the United States is an outlier in two ways. It is the only one that uses an Electoral College, and it is the only one with an entrenched two-party electoral system. Almost everywhere else, we find multiparty democracies.²⁰

A. *Duverger's Law*

How are we to account for this fact? The usual explanation in the political science literature points to Duverger's law: systems that elect their legislature (a) in single-member districts and (b) on the rule of first-past-the-post (i.e., the winner of the most votes becomes the representative of the district: there is no requirement of a *majority*) will tend to have two political parties. Maurice Duverger (a French political scientist who published his influential study of political parties in 1951) gave a persuasive reason why this is so.²¹ Consider a party that runs third in such a system. It might win, say,

²⁰ For documentation, see DRUTMAN, *supra* note 6. Drutman gives the statistical analysis across the OECD countries. The methodological difficulties in making the comparison are enormous. Great Britain, for instance, from some points of view, has a two-party system: from others, it is a multiparty democracy. But there is no dispute among political scientists that the American two-party system is exceptional. The comparative matters are explored in AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999), and in STEVEN L. TAYLOR, MATTHEW S. SHUGART, AREND LIJPHART & BERNARD GROFMAN, A DIFFERENT DEMOCRACY: AMERICAN GOVERNMENT IN A THIRTY-ONE-COUNTRY PERSPECTIVE (2014).

²¹ MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara North & Robert North trans., 4th prtg. 1976) (1954). Duverger states his hypothesis as follows: "*the simple-majority single-ballot system favors the two-party system*. Of all the hypotheses that have been defined in this book, this approaches the most nearly perhaps to a true

25% of the national popular vote. But if it wins only 25% in each *district*, it will never get “past the post” and will achieve no representation in the legislature whatsoever. In general, a third party in a system satisfying those two conditions must expect to be systematically underrepresented in the legislature. It may win a few seats here and there, but fewer than its support in the general populace would warrant. In time, its support will wither as the voters choose not to waste their vote. “Duverger’s law” can be given more elaborate formulations, but the central insight is straightforward.²² (It was essentially for this reason that Belgium, in 1899, introduced elections based on proportional representation).²³

Duverger’s law is bolstered by a further argument, the “median-voter theorem,” that was given its canonical formulation in 1957 by Anthony Downs.²⁴ The argument is that in a two-party system, under certain natural assumptions, the two parties will naturally gravitate to the center of the political spectrum: technically, toward the preferences of the median voter. Once again, the underlying reasoning is straightforward. Suppose the

sociological law.” *Id.* at 217. For retrospective evaluations of Duverger’s book, see Nicolas Sauger, *L’esprit des lois? L’étude des modes de scrutin un demi-siècle après Les partis politiques de Maurice Duverger*, 55 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 524 (2005), and Joseph A. Schlesinger & Mildred S. Schlesinger, *Maurice Duverger and the Study of Political Parties*, 4 *FRENCH POLS.* 58 (2006).

The empirical limitations of Duverger’s law can be seen from the case of Great Britain, which employs single-district, single-ballot elections. For the first half of the twentieth century, there were three national political parties: Conservative, Liberal, and Labour. Gradually, the Liberals were absorbed by the Conservatives, and for several decades, Duverger’s law appeared to hold. But the Liberal Democrats emerged in the 1980s and entered a coalition government under David Cameron in 2010-15; Theresa May’s government was an unsteady coalition with a fringe party from Northern Ireland. The Liberal Democrats have receded, but the rise of the Scottish National Party to almost monopoly position in Scotland means the UK is now effectively once again a state with three major political parties.

²² A comprehensive survey of the technical results in voting theory is provided by DENNIS C. MUELLER, *PUBLIC CHOICE III* 230–332 (2003). A discussion of Duverger’s law (with a slightly different explanation, based on a voter’s probabilistic estimates of a party’s chances of success) is provided *id.* at 271–76.

²³ Ernest Mahaim, *Proportional Representation and the Debates upon the Electoral Question in Belgium*, 15 *ANNALS AM. ACAD. POL. SOC. SCI.* 69, 69 (1900). Mahaim notes that there were Swiss and other precedents, but that Belgium was embarking on an experiment essentially new. *Id.* There had also been considerable theorizing in Britain. See also JENIFER HART, *PROPORTIONAL REPRESENTATION: CRITICS OF THE BRITISH ELECTORAL SYSTEM, 1820–1945* (1992).

²⁴ Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 *J. POL. ECON.* 135 (1957); expanded as ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

political preferences of the voters lie along a spectrum, ranging from far-left to far-right, and are normally distributed (in the statistical sense). Then a moderately conservative party can hope to attract all the voters to its right and a fair share of those in the middle; but if it abandons the middle and moves right, it will surrender voters in the middle. Symmetrical considerations apply to a moderately liberal party. The consequence is that both parties gravitate toward the center. The technical, theoretical elaboration of the median-voter theorem is extremely intricate and the subject of an extensive literature, but the underlying idea is the one that Downs outlined in 1957.²⁵

It is important to understand that Duverger's "law" is only a statement of a general tendency (as Duverger himself was careful to point out).²⁶ If it is taken to be a statement of an invariable correlation, then it is manifestly false. A dramatic counterexample comes from the United States. In the American South, for more than a century after the Civil War, the former Confederacy satisfied Duverger's two criteria. It had single-member districts and first-past-the-post elections. But it was in effect a one-party state, its politics grounded in racial resentment, lingering bitterness at the military defeat, and a canny awareness of the national political power that can be obtained by voting as a regional block. The consequence was a collective refusal to vote for the party of Lincoln. The empirical evidence shows that Duverger's law does generally hold for situations with a relatively homogeneous electorate facing a choice among several plausible alternatives.²⁷ But in situations of

²⁵ See Downs, *supra* note 24, at 115–117 (giving the famous analogy of political markets to town merchants clustering toward the center of town). Downs does not himself speak of the "median-voter theorem," but the term has established itself in the technical literature, which is by now enormous. For a survey of the technical results on two-party competition with deterministic voting, see MUELLER, *supra* note 22, at 230–48.

²⁶ Duverger begins his discussion of two-party systems by remarking that they can arise from multiple complex factors: "tradition and history, social and economic structure, religious beliefs, racial composition, national rivalries, and so on." And he concludes with the remark that "[t]he electoral system works in the direction of bipartism; it does not necessarily and absolutely lead to it in spite of all obstacles. The basic tendency combines with many others which attenuate it, check it, or arrest it." DUVERGER, *supra* note 21, at 203, 228. Subsequent invocations of his "law" have at times been less cautious.

²⁷ See generally DOUGLAS RAE, POLITICAL CONSEQUENCES OF ELECTORAL LAWS (1971); GARY COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (1997).

political polarization, of racial or religious or linguistic or geographical or class division—in Northern Ireland, or Bosnia, or Lebanon—the argument breaks down.²⁸

What is true of Duverger’s law is also true of the median voter theorem. Indeed, Downs’s original mathematical analysis demonstrates that two-party democracy can only function *under certain background conditions*, which are essentially the same as the conditions that limit the analysis by Duverger. The analysis could just as well be described as an analysis of the *limitations* of two-party electoral systems, and Downs, already in 1957, emphasized a fundamental consequence of his model: “[a] two-party democracy cannot provide stable and effective government unless there is a large measure of ideological consensus among its citizens.”²⁹

That is a remarkable statement, and its implications need to be emphasized. There is a comforting story that one encounters among political scientists that goes like this (and it is reinforced by the quasi-mathematical terminology of “laws” and “theorems”). Single-member districts encourage the emergence of two political parties; a two-party system promotes convergence to the middle of the political spectrum; extremist positions are thereby nullified, resulting in political moderation and stability. But if matters were that simple, one would have a quick solution to the problem of intractable political conflict. I do not dispute that in “normal” times with a “normal,” non-polarized electorate not riven by ideological dissensus Duverger helps to explain how single-member districts can promote a two-party system and the comforting story can appear plausible. But what if the times are *not* normal?

B. The Madisonian Puzzle

There is a further problem about the American two-party system that might be called the Madisonian Puzzle.

²⁸ For a recent work that refines Duverger’s insight and points out the theoretical limitations of his “law,” see MATTHEW S. SHUGART & REIN TAAGEPERA, *VOTES FROM SEATS: LOGICAL MODELS OF ELECTORAL SYSTEMS* (2017).

²⁹ Downs, *supra* note 24, at 114. For his development of these arguments, see *id.* at 114–41.

The United States spans an entire continent, and contains vast diversities of race, religion, national origin, regional history, political culture, as well as of wealth, class, education, and profession. Already in 1787, in *Federalist No. 10*, Madison pointed out these facts and argued, contrary to Montesquieu, that precisely the variety of factions in such a vast territory would enable Republican government to function. His argument was that the factions and interests would cancel one another out, making it difficult for “the secret wishes of an unjust and interested majority” to form. Small polities, he observed, were unstable. But:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strengths, and to act in unison with each other.³⁰

For Madison, “faction” was just another word for “party,” and one might expect, on his analysis of the United States, to see the development not just of two political parties, but of a great multitude. That is the puzzle: why did multiparty democracy not emerge in the United States?

Madison’s analysis was entirely plausible in 1787. The new nation was a loose confederation of republics. Most people never journeyed beyond the state where they were born. Interests were local, government was local, allegiances were local. Pennsylvania provides an illustration. There were Quakers in Philadelphia, German-speaking Lutherans in Lancaster County, Scots-Irish farmers further to the West. Economically, too, the Commonwealth had a diversity of interests: banking and shipping, as well as farming and manufacturing.³¹

If we restrict our attention to Pennsylvania, then one might, on Madisonian principles, expect the emergence of a multi-party democracy, with Quakers elected to the state legislature from the County of Philadelphia, Germans from Lancaster County, and so on.³²

³⁰ THE FEDERALIST NO. 10 (James Madison).

³¹ These various diversities are everywhere visible in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976).

³² That would be true even if the conditions of Duverger’s law were satisfied. In reality, most counties selected multiple members, making the case for pluralism even stronger.

But the puzzle does not stop there. Madison's picture suggests that, as the sphere is extended, as more and more states are added to the Union, the number of interests and the number of parties will also increase: there will be a multitude of parties from all the states in the extended Republic, and they will all jostle together in the U.S. Congress. In 1787, the natural unit of political analysis was the state, not the union. That is where one should expect the principal alliances to be formed.

The force of this reasoning can be illustrated by considering a modern example. The European Union is a confederation of twenty-seven member states, rather more tightly unified than the United States was in 1787. It, too, spans a continent. Each European state has four or five principal political parties: sometimes more. They interact across state borders, but in a limited way. The Socialist party in one country will exchange ideas with its counterparts in other countries. So will the Conservatives. They attend conferences together and learn from one another. But they remain national parties, running in national elections and reflecting national politics. That means that, inside the European Union, we find a robust Madisonian pluralism of political parties.

Why did something similar not develop in the United States? The more one examines the matter, the more puzzling the question becomes. The United States spans an entire continent, contains vast diversities, and yet has only two effective parties. The UK has at least three. Sweden, Norway, Denmark, Finland, and Switzerland each have at least five. Iceland and Israel have at least six. Belgium has seven, and the Netherlands has eight. The European Union, which is the more natural object of comparison, contains well over a hundred.³³

There are three questions that need to be answered: how did the American two-party system get started? Why do the parties cross state lines? And why, despite all the Madisonian diversity, has the two-party system endured?

³³ DRUTMAN, *supra* note 6, at 208 fig.9.1 (giving statistics from OECD countries).

C. Emergence of Two Parties

The story of the emergence of two national parties can be quickly told. It has everything to do with the Electoral College.³⁴

In 1787, when the Constitution was signed, the supposition was that the states would choose an elite body of electors. They would meet, confer among themselves, and then vote. The idea was to choose the president who would best serve the national interest. Political parties were reprehended well into the nineteenth century.³⁵ That conception of national politics worked, more or less, for the election of George Washington. But when the conflict between Jefferson and Hamilton hardened into a division between Federalists and Republicans, it broke down irretrievably.

These facts do not yet entail unified national parties that operate across state lines. One can readily imagine state parties remaining distinct from one another, as they do in Europe—cooperating with their counterparts elsewhere, but in tactical alliances. One can, for example, imagine presidential electors coming for a meeting of the national Electoral College. The Federalists from New York would congregate with the Federalists from Georgia and from Massachusetts. They would talk and agree among themselves on a Federalist candidate. And then they would vote. But that possibility was precluded by a technical feature of the Constitution, which requires the state Electoral Colleges to meet separately. That technical detail created an obvious risk. If the Federalists from New York voted for Hamilton, and the Federalists from Massachusetts voted for Adams, the consequence would be to elect Jefferson. But there was an equally obvious solution, quickly adopted by both sides. It had two parts. First, the parties must coordinate across state lines and agree, in advance, on a single

³⁴ The literature on American political parties is enormous, beginning with CHARLES BEARD, *THE ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY* (1915). RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* (1970) is a classic, as is ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2009). *See also* ROY F. NICHOLS, *THE INVENTION OF THE AMERICAN POLITICAL PARTIES* (1967); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* (1983); JOHN HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES, 1789-1803* (1986); and NANCY ROSENBLUM, *ON THE SIDE OF ANGELS: A POLITICAL THEORY OF PARTIES AND PARTISANSHIP* (2008).

³⁵ HOFSTADTER, *supra* note 34, at 40–73.

candidate. Secondly, the individual human electors must surrender their autonomy, and pledge to cast their vote for the Party candidate.

The Electoral College, in other words, was fundamental to the establishment of a national two-party system. It made coordination across state lines imperative. It also gave the two parties, once they had become established, a powerful incentive to block the creation of any third party. For under the rules of Article II, it is necessary for a candidate to secure a *majority* of the electoral votes cast, and with a third party, the election would likely end in the House of Representatives. Much better retain a two-party monopoly.

It should be noted that it was not inevitable that the human electors would surrender their faculty of choice. If there had been a meeting of all the electors at the seat of national government (as some delegates to the 1787 Convention proposed), things might have evolved differently. But the Constitution required the electors to meet in their several states, making consultation impossible.

It should also be noted that the *ideological* division of parties into Federalists and Republicans is not the only way things might have developed. At the Convention, indeed, the delegates expected that the natural division would be between large states and small states. That, in fact, is why they designed the presidential electoral sequence the way they did.³⁶ The large states (it was thought) would dominate the first stage, inside the Electoral College. That stage would narrow the field to the top five candidates. (The Twelfth Amendment lowered the number to three). The next stage would be the vote in the House of Representatives. Since each state delegation would have an equal vote, the small states would dominate the final choice.

Another possibility, occasionally mentioned at the Convention, envisioned alliances based on geographical region. Certainly, it is easy to see how such a system could have developed. One might have had one regional party representing the interests of New England, another the mid-Atlantic, and another based in the South. (The “Solid South” of the twentieth century gives an indication). More ominously, there might have been a different sort of two-party system, one for the North, the other for the South.

³⁶ 2 THE RECORDS, *supra* note 10, at 500–528.

These were all live possibilities in 1787, and the point I wish to make is that the *emergence* of political parties could have proceeded very differently. Even in retrospect, the entire development is wildly contingent. Nothing in the Constitution mandated the creation of parties; nothing mandated that they operate across state lines; nothing mandated that they be organized around ideologies; and nothing mandated that their number be precisely two. There was an enormous amount of contingency. No doubt Duverger's law had something to do with the emergence of two party system, but the constitutional structure of the Electoral College appears to have been even more fundamental.

D. Persistence of Two Parties

This story explains, in general terms, how the Federalist and Republican parties came into existence. It also explains why they needed to act as national parties. But we are still left with the Madisonian riddle: why, in such a vast country, with such a multitude of factions and interests, did a national, two-party system persist? Why did the two-party system not give way to something more in line with *Federalist No. 10*? That is the crucial question. Several explanations suggest themselves.

1. *Protectionism*. Once a two-party system had established itself, the two dominant parties had a shared interest in protecting their privileged position. They were in control of the state and national legislatures, and whenever a third party threatened, they jointly took steps to thwart it or absorb it—always energetically, and sometimes unscrupulously.

This explanation undoubtedly covers part of the story. American history is full of episodes where the two principal parties colluded to restrict access to the ballot, to gerrymander electoral districts, to manipulate the mechanics of voting, to shorten the calendar, to require large numbers of signatures for ballot access, and generally either to hinder the emergence of any third party or to swallow it.³⁷ But this explanation goes only so far. There are constitutional rights to freedom of association that limit the ability of the

³⁷ The subject is vast. For an overview, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 345–381 (5th ed. 2016).

Republicans and Democrats to maintain a duopoly, and, after all, established parties in Europe, with many of the same incentives, have not been able to hinder the emergence of new parties. Protectionism cannot be the full explanation.

2. *Presidentialism*. A second explanation points out that the United States has a presidential system, whereas most of the world's constitutional democracies are parliamentary systems. This, too, is a plausible thought. In a parliamentary system, it is easy to have many parties. They are elected to parliament; they form a governing coalition; and the governing coalition then chooses a prime minister to sit as the head of the government. The other parties take seats in the governing cabinet. In the United States, such an arrangement would be extremely awkward. How, after all, could a president from one party sit at the head of a coalition of several parties in Congress?

But under the present arrangements, the president does not need to be the head of any legislative party whatsoever. The number of parties is irrelevant. Indeed, the United States has frequently had periods where the president belongs to one party and both houses of Congress belong to the other. It is almost normal for at least one house to belong to the opposition party. Frequently, there are conflicts between the president and the president's own party in Congress. The situation would be no worse if the president had to deal with three or more parties in Congress. Indeed, in some ways a multiparty arrangement would be less of a headache than the paralysis of a two-party deadlock.

Can Duverger's law be invoked here? The argument might go as follows. A presidential election is for a *single* president of the *entire* nation, and the nation only votes once: in effect, presidentialism converts the entire nation into a single-member district with a single ballot, thus satisfying Duverger's conditions. (The contingent congressional procedure, which is never used, can be ignored here).

But precisely for that reason, Duverger's analysis does not carry over. His argument depends crucially on the fact that he considers elections for a legislature with *multiple* representatives, and that the trailing third party will find itself underrepresented *relative to the other two*. If there is only a single

district, it makes no difference how many losers there are, since only one candidate can win.³⁸

3. *Federalism.* A third explanation connects the persistence of the two-party system to federalism. That, too, is a plausible suggestion, and no doubt federalism helps to explain certain characteristic features of the American party system. For instance, for long periods of American history, the two parties, in contrast to European parties, were relatively nonideological. In the middle decades of the twentieth century, the Democratic Party was essentially an alliance between white segregationists in the South and New Deal liberals in the North: the Republican Party was similarly an alliance between internationalist Wall Street bankers and small-government Midwest isolationists. Those alliances were essentially marriages of convenience: a way of trading favors and distributing patronage. The entire arrangement was made possible by the federal structure.

The well-known protean nature of American political parties is related. The Republican Party started as an anti-slavery party, turned into a vehicle for Gilded Age big business, then into a progressive party under Theodore Roosevelt. In the 1930s, it was a reactionary party opposed to the New Deal. Under Eisenhower, it essentially ratified the New Deal and pushed for civil rights. It mutated into the conservative party of Barry Goldwater and Ronald Reagan, and then became a vehicle for Donald Trump. Anybody searching for a common ideological thread running through all these positions is searching for something that does not exist.

These observations about federalism do help to explain certain anomalous features of American political parties. Unfortunately, they leave the central question untouched. They do not explain why the United States has precisely two political parties, rather than six or seven; and so, the Madison riddle remains unanswered.

³⁸ Empirically, too, the argument confronts a major counterexample. Among the world's leading democracies, France is the other conspicuous presidential system, with a president elected by a nationwide popular vote. Typically, there are about a dozen significant candidates in the first round. (A runoff between the top two is generally necessary to establish a majority winner). The French example does not fully meet the Duverger criteria, because of the runoff: the point is rather that, even without a runoff, one can easily imagine a multi-party, first-past-the-post national election. In other words, if France were to abolish the runoff, there is no reason to suppose that a dozen parties would cease to field candidates.

4. *The Electoral College*. I argued earlier that the Electoral College was central to the *emergence* of two national political parties. Could it also be the explanation for their *survival*? Such an argument was put forward in 1971 by Alexander Bickel.³⁹

There is a separate objection to the proposal for direct popular election The monopoly of power enjoyed by the two major parties would not likely survive the demise of the electoral college. Now, the dominance of two major parties enables us to achieve politics of coalition and accommodation rather than of ideological and charismatic fragmentation, governments that are moderate, and a regime that is stable. Without forgetting that of all the mysteries of government the two-party system is perhaps the deepest, one can safely assert that each major party exerts centripetal force; that it ties to itself the ambitions and interests of men who compete for power, discouraging individual forays and hence the sharply defined ideological or emotional stance; that it makes, indeed, for a climate inhospitable to demagogues; and that it provides by its very continuous existence a measure of guidance to the marginally interested voter, who is eminently capable of casting his ballot by more irrelevant criteria.⁴⁰

Bickel's reasoning can be summarized as follows. Consider a third party that commands 20% support in the national electorate. Under the Electoral College system, it can only hope to gain an electoral vote if it is able to secure a plurality in some number of states. If it runs at 20% in every state, its electoral vote total will be zero, and voters will be wasting their votes. This creates a formidable barrier to entry. If, on the other hand, the Electoral College is replaced by a national popular vote (with a runoff election between the top two candidates, in case neither reaches a threshold of 40%), the 20% party may as well enter the race, with the hope of entering negotiations for its support before the runoff. The result would be a breakdown of the two-party system and a politics "infinitely more open to demagogues, to quick-cure medicine man, and to fascists of left and right."⁴¹

It is not entirely easy to evaluate this argument. (It has some similarities to the Duverger-Downs argument, which is not mentioned). A great deal

³⁹ BICKEL, *supra* note 5, at 21–29.

⁴⁰ *Id.* at 21–22.

⁴¹ *Id.* at 25.

depends on guesswork about what might happen. Certainly, there are considerations that point toward an opposite conclusion. In the first place, the entrenched historical political parties have great advantages. They are known, they are deeply organized, and they could argue that a vote for (say) the Green Energy Party would be, in effect, not merely a wasted vote, but a vote for the established party that favors increased drilling for oil. Moreover, under the present Electoral College system, there is an incentive of a different sort. If the votes of the national 20% party are concentrated in a few states (as in fact happened with the Dixiecrats in 1948 and with George Wallace in 1968), then the third party can hope to secure enough electoral votes in those states, not to win, but to be a spoiler, and perhaps, in a close election, to throw the decision to the House, where its representatives can hold the balance. That is not an unrealistic hope. In 1948, Strom Thurmond ran on precisely such a strategy.⁴² He received only 2.4% of the national popular vote, but because his 2.4% was concentrated in a handful of states, it translated into thirty-nine electoral votes.⁴³ That particular leverage would disappear under a direct popular vote.

That observation is related to a deeper point. Bickel takes it for granted that two-party politics is superior to multiparty politics. Two-party politics, he says, encourages the “moderate coalition, the sensible accommodation, the muted ideology, the politicians who strive to borrow one another’s protective coloration and who jostle one another in the center.”⁴⁴ He gives no argument. No doubt in the happier circumstances of the middle of the twentieth century, these things seemed obvious. Nobody would describe the United States that way now. Indeed, the experience of recent years, both in the United States and in Great Britain, shows how, given the right circumstances, a two-party system can be vulnerable to extremism—even more, perhaps, than a multi-party democracy.⁴⁵

⁴² KEYSSAR, *supra* note 2, at 147–48.

⁴³ BICKEL, *supra* note 5, at 23. Truman won a majority in the Electoral College, but the danger of a House of Representatives election was real.

⁴⁴ *Id.* at 79.

⁴⁵ The point is a structural one. If you have two moderate parties, A and B, they will, in the right circumstances, gravitate towards the center, even if they contain some extreme elements. But if the extreme elements manage to capture one of the two parties in a highly partisan system, then there

In retrospect, it is evident that much American constitutional theorizing of the late twentieth century was unduly complacent. The U.S. Constitution (it was thought) somehow guaranteed a two-party system, and two-party systems guaranteed political moderation. The limitations of this argument were pointed out both by Duverger and by Downs but tended to be overlooked.

Why does the United States have a two-party democracy? The answer, I think, remains elusive. One can point to Duverger and various mathematical models, but their correspondence to the empirical realities is unclear. We lack both a comprehensive history of how the two parties have achieved and maintained their dominance and a satisfactory theoretical analysis. Indeed, the American system—with its federalism, its unitary president, its separation of powers, its Electoral College, its single-member districts, its party primaries, its haphazard presidential election sequence, its entrenchment of political power in the hands of the Republicans and the Democrats—is such an enormously complicated structure, with so many interacting variables, that a satisfactory mathematical model may not be possible. It may be that the best we can do is describe what happened, point to some of the more conspicuous structural features, and leave it at that.⁴⁶

is a serious structural problem, namely, that the non-extreme members may find themselves with no place to go. The example of the anti-Trump Republicans provides an illustration. Many had made a political career questioning the judgment or even the patriotism of Democrats, making it difficult suddenly to switch parties. Their choice was either to accommodate themselves to Trump or to leave politics. In a multiparty democracy, they would simply have reconstituted themselves as a new conservative party.

The structural point is even clearer in the UK. The Brexit referendum of 2016 was close and regionally divided. The socialist left of the Labour Party long opposed the EU, viewing it as a bastion of neoliberal capitalism. A symmetrical fringe in the Conservative Party viewed the EU as a Trojan Horse for socialism. The leadership of both parties was solidly opposed to Brexit and surprised by the result of the referendum. Scotland voted sharply against Brexit. The consequence today is that, in opinion polls, a clear majority of voters in the UK (and a less robust majority in England) say Brexit was a mistake; that Scotland has become virtually a one-party state under the secessionist Scottish Nationalist Party; but that neither the Conservatives nor Labour wishes to reopen the Brexit question for fear of provoking an angry intra-party split. In other words, structurally it is possible, in a two-party system, for a majority of the voters to favor an important policy, but for neither party to align itself with the preferences of the majority.

⁴⁶ In other words, we may have reached the limits of what mathematical modelling can accomplish. The aim of a good model is to obtain perspicuity by making a few powerful assumptions that explain

We can, however, conclude that no law of nature or law of political science or provision of the Constitution requires the United States to have a two-party political system, and nothing guarantees that a two-party system will always be politically stable. It is easy to think of ways in which the present system could abruptly change.

Whether, in general, a transition to multiparty democracy should be welcomed is a matter on which I express no opinion. Multiparty systems can work extremely well in some circumstances and extremely poorly in others. I have a much narrower reason for fearing that, as Article II is currently drafted, a breakdown of the two-party system would lead to catastrophe.

IV. THE CONGRESSIONAL PROCEDURE

That brings me to the contingent congressional procedure. I begin with some history.

the observed phenomena: but the fewer the assumptions, the less likely they are to mirror the complexities of human behavior. Duverger's law is illuminating precisely because it provides a readily intelligible explanation why certain electoral rules would encourage the formation of exactly two parties. But as I noted, *see supra*, note 26, Duverger is careful to point out that this is only a tendency. Once one begins to inject cultural and other factors into the mix, it may not be possible to attain accuracy while preserving perspicuity: one is simply adding epicycles. The underlying problem becomes especially visible once one begins to make comparisons across cultures. Even the general concept of a *political party* in (say) twentieth-century Italy does not correlate well with the idea of a political party in the United States. To join the fascist party, for example, was not merely to endorse a particular political program, but to belong to a "total" organization that had implications for your employment, whom you could associate with, the education of your children, and so on. That is an extreme example, of course, but even post-1945, political parties in Italy reached deeper into the organization of the wider society than they did in the United States—which is why the revelation in the 1990s by judicial magistrates that the leadership of essentially all the mainstream parties was deeply corrupt caused a massive shock to the system. An illuminating discussion of Italian political parties and their place within the constitutional order is to be found in CESARE PINELLI, *NEL LUNGO ANDARE* 439–652 (2012). Similar examples from other countries abound. Even in the United States, the functioning of the Democratic Party in the Jim Crow South presents a collection of cultural distortions not easily illuminated by a mathematical model. In such cases, adherence to a political party is more like membership in a tribal or religious or even military organization than the reflection of rational calculations made by individuals with single-peaked sets of preferences over a constrained policy space. The relevance of these remarks to the increasingly tribal politics of the United States is, I assume, obvious.

A. The Elections of 1800 and 1824

The congressional procedure has been used only twice: in 1801 and 1824. No sensible person would wish to repeat either experience.

In the election of 1800, the Republicans put forward two candidates: Thomas Jefferson and Aaron Burr, with the understanding that Burr was to be vice president.⁴⁷ The Federalists put forward John Adams and Charles Cotesworth Pinckney, with a similar understanding. The Republicans won a solid majority in the Electoral College: seventy-three votes apiece for Jefferson and Burr, with Adams trailing at sixty-five. Unfortunately, the Constitution provided no way for the electors to distinguish a vote for president from a vote for vice president, so the two Republicans, Jefferson and Burr, were tied. (The Federalists had prudently arranged for Pinckney to receive one less vote than Adams).

That meant the election, on February 11, 1801, went to the lame-duck House of Representatives. The House (in which the Federalists held a majority) deadlocked. The Federalists were implacably opposed to Jefferson. There was ballot after ballot, and no resolution. The crisis deepened. What would happen if the deadlock did not break? Disastrously, the Constitution had neglected to say. Adams's term, and the term of the lame-duck Congress, would end on March 4th. The new Congress would not convene until nine months later. Some Federalists thought they could engineer a Federalist presidency in the interval. Others hoped to do a power-sharing deal with Burr. Jefferson, for his part, threatened to raise an insurrection and summon a new constitutional convention. Adams afterwards wrote that he feared civil war.⁴⁸

In the end, Delaware's sole representative, the Federalist James Bayard, announced that he would abstain. That broke the deadlock, and Jefferson

⁴⁷ The most detailed examination of the constitutional crisis of February 1801 is BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 77–108 (2005), which I follow here. Much valuable background material is also to be found in: *THE REVOLUTION OF 1800* (James Horn, Jan Lewis & Peter Onuf eds., 2002); JOANNE FREEMAN, *AFFAIRS OF HONOR* (2001); and Joanne Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 *YALE L.J.* 1959 (1999).

⁴⁸ KEYSSAR, *supra* note 2, at 40–41.

was elected on the thirty-sixth ballot.⁴⁹ Without Bayard's switch, the U.S. Constitution could easily have collapsed after twelve years and eight months.⁵⁰

The events of 1825 were only slightly less dramatic.⁵¹ There were three principal candidates in the 1824 election: Andrew Jackson, John Quincy Adams, and Henry Clay. Jackson, by a significant margin, won the most popular votes and the most electoral votes, but did not have an absolute majority in the Electoral College. The election therefore went to the House, where Henry Clay threw his support behind Adams. Clay told the House delegation of his home state, Kentucky, to vote for Adams, even though (i) Adams had won not a single popular vote in Kentucky and (ii) the Kentucky legislature had instructed the delegation to vote for Jackson Adams was duly elected—and then promptly appointed Clay his Secretary of State. The Jacksonians were furious, and the Era of Good Feelings came to an abrupt end. The charge of a “corrupt bargain” poisoned national politics for years.⁵²

B. Risks

The congressional procedure has not been used since 1825. There were efforts to reform it in the 1820s. But gradually, as the two-party system took hold, the sense of urgency was lost. In the past two centuries, calls for reform of the Electoral College have been frequent: calls for reform of the congressional procedure have been, at best, an occasional afterthought.⁵³

⁴⁹ ACKERMAN, *supra* note 47, at 101–107.

⁵⁰ There was a tragic further consequence: it was Alexander Hamilton who persuaded Bayard to support Jefferson over Burr. That incensed Burr against Hamilton and ultimately led to their duel.

⁵¹ An excellent account of the election and its political aftermath is SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 251–265 (2005), which I follow here.

⁵² Wilentz thinks it unlikely that there was an actual bargain. The deeper political problem was the appearance of collusion. Matters were not improved by Adams's maladroit remark in his first message to Congress, urging it not “to slumber in ignorance or fold up our arms and proclaim to the world that we are palsied by the will of our constituents.” *Id.* at 260.

⁵³ This is clear from Alexander Keyssar's comprehensive history. The most active efforts at reforming the congressional procedure came in the first decades of the nineteenth century, then receded as the problem appeared no longer urgent. The various proposals for reform (such as they are) are discussed in KEYSSAR, *supra* note 2, at 86–87 (for proposals in 1823 and 1824), 99–102 (after 1824), 219–20 (1960s), and 367 (1990s).

How likely is it that the congressional procedure might be employed today?

If the President of the Senate counts the votes on January 6 and no candidate wins a majority, then the election is made by Congress. There are several ways that could occur. For instance: (1) There could be an exact tie between the top two candidates. That is statistically unlikely, but considerably more likely than what happened in the Florida recount. (2) A state could, through political paralysis or some other irregularity, fail to deliver its electoral votes in a form suitable for counting.⁵⁴ (3) In a close race, a handful of “faithless electors” could throw the election into the House. (4) A third-party candidate could follow the Thurmond strategy and translate a modest share of the popular vote into enough electoral votes to throw the election to Congress.

I note that the Thurmond strategy could well have succeeded had the 1948 election been somewhat closer: in the end, Truman won a majority of the electoral votes. I also note that a strategy of “throwing the election to the House” was recommended to President Trump by John Eastman in his memo of January 3, 2021: although Democrats had a majority of individual members in the House, Eastman calculated that the state delegations would vote 26-23-1 for Trump.⁵⁵ The greatest immediate risk is a fragmenting of two-party politics. It is not difficult to imagine the present Republican Party splitting into two, with different regional bases of support. Nor can a billionaire third-party candidate be ruled out. There are many fissiparous tendencies in American politics, and the two-party system cannot be taken for granted.

What happens if no candidate receives a majority in the Electoral College? The election of the president would be made by the House of Representatives. The vote would not be by individual representative, but by state delegation, on the principle of one-state-one-vote. There are several

⁵⁴ That actually happened in the election of 1800. Georgia did not comply with the requirements of Article II when it communicated its electoral votes to the President of the Senate. The President of the Senate, Thomas Jefferson, who happened to be an interested party, decided to count the votes nevertheless. See ACKERMAN, *supra* note 47, at 59–74.

⁵⁵ Eastman, *supra* note 8. Eastman’s constitutional argument was, of course, insane, but that is no reason to doubt his arithmetic.

problems. What happens if a delegation splits, or a representative dies or is indicted or revealed to be a foreign agent? What happens if a state legislature attempts to instruct its delegation on how to vote? The Constitution does not say. In 1801 and 1825, the House made up the rules. Could they choose to admit fractional votes? The point can no doubt be debated.

Note that the individual representatives would not be pledged to anybody. Legally, they would be free agents: 435 of them. Their only constraint would be to choose among the top three candidates in the Electoral College. They would be free to bargain with party leaders, fellow politicians, and, no doubt, lobbyists. They would also be free to change their party affiliation or to seek career advancement. There would undoubtedly be charges of “corrupt bargains,” real or imagined, just as there were in 1825.

This is all rather different from the Electoral College. The Electoral College operates by rigid rules, known in advance. They may be bad rules, but at least they are clear rules and one can agree that they have been followed. The congressional procedure is more like the croquet game in *Alice in Wonderland*.

There is another problem. In the Electoral College, there is a discrepancy of 3.5:1 between the weighting of votes in Wyoming and California. In the congressional procedure, the discrepancy becomes 68:1. In principle, states making up 19% of the population could appoint the president.⁵⁶

Meanwhile, while the House chooses the president, the Senate would choose the vice president. It would choose from the top two vice-presidential candidates, rather than the top three. (The Constitution does not explain the reason for the difference). Incidentally, there is no requirement that the vice president be of the same party as the president. Would the vote be subject to filibuster? Presumably, that would be for the Senate to decide.

⁵⁶ Based on recent data, the twenty-six least populous states net a population of 63,594,033, which comes out to roughly 19% of the national population of 331,893,745. See *Quick Facts*, U.S. CENSUS BUREAU (July 1, 2021), [census.gov/quickfacts/fact/dashboard/US/PST045221#PST045221](https://www.census.gov/quickfacts/fact/dashboard/US/PST045221#PST045221).

C. Remedies

There is a great deal in these rules that people could disagree about in calm good faith. But calm good faith is not what one usually finds in the aftermath of a closely contested presidential election. If one wanted to design a procedure almost guaranteed to bring people to the brink of fury, this congressional procedure could scarcely be improved.

Can the danger be warded off? Or must we continue to rely on luck? Unfortunately, the only practicable way to eliminate the congressional procedure is by constitutional amendment,⁵⁷ and the long history of failure to amend the Electoral College gives little ground for optimism.

But perhaps that is too quick. There is a significant difference between the two things. In the Electoral College, a handful of states know, *ex ante*, that they are concretely advantaged by the current system, and that fact makes them obstinate. But with the congressional procedure, the situation is different. The way the procedure would operate in a tight election is unpredictable, and by definition the election would be tight. There is no way to calculate a strategy in advance. The advantages to any particular state are

⁵⁷ The National Popular Vote (“NPV”) Compact would accomplish that result by an interstate agreement awarding an absolute *majority* of electoral votes to the winner of the largest share—*i.e.*, a *plurality*—of the total national popular vote. See KOZA ET AL., *supra* note 1, at 944 (giving NPV bill as introduced in legislature of Vermont). The NPV Compact appears to be faltering, and there are lingering questions about its constitutionality that may, as a practical matter, make it no easier to enact than a constitutional amendment. I note in passing a problem with the drafting of the NPV bill in its present form. It provides for a backup procedure in case there is an exact tie in the national popular vote—a near statistical impossibility. *Id.* at 945. Oddly, however, it does not consider what is to happen if there are multiple candidates and none receives more than a modest share of the popular vote. The various bills introduced in the 1960s by Sen. Bayh and others dealt with this problem by providing that, if no candidate achieved some threshold of the popular vote, then there should be a runoff election between the two top contenders. See, e.g., S.J. Res. 84, 90th Cong. § 2 (1967) (“If no person has at least 40 per centum of the whole number of electoral votes, the Senate and the House of Representatives sitting in joint session shall choose, immediately, by ballot, the President.”). The problem of pluralities needs to be dealt with if one is to handle the difficulties discussed systematically in FOLEY, *supra* note 3: as I have been emphasizing, it would be unwise to assume the United States will always have only two major political parties, and a constitutional amendment should be designed to accommodate that possibility. There are numerous ways to do this (discussed by Foley). Ranked-choice voting has the advantage of requiring the voters to go to the polls only once; a runoff has the advantage of providing a further period of deliberation and requiring the voters to focus their attention on the final choice. I take no position other than to say that the lack of any threshold requirement is a surprising omission.

uncertain. Wyoming might like the idea of having an equal vote with California, but it would need to reckon the votes of Delaware and Rhode Island and Vermont. At present, there are roughly an equal number of solidly red states and solidly blue states, and only a handful of purple states in the middle. That makes the present system a roll of the dice. What one can predict with near certainty is national turmoil.

What might a plausible constitutional amendment look like? There are several possibilities. I assume it would be necessary, for political reasons, to leave the Electoral College in place. The aim would be to provide a different backstop.

The most straightforward solution would use the national popular vote as the backstop. In other words: if the Electoral College yields no majority, then the presidency goes to the candidate who received the largest share of the popular vote. That solution is readily intelligible and its democratic justification obvious. There are subsidiary matters that a carefully drafted amendment would need to consider. If there are multiple candidates and nobody wins a majority of the popular vote, then one might wish to have a runoff election (as in France) or ranked-choice voting (as in Australia). But those matters should not be difficult.

There is a more serious obstacle. The parties might disagree about who is advantaged. Republicans, for instance, might fear that a national popular vote, even as a backstop, would favor the Democratic candidate, and refuse to support the proposed solution. There are other alternatives that might be considered. Hamilton at one point in the 1787 Convention suggested that the winning candidate be required to receive only a plurality in the Electoral College, rather than a majority.⁵⁸ His proposal raises obvious questions (What do you do about a tie? What if the plurality candidate receives only 15% of the vote?), but I assume they could be solved.

⁵⁸ Hamilton was worried about the influence of the Senate on the election: “[h]ere then is a mutual connection & influence, that will perpetuate the President, and aggrandize both him & the Senate. What is to be the remedy? He saw none better than to let the highest number of ballots, whether a majority or not, appoint the President. What was the objection to this? Merely that too small a number might appoint.” Alexander Hamilton, Remarks in the Constitutional Convention on the Election of the President (Sept. 6, 1787), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 123 (Morton J. Frisch ed., 1985).

I take no position on any of these solutions. The principal point is that *any* of them would be preferable to the dangerous system we have now. That fact provides some limited grounds for hope. After all, if there is anything that unites Republicans and Democrats in all fifty states, it is distrust of Congress.

V. CONCLUSION

This has been a complicated argument. Let me pull together some conclusions.

In considering reforms to such constitutional structures as the Electoral College, it is necessary to look beyond the most immediate shortcomings and consider as well the interactive effects with the rest of the system. It then quickly becomes clear that there are significant interrelationships that are poorly understood. It is possible to predict the consequences of abolishing the Electoral College on the national presidential campaign and to argue that the consequences would be almost entirely beneficial: but what would be the consequences on the earlier party primaries? These matters become much more obscure, and there is a risk that benefits to one part of the system might be offset by harms to another.

In particular, the question of the relationship of the American system of presidential election to the two-party system remains mysterious. It is of course possible to describe the historical evolution of the two parties, to point out the involvement of the Electoral College, and even to provide certain more-or-less implausible mathematical models: but none of this removes the underlying mystery. A measure of the depth of the problem can be gained by reflecting that Alexander Bickel, one of the most acute constitutional thinkers of the twentieth century, took it for granted that a two-party system promotes moderation and that the Electoral College is responsible for the two-party system. He did not argue for these propositions, but stated them as obvious, which, fifty years ago, they probably were. But those assumptions have not worn well.

What about reform of the Electoral College? Bickel made a broadly Burkean argument and opposed reform. He reasoned, first, that the Electoral College secures two-party democracy; secondly, that two-party

democracy produces political moderation; and concluded, thirdly, that tinkering with a system that more-or-less works was inadvisable. I disagree with his analysis. I think the first premise is far from established. I furthermore think he underestimates the harms of the present system and exaggerates the risks of reform. But I concede that the Electoral College can be lived with—unhappily and with gritted teeth, but it can be lived with, the way one might live with an unsightly blemish. It was even possible to live with the “wrong winner” results of 2000 and 2016.

But the contingent congressional procedure is a different matter. My own argument boils down to this. The congressional procedure was cobbled together in great haste and is badly designed. Already in 1823, Thomas Jefferson judged it “the most dangerous blot in our constitution.”⁵⁹ If it were used in the present combustible political circumstances to resolve a close presidential election, the result would be catastrophic. The nation might survive one such election. I doubt it could survive two.

That the procedure has not been used since 1825 is mostly a matter of luck and the persistence of the two-party system. But the two-party system is itself fragile, and there is no good reason to imagine that it is perpetual. I do not, of course, deny that the contingent procedure can be lived with, just as one might live with an aneurysm that goes unnoticed until the day it kills you.

⁵⁹ KEYSSAR, *supra* note 2, at 3 (quoting Letter from Thomas Jefferson to George Hay (Aug. 17, 1823) (on file at the National Archives)).