

## The Tenacity of Tradition

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At the 1948 Democratic National Convention, in Philadelphia, the delegations of Alabama, Louisiana, Mississippi and South Carolina walked out to the tune of "Dixie," in dramatic protest against the Civil Rights plank adopted for the party platform. They later nominated their own States' Rights Democratic candidate, Governor (later Senator) J. Strom Thurmond of South Carolina for the Presidency, with Governor Fielding L. Wright of Mississippi as his running mate.

Thus, six years before the Supreme Court decision on Integration, there was a significant political crystallization of the incompatibility between the theories of James Madison and those of Jean Jacques Rousseau. For there can be little doubt that the "general will" of the American people as a whole has developed so as to oppose any legal discrimination within the United States on the grounds of color or race. A national plebiscite on this issue would

almost certainly go strongly in favor of full social democracy. But it is far less certain that such a plebiscite would favor the enforcement of social democracy in accordance with the theory of unbridled political democracy, as was attempted by President Eisenhower at Little Rock.<sup>1</sup>

The temporary withdrawal of the States' Rights Democrats in 1948 was not an attempt to establish a third party. There was no open division between this faction and the "loyal" Democrats in Congress, and therefore no disturbance of seniority rights there. But Democratic opposition to the regular Democratic Presidential candidates, Truman and Barkley, was nevertheless intense throughout the South. They were eliminated from the ballot in Alabama and ran far behind in other rebellious States, which together rolled up 38 electoral votes for Thurmond. To this was later added that one independent electoral vote from Tennessee.

President Truman nevertheless won re-election, capturing twenty-eight States with 303 electoral votes, as against sixteen States with 189 electoral votes for Governor Dewey and four States, 39 electoral votes, for Governor Thurmond. But what impressed close students of Amer-

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<sup>1</sup> On February 11, 1959, the Department of Justice released the text of a telegram sent to President Eisenhower by Mayor W. W. Mann, of Little Rock, on September 24, 1957. This telegram urged the immediate dispatch of national troops to Arkansas "in the interest of humanity, law and order *and the cause of democracy world-wide . . .*" *A.P. Report* of Feb. 11, 1959 (emphasis supplied). Mayor Mann was later quoted as saying: "Even in the United States, force cannot and will not make people submit to a way of life that they are not willing to accept." (*U.S. News and World Report*, Feb. 27, 1959, p. 103.) Why "even"?

ican politics at the time was this: If Thurmond had been first in only four more Southern States, Florida, Georgia, North Carolina and Virginia—in all of which there was a strong “Dixiecrat” poll—President Truman would not have been re-elected. And if the Republican candidate had on this assumption run exactly as he did, nobody would have been elected at the polls in 1948. For Truman would then have had 258 electoral votes; Dewey his 189 and (in the circumstances envisaged) Thurmond 84. The requisite number for election was then, prior to Alaskan and Hawaiian Statehood—266.

This outcome would have forced a House run-off election, with its result as unpredictable, and as conducive to devious dealing, as in the case of the Adams-Jackson contest.<sup>2</sup> For if the Republicans in 1948 had kept their sixteen States, and if the Dixiecrats had won eight instead of four, the national Democrats would have controlled only twenty-four States, which then lacked one of the majority necessary to elect. It is not difficult to imagine the hectic competition for House delegations that would have ensued, especially since in the States of Delaware, Nevada, Vermont and Wyoming one single Congressman, in each of these four States, would have had the individual power to cast the vote of the State. With Alaska and Hawaii in the Union there are now six one-Congressman States.

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<sup>2</sup> The hectic political maneuvering at that time is vividly described in James, *Andrew Jackson*, pp. 428–40. For stratagems in one newly admitted State (Missouri) see William Nisbet Chambers, *Old Bullion Benton, Senator from the West*, Little, Brown & Co. (Boston 1956) pp. 129–30.

It may also be noted that the electoral vote is not tabulated, by present law, until the first Monday after the second Wednesday in December.<sup>3</sup> In 1956 that was December 17, almost six weeks after the election on November 6. The almanacs for 1957, going to press between these dates, assert that in 1956 Eisenhower got 457 electoral votes and Stevenson 74. That is incorrect. The official tally was Eisenhower 457, Stevenson 73, Jones 1. The error points up the fact that under our electoral system a whole Presidential election can be upset a month or more after it is apparently decided.

All this is by no means idle theorizing. In 1948 the switch of the one Tennessee elector, weeks after the election, made no real difference. It reduced Truman's electoral vote from 304 to 303; increased Thurmond's from 38 to 39, and elicited a certain amount of professional political criticism. That was all.

But suppose Thurmond on November 2, 1948, had won seven of the Southern States mentioned, allowing Florida's eight electoral votes to Truman, who actually took them. On that hypothesis Thurmond would apparently have had 75 electoral votes, Dewey his 189 and Truman 267, or one more than the minimum necessary for election. Then suppose that six weeks later not only Mr. Parks but also just one other Tennessee elector had decided that he preferred the States' Rights Democrat to the national Democrat. Then Truman's election would have been an-

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<sup>3</sup> 3 USC 7; 62 Stat. 672.

nounced on November 2, and necessarily denied on December 13. The shock to this country would have been terrific, and that to the world at large even greater.

Of course this is only a picture of "what might have been." But it is worth drawing as an illustration of the divergence between our actual constitutional law and the often wholly erroneous contemporary idea of the American political system.

After the dual Democratic candidacy in 1948 some obvious hard feeling between the two factions remained. But its intensity seemed to fade with the emergency of the Korean War. In 1952 there was no repetition of the "Dixiecrat" split. As a placatory move, Alabama's Senator John J. Sparkman was nominated as Adlai Stevenson's running mate, and superficially it seemed that the former Illinois Governor had a united party behind him. Yet signs to the contrary were not lacking. Shortly before the 1952 election, influential Senator Byrd of Virginia announced that he could not endorse Stevenson's candidacy. The extent of Southern discontent with the socialistic leadership of the Democratic Party was revealed when General Eisenhower carried Florida, Texas and Virginia, as well as the border States of Missouri and Tennessee, all five of which had gone Democratic four years earlier. In 1956 the Republicans added Louisiana to this list, though they then narrowly lost Missouri.

The assumption that the "Solid South" had lost cohesiveness under the warmth of President Eisenhower's personality was clearly premature. It was an unwarranted

conclusion from the evidence that many Southerners preferred him to the leadership of the Northern Democrats. But as the President's doctrine of "modern Republicanism" became scarcely distinguishable from the centralizing philosophy of Northern Democracy, the Southern divergence from both of them became apparent. From the day of the Supreme Court's unanimous ruling against racial segregation in the public schools, May 17, 1954, a resurgence of political movement in behalf of States' Rights became probable. It became a certainty when President Eisenhower ordered troops of the central government to Little Rock to enforce integration, on September 24, 1957.

If the situation which has resulted is to be constructively resolved, there must be a separation of the social and political aspects of the problem. Like oil and water these different issues simply cannot be "integrated" and no helpful purpose is served by muddling them together. From the social viewpoint one is perhaps entitled to conclude that the South is reactionary, benighted, feudalistic or what-have-you in the way of self-righteous, denunciatory epithets. But from the separated political viewpoint one must then also conclude that a very considerable section of the Republic, perhaps holding a balance of power in the Electoral College, does not believe in unqualified majority rule; does not, in short, concede the theory of a dictatorial general will. The positive faith of the South clearly favors something quite different from and antagonistic to totalitarian democracy. It favors the federal prin-

ciple, which in all but clearly delegated powers definitely protects each constituent State against subservience to the majority will of the nation as a whole. The unsavory story of the Fourteenth Amendment, far better known in the South than elsewhere, helps to strengthen the loyalty of that section to authentic federalism.

Thus the Democratic Party is torn between those who put democracy ahead of States' Rights, and those who put States' Rights ahead of democracy. But if the issue should irrevocably split this party, that outcome would by no means necessarily favor the Republicans. The two divisions were in 1956 weakened by vain efforts to find a successful compromise ticket, yet still were strong enough to elect a Democratic Congress. In 1958, the Democratic factions, striking from right and left, mowed down Republicans whose leadership seemed to the electorate to have no real convictions on any issue. If the Democratic Party should separate again there would certainly be a closing of the ranks in each of the divided camps. The Southern Democrats would line up solidly behind their constitutional candidate; the Northern and Western Democrats no less solidly behind a more socialistic nominee. Faced with this opposition on two fronts the Republican Party would reap an advantage only in those border states where right- and left-wing Democrats tend to cancel each other. Wherever one or the other wing proved clearly dominant, holding undisputed control of the State organization, the Republican nominee would fail to gain substantially from Democratic dissension.

That holds true because our Presidential election is, at the risk of repetition, really a sum total of fifty separate and distinct State elections now for reasons of convenience held on the same day—as was not originally the case. Anything but a straight two-party contest is of dubious outcome, and may have to be resolved by the House, especially if a third candidate has a sectional strength which has been consolidated by coercive external pressure. In such a three-man fight Candidates A, B, and C would not oppose each other on an equal basis throughout the country. In one section it would be primarily A versus B; in another B versus C; in the third, A versus C. That situation increases the possibility of an inconclusive popular vote.

If the simple theory of political democracy—majority triumph—were acceptable to most Americans, one would certainly expect a fundamental revision of this highly complicated, and highly undemocratic, electoral system. Doubtless, if a Presidential election should again go to the House for decision, to the complete surprise and bewilderment of many, such a revision would be attempted. At present, however, there is no apparent popular demand for changing the Constitution in respect to Presidential elections, and there has not been such demand since the adoption of the Twelfth Amendment in 1804. Since Presidential elections began to be tabulated, no less than thirteen have been won by a candidate who secured only a minority of the popular vote. But few Americans have been disturbed by this, though many continue to misname the Republic a democracy just the same.



There have, certainly, been many suggestions for a revision of Presidential election procedure. The original plan of the founding fathers was that the electors should be chosen individually by Congressional districts, with the two extra ones for each State selected "at large" from that State as a whole. But the matter was left to the State legislatures to decide and the district plan never was universally established.<sup>4</sup> Then, after the rise of organized political parties, the custom arose of naming mere figureheads as electors, loyal but undistinguished party workers pledged in advance to support the party slate. Because there is nothing other than party discipline to enforce that pledge, any severe dissension within a party will weaken its influence on independent-minded electors.

This application of a unit rule, in all the States, of course accentuates the inevitable disproportion between the popular vote and the electoral vote. In the 1956 Presidential election, for instance, Eisenhower received 457 electoral votes, Stevenson 73 and Jones 1. Had the electoral vote been divided in the same proportion as the popular vote, Eisenhower's score would have been 305 and Stevenson's 223. Minor candidates would have divided the remaining 3 votes needed to fill out the then electoral college total

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<sup>4</sup> No subject before the Constitutional Convention aroused more protracted debate than the procedure for election of the President. The entire discussion is of course summarized in Ferrand, *Records of the Federal Convention, seriatim*. It may more conveniently be examined in the one-volume *Documents illustrative of the Formation of the Union of the American States*, selected, arranged and indexed by Dr. Charles C. Tansill, 69 Cong. 1st Sess., House Document No. 398, Govt. Printing Office (Washington 1927), Index, p. 1080.

of 531. Judge Jones, who had no popular vote, but one electoral vote from Alabama, would have lost the latter. The extreme anomaly of the electoral system is found when it defeats a Presidential candidate who has actually polled more popular votes than the one elected. This happened not only in the case of Adams and Jackson, but also when Hayes was dubiously chosen over Tilden in 1876, and when Harrison got more electoral, though fewer popular, votes than Cleveland in 1888.<sup>5</sup>

The results of the system in individual States are even more devoid of logic or democratic propriety. In the 1948 Presidential election the Republicans in New York State polled 45 per cent of the popular vote; the Democrats 44 per cent. Yet by this trifling plurality, and on a minority of the popular vote, the Republican Presidential candidate obtained all of New York's 47 electoral votes (as the number was then), a figure which of itself was almost 9 per cent of the entire Electoral College. In New York, on that same day, the same ballots of the same voters sent more Democrats than Republicans to Congress from the same State that was in effect voting unanimously for a Republican President.

The principles of democracy and of federalism are alike

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<sup>5</sup> Morison and Commager see "little reason to doubt" that "the will of the people" was overborne by the outcome of the Hayes-Tilden election (*The Growth of the American Republic*, Vol. II, p. 78). Full contemporary accounts, by men deeply concerned in the contest, are found in James G. Blaine, *Twenty Years of Congress*, The Henry Hill Publishing Co. (Norwich, Conn. 1886) Vol. II, Ch. 25, and in John Sherman's *Recollections of Forty Years in The House, Senate and Cabinet*, The Werner Co. (Chicago 1895) Vol. I, Ch. 28.

flouted when a minority of ballots can so easily be taken as expressing the will of the State. The arrangement gives a wholly undesirable influence to the political boss who, by controlling 2 or 3 per cent of the registration in a State, is yet able to deliver its solid bloc of electoral votes to the Presidential candidate who knows he must secure them to be elected. Aside from the inevitable corruption thus promoted, the situation gives easily organized metropolitan districts a substantial advantage over the suburbs and rural areas.

There have been various proposals to correct this undesirable arrangement. The most enduring and logical is the proposed Constitutional Amendment, originally sponsored by Senator Mundt (S.D.) and Representative Coudert (N.Y.), prescribing that electors be chosen by Congressional districts, with the two corresponding to the Senators named from each State as a whole, as the founding fathers anticipated would be the case. The essential, and admirable, feature of the Mundt-Coudert plan is that it ties the elector to the verdict of his Congressional district, thus permitting a reasonably accurate reflection of the popular will, without doing any injury to the federal basis of our Republic. Under this plan, in the 1952 election Eisenhower would have received 375 electoral votes to 156 for Stevenson—a good deal more accurate reflection of the popular division than was the electoral vote as then cast: Eisenhower 442; Stevenson 89.

But neither the Mundt-Coudert Amendment, nor any of several proposed alternatives, seems to have any chance

of adoption. No revision plan has as yet passed both Houses of Congress, let alone going before the States for ratification, and none has been pressed by any recent President. This steadfast refusal to bring some real democracy into our Presidential elections certainly suggests that, in spite of all their lip service to the word, political democracy is actually neither valued nor desired by the politicians.<sup>6</sup>

Political inertia could, of course, account for our failure to revise a Presidential election system which certainly has little to commend it from the viewpoints of simplicity, efficiency or democracy. But Americans are not an inert people. It is not merely in mechanical matters that we are quick to adopt new devices and welcome any gadget which, rightly or wrongly, can be said to show "progress." Changes in styling, design, architecture and even educational methods are readily accepted. "Novelties" are always popular and from fiction to flower arrangements that which is latest is also likely to be that which is fashionable.

Therefore it is difficult to believe that an inconsistent apathy adequately explains the public indifference to po-

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<sup>6</sup> Some of the older States retain equally undemocratic arrangements for State elections. In Maryland, for instance, primary contests for State-wide office are not decided by popular vote, but by a "unit system" comparable with that of the Electoral College. The 23 counties of Maryland divide 110 electoral votes in the State convention in set proportions, while Baltimore City is allotted 42 electoral votes to make the total of 152. The city, with approximately one-half the population of the State, controls less than one-third of the electoral votes. Consequently a candidate for Governor or Senator not infrequently gets a majority of his party's popular vote but fails to obtain the party nomination.

litical improvement in so basic a matter as the selection of the nation's Chief Executive. No corporation, no women's club, no sandlot baseball team, would choose its captain in so implausible a manner. And certainly there is no sign of public indifference as to the character, capacity and commitments of Presidential candidates. It applies only to the archaic method by which one is selected over another.

Clearly there is a missing ingredient somewhere in this picture, and it would seem to be the stubborn American sense of tradition in political matters. In spite of our zest for experimentalism we have surrounded the Constitution with much of that divinity which doth hedge a king. The sad results of the Fourteenth Amendment, forced into the Constitution in a most unconstitutional manner, have not been altogether pernicious. The outrages springing from the Sixteenth Amendment have also strengthened conservatism. It seems most unlikely that we shall again attempt to destroy the essence of our organic law by direct amendment.

The essence of the Constitution is, of course, the federal system which it established. Every provision of the organic law is based on the fundamental concept of *these United States*. They are not and cannot be merged into a single state as long as the Constitution stands. And so, for all who revere the Constitution, States' Rights is a vital issue, whereas political democracy decidedly is not. If, as and when democracy runs sharply counter to States' Rights, then many Americans will rally to oppose democracy. It should be obvious to all that an organic law which

specifically safeguards minorities is for that very reason antagonistic to unqualified majority rule. But where reasoning power is lacking, the reverential attitude comes in to support our constitutional form of government. And where reason and reverence alike support a tradition, it is sure to be strong.

This strong tradition, and not inertia, explains why efforts to reform the method of Presidential election have failed, even though it is obvious that some reform is on many counts desirable. And one should note that the most democratic reform suggested is the one that has met with the least favorable response. Senators Humphrey (Democrat of Minnesota) and Langer (Republican of North Dakota) have proposed that the President and Vice-President shall be elected by direct vote of the people. If we believe in democracy that is obviously the most appropriate procedure. The fact that it would eliminate the electoral vote, and therefore the States as such as factors, should be secondary. Actually the proposal when made fell flat on its face, and neither in Congress nor in the country as a whole is there any apparent strength behind it.

Even the Mundt-Coudert proposal, in thorough consonance with both the letter and spirit of the Constitution, lacks popular support. The tradition in favor of the federal system is so strong that any reform here is regarded as tampering with the Constitution, despite the most convincing proof that there is no such intent, and would be no such result.