

CHAPTER 7

*Some Reflections on the Prospects
for a More Democratic Constitution*

IN A 1987 SURVEY THAT REVEALED STRONG SUPPORT among Americans for the Constitution on the whole, the results of one question stand out. When respondents were asked, “How good a job has [the system of government established by the Constitution] done in treating all people equally?” Fifty-one percent answered that it had done a bad job, 8 percent expressed no opinion, and a minority of 41 percent said that it had done a good job.¹

If we want to enjoy a system of government that performs better in treating all people equally—at least in their roles as democratic citizens—what might we do? As I said at the beginning of Chapter 1, my aim in these essays is not to offer a set of specific proposals for changes in the Constitution but rather to encour-

age a change in the way we *think* about our Constitution. How then might we begin to think realistically about changing it? What possibilities would actually be open to a body of framers in the early years of the twenty-first century? What limits on the range of possibilities should they expect to confront?

The Limited Role of a Constitution

To begin with, tomorrow's constitutional reformers would be wise to recognize that no matter what a constitution prescribes on paper, it can achieve only a limited range of goals. For example, as I pointed out in Chapter 5, no constitution can ensure democracy in a country where the conditions favorable to democracy are absent. To preserve and improve these favorable conditions would accomplish far more in achieving a more democratic order than any changes in the constitution.

The Framers of 1787 were well aware of their limits. One of the striking features of the constitution they wrote is its admirable brevity. Depending on the style in which it is printed, the written text runs fifteen to twenty pages, plus another five to seven pages of amendments. What enables the written Constitution to achieve this brevity is its almost exclusive focus on just three matters: *structures*, *powers*, and *rights*.

Most of the Constitution is devoted to the first two matters, structures and the powers allocated to these structures. Provisions about the third matter, rights, are

found mainly in the Bill of Rights and in later amendments. An important feature of these constitutional rights is that they are guaranteed almost entirely by imposing constitutional *limits* on the government. The Constitution tacitly assumes that citizens themselves will somehow possess the opportunities and resources necessary in order for them to act on their rights. I'll come back to this assumption in a moment.

Constitutional Structures

Let me say a few words about structures. I am inclined to believe that three, and possibly four, structural elements in our constitutional system are not, realistically speaking, open to change in the foreseeable future.

Federalism. One element is our federal system. Just as the Framers knew that they could not abolish the states, constitutional reformers today should probably assume that the states will remain—and in my judgment they should remain—as fundamental units in a federal government that are endowed with significant powers. As has been true for two centuries, the question of how power is shared between the federal government and the states will persist as a subject of endless dispute. But I do not believe that constitutional framers today would or should attempt to dissolve the existing states.

Presidentialism. A second limit on constitutional reform, I believe, is our presidential system. We may

be able to alter it a bit around the edges with amendments or changed practices, but the option of a parliamentary system is, I would guess, simply not attractive to most Americans. We have so deeply invested ourselves in the mythical aspects of the presidency that short of some constitutional breakdown, which I neither foresee nor, certainly, wish for, we won't seriously consider changing it. For better or worse, we Americans are stuck with a presidential system.

Inequality in representation. The other feature that I fear constitutional reformers would be unable to change is the gross inequality in representation resulting from the fixed allocation of two senators to each state without regard to population. Let me remind you again that Section 3 of Article I reads: "The Senate of the United States shall be composed of two Senators from each State for six Years, and each Senator shall have one Vote." A constitutional amendment to change this provision faces two formidable obstacles. The first makes it most unlikely that any constitutional amendment to change the composition of the Senate will be adopted. The second makes it virtually impossible. First, under Article V of the Constitution, you may recall, amendments can be proposed only with a *two-thirds* vote in both houses or by a convention supported by *two-thirds* of the state legislatures; and they can be adopted only after ratification by the legislatures or conventions in *three-fourths* of the states. I can't help thinking that at least thirteen of the least

populated states would exercise their veto to prevent the adoption of any amendment that would reduce their influence in the Senate. But in the highly improbable event that such an amendment might somehow make its way past this formidable obstacle, the second barrier promises to be totally impregnable. "No State, without its Consent," Article V of the Constitution concludes, "shall be deprived of its equal Suffrage in the Senate."

In effect, those fifteen words end all possibility of amending the constitution in order to reduce the unequal representation of citizens in the Senate. So we are destined, it seems, to be saddled indefinitely with a greater degree of unequal representation in the upper house than exists in any of the other established democracies.

If I am correct about these three fixed elements—federalism, presidentialism, and unequal representation in the Senate—they in turn seem likely to impose other limits on what today's framers might accomplish.

The electoral college. For example, what can we do about changing the electoral college? In Chapter 4 I showed how the inequality of representation in the Senate reproduces itself, though somewhat weakened, in the electoral college. It plays out yet again in diminishing the chances that the Constitution can be amended to replace the electoral college with a system of popular election. Consequently, I suggested, the relative desirability of three possible solutions to the problem

of unequal representation in the electoral college is inversely related to the probability of their enactment.

Consensual, majoritarian, or neither? I have already expressed some sympathy toward a consensual system as an alternative to a majoritarian system. The United States, I suggested, is neither one nor the other. It is a hybrid that just might have the vices of both and the virtues of neither.

That our political leaders manage much of the time to avoid complete deadlock and make the system work—more or less—is testimony, I think, to their exceptional political skills, which tend to be vastly undervalued in the media and among ordinary citizens. I have also suggested that the necessary wheeling and dealing, the inevitable behind-the-scenes compromises, and the unavoidable gap between public rhetoric and the mutual concessions among insiders, result in a political system so opaque and so at odds with general conceptions of public virtue that it weakens both civic understanding and citizens' confidence in our political institutions.

If we are unlikely to change either our presidential system or our severely unequal representation in the Senate, then it will also be very difficult to bring about some constitutional options that otherwise could be, and should be, seriously considered. In particular, I am not entirely sure that we can redesign our present hybrid so that it facilitates either greater consensus or stronger majoritarianism.

Neither alternative can exist without an appropriate political culture. Yet, a system designed to be consensual would harbor a serious danger if it were not strongly implanted in a political culture that fosters agreement. Lacking the appropriate political culture, a constitutional design intended for a consensual system would enable a minority to veto any changes from the status quo that threaten its privileges, as the Southern states did before the Civil War. Or a regionally privileged minority could extort concessions from the majority by threatening to use its veto, as the Southern states did when they compelled the rest of the country to abandon efforts to protect the civil rights of African-Americans after the Civil War.

I am inclined to believe that our political culture—unlike, say, that of Sweden, Switzerland, or Holland—would prevent a consensual design from realizing its potential advantages.

The corresponding fear about a strictly majoritarian system is that it might fail to provide the leaders of a majority with adequate incentives to seek greater consensus before they invoke their power as a majority. I'm not raising again here the issue of liberty versus political equality that I discussed earlier. Even if the leaders of a majority were to maintain the fullest respect for the democratic rights of minorities, they might see slight reason to explore options that would achieve a wider range of agreement and support than they need to push through a law or policy by majority vote.

The ideal solution, it seems to me, would be a political system that provides strong incentives for political leaders to search for the broadest feasible agreement before adopting a law or policy and yet allows the decision to be made, if need be, by majority vote—always, of course, within the limits set by the need to preserve fundamental democratic rights. No majority should have the right, moral or constitutional, to foreclose decisions by future majorities.

Here again, I fear that this ideal solution may not be open to us so long as severely unequal representation in the Senate allows some geographical minorities to block decisions by representatives elected by a majority of their fellow citizens. Because of this minority veto, the search for consensus could easily turn into what might be harshly described as extortion and blackmail by a minority of Senators.

Although this barrier to majority rule may be impossible to change, rules of the Senate that further compound the power of privileged minorities might be more amenable to change, as, in my view, they definitely should be. For example, it is doubtful that our futile and counterproductive policy toward Cuba would have remained so long in effect were it not for the ability of a handful of U.S. Senators to extort from Congress and the president the policies they favor, in return for their support on other issues.

So we arrive at this unhappy conclusion: The Framers of 1787 appear to have limited today's framers to a system that is neither consensual nor majoritarian but

is a hybrid that possesses the vices of both and the virtues of neither.

Hidden costs and uncertainties. The difficulty of transforming a long-established political culture into one appropriate to a new and different constitutional structure—one more consensual, say, or more majoritarian—illustrates yet another problem. Major constitutional change involves large hidden costs and a great uncertainty. The hidden costs arise because of the need to abandon familiar habits, practices, beliefs, and understandings that exist among the political elites and that are embedded in the popular culture as well. Creating an appropriate political culture may be almost as far beyond the capacities of constitutional framers today as it was for the Framers in 1787. What is more, even if our knowledge about the likely consequences of alternative constitutional structures is immeasurably better than that of the Framers, after two centuries of experience with different democratic constitutions predicting the outcome of major changes remains fraught with considerable uncertainty.

Powers

Are the constitutional powers of the states, the federal government, and the three main branches of the federal government appropriate to our democratic needs and values today? An attempt to answer this daunting question would so far exceed my limits here that I shall simply call attention to its relevance and importance.

Rights

As with powers, the subject of rights is so vast that I can do no more than sketch a view that seems to me useful for appraising fundamental rights in the context of a democratic country's constitution.

It is a standard view in jurisprudence that rights imply duties: in order for a right to be effectively exercised, government officials and others must assume the duty of protecting the right against persons who seek to violate it. A less-common assumption, but one present by implication, is that rights also imply opportunities: your *right* to vote is meaningless if you don't actually have an *opportunity* to vote. So too with freedom of expression. What would a right to free speech mean to you if you didn't have any opportunity to speak freely?

Now I want to add a fourth element to our discussion. To rights, duties, and opportunities I would add *resources*.² Suppose, for example, that voting booths were placed by officials in locations far from the homes of many citizens and were open for only one hour in mid-morning: most citizens would lack both opportunities and resources necessary to cast a vote. They would be outraged, and so would you and I.

To clarify further what I have in mind when I refer to resources, I'm going to invite you to contemplate a fictional scenario.

Say that we are all citizens in a New England town with a traditional town meeting. As usual, a modest

proportion of the citizens eligible to attend have actually turned out, let's say four or five hundred.

After calling the meeting to order, the moderator announces:

"We have established the following rules for this evening's discussion. After a motion has been properly made and seconded, in order to ensure free speech under rules fair to everyone here, each of you who wishes to do so will be allowed to speak on the motion. However, to enable as many as possible to speak, no one will be allowed to speak for more than two minutes."

Perfectly fair so far, you might say. But now our moderator goes on:

"After everyone who wishes to speak for two minutes has had the floor, each and every one of you is free to speak further, but under one condition. Each additional minute will be auctioned off to the highest bidder."

The ensuing uproar from the assembled citizens would probably drive the moderator and the board of selectman away from the town hall—and perhaps out of town.

Yet isn't this in effect what the Supreme Court decided in the famous case of *Buckley v. Valeo*? In a seven-to-one vote, the court held that the First Amendment—guarantee of freedom of expression was impermissibly infringed by the limits placed by the Federal Election Campaign Act on the amounts that candidates for federal office or their supporters might

spend to promote their election.³ Well, we've had time to see the appalling consequences.

What went wrong? The justices failed to view campaign expenditures and contributions in the context of a democratic system that derives its legitimacy from the principles of political equality that I described earlier. In order to exercise the fundamental rights to which citizens in a democratic order are entitled—to vote, speak, publish, protest, assemble, organize, among others—citizens must also possess the minimal *resources* that are necessary in order to take advantage of the opportunities and to exercise their rights.

The problem of matching resources to democratic rights admits of no easy answer. Nor can the problem be solved merely by constitutional prescription. But surely a constitution is deeply flawed if the highest court in the land can interpret it to impose an immoveable barrier to the achievement of a satisfactory degree of political equality among its citizens.

A Democratic Role for the Supreme Court

In earlier chapters I alluded to a problem that our best legal and constitutional scholars have disputed at length yet remains with us still. In American constitutional circles it sometimes travels under the name of "the counter-majoritarian difficulty."

I'll put the difficulty this way. We cannot simultaneously lodge the authority to make laws and policies

exclusively in the hands of elected officials who are, at least in principle, accountable to citizens through elections and at the same time give the judicial branch the authority, in effect, to make crucial public policies. That dilemma presents us with a difficult choice. Many Americans will resist making it. But if we were ever to undertake a discussion about the adequacy of our constitution when we assess it against democratic standards, this problem, which so far been discussed mainly among legal scholars, would have to be opened up to public debate and discussion.

There is, I believe, an important place in a democratic country for a supreme court with the authority to review the constitutionality of legislative and administrative enactments. For one thing, a federal system needs a high court empowered to decide if and when state authorities have exceeded their proper bounds. But a supreme court should also have the authority to overturn federal laws and administrative decrees that seriously impinge on any of the fundamental rights that are necessary to the existence of a democratic political system: rights to express one's views freely, to assemble, to vote, to form and to participate in political organizations, and so on.⁴

When the court acts within this sphere of fundamental democratic rights, the legitimacy of its actions and its place in the democratic system of government can hardly be challenged. But the more it moves outside this realm—a vast realm in itself—the more dubious its authority becomes. For then it becomes an

unelected legislative body. In the guise of interpreting the Constitution—or, even more questionable, divining the obscure and often unknowable intentions of the Framers—the high court enacts important laws and policies that are the proper province of elected officials.

Even within the realm of fundamental democratic rights the decisions of the court will arouse controversy. And controversy is all the more likely because our understanding of democratic rights will surely continue to evolve.

Is Significant Change Possible?

My reflections lead me to a measured pessimism about the prospects for greater democratization of the American Constitution. Changes described in this chapter that would be desirable from a democratic point of view seem to me to have very little chance of coming about in the indefinite future. Although my judgments about likelihoods are necessarily subjective, I believe that most others familiar with American political life would concur.

The likelihood of reducing the extreme *inequality of representation in the Senate* is virtually zero. The chances of altering our constitutional system to make it either *more clearly consensual* or *more definitely majoritarian* are also quite low. The likelihood is very low that the Supreme Court will refrain from legislat-

ing public policies, often highly partisan ones, and instead focus its power of judicial review strictly on the protection of fundamental democratic rights and issues of federalism. The combination of chief executive and monarchy in the American presidency is not likely to change. Finally, the probability that democratic changes in the electoral college will occur appear to be inversely related to their desirability, with the most desirable having the lowest probability of occurring. There is at least a modest chance that some states might require their electoral votes to be allocated in proportion to the popular votes. But a constitutional amendment that makes the number of a state's electors proportionate to its population stands little chance of adoption. And the inequality in representation in the Senate makes a constitutional amendment providing for direct popular election of the president virtually impossible.

Those who regard the Constitution as a sacred icon will, no doubt, take comfort from this conclusion: my pessimism is the mirror image of their optimism.

Yet the historic, if fitful, American impulse toward democracy and political equality has not come to an end. And so, we face a challenge. Given the present limits I have described, how might we advance toward a fuller achievement of democratic processes, rights, liberties, opportunities, and resources?

Let me suggest two very general strategies.

First, it is time—long-past time—to invigorate and greatly widen the critical examination of the Con-

stitution and its shortcomings. Public discussion that penetrates beyond the Constitution as a national icon is virtually nonexistent. Even when in-depth analysis does occur—mainly among constitutional scholars in schools of law and departments of political science and history—the Constitution as a whole is rarely tested against democratic standards or against the performance of constitutional systems in other advanced democratic countries.

I can envision the possibility—here a degree of optimism breaks through—of a gradually expanding discussion that begins in scholarly circles, moves outward to the media and intellectuals more generally, and after some years begins to engage a wider public. I cannot say what the outcome might be. But surely it would heighten understanding of the relevance of democratic ideas to the constitution of a democratic country, and specifically it would heighten understanding of the shortcomings of the existing constitution viewed from that perspective and of the possibilities of change.

Meanwhile, however, we need a second strategy, one designed to achieve greater *political* equality within the limits of the present American Constitution. A major objective of such a strategy would be to reduce the vast inequalities in the existing distribution of *political resources*. The characteristics of the Constitution that I have described in this book will, of course, stand as obstacles to the success of such a strategy, for they arm those who possess the greatest resources with strong

defenses—opportunities to veto changes—against all efforts to reduce their privileged positions.

I cannot foresee how successful either strategy may prove to be. But the belief of most Americans that a democratic government, warts and all, is better in the end than any feasible alternative to it is justified on fundamental principles of human equality that cannot be tightly bounded. Our understanding of the implications of those principles will therefore continue to evolve indefinitely. So, too, will the implications of those principles for our democratic political system, and its Constitution, under which we Americans freely choose to live.

CHAPTER 8

*Further Reflections:
Changing the Unwritten Constitution*

BECAUSE SOME OF THE MOST UNDEMOCRATIC features of the Constitution are fixed into that document by provisions that are virtually impossible to alter, at the end of the last chapter I expressed “a measured pessimism” about the prospects for significant change.

Perhaps I was too pessimistic. Changes that would make our *written* constitution more democratic may not be politically feasible. But we could make changes in our *unwritten* constitution much more readily.

The Written and Unwritten American Constitution

I'm aware that the distinction between our formal or written constitution and our informal or unwritten constitution may be puzzling to some of my American readers. Unlike the British, who have lived for centuries

with an unwritten constitution that is nowhere laid out in a single document that one could call the British constitution,¹ Americans may find it hard to realize that we are accustomed to certain traditional political practices, institutions, and procedures that we tend to take for granted as essential aspects of our American system of government, even though they are not prescribed by the written constitution.

Of course the written constitution *can* be amended and it has been. In addition to the first ten amendments, which we might reasonably view as part of the original document, from 1798 to 1992 Americans have amended the Constitution seventeen times. Of these, only three, however, had such a distinctive impact on geographical minorities that almost certainly they would have been derailed in the Senate throughout most of the nation's history: the seventy years before the Civil War and the ninety years after the end of Reconstruction in 1876. The decade following the Civil War provided a brief window of opportunity for enacting the Thirteenth, Fourteenth, and Fifteenth Amendments—which were imposed on the defeated Southern states by the victorious North. Of the remaining fourteen amendments, none mobilized widespread opposing interests among the smaller states.

*Equal Representation in the Senate = Unequal
Representation of Citizens*

The Census of 2000, which was completed after my lectures were published, shows that the power to veto

constitutional amendments reposes in the hands of an ever tinier geographical minority.

Let's recall that the Constitution requires an amendment to receive two-thirds of the votes cast in the Senate. A proposed amendment can be blocked, then, by the votes of two senators from one-third of the states, plus one additional vote. In the existing Senate composed of two senators from each of the fifty states, thirty-four Senate votes are sufficient to block a constitutional amendment. If an amendment does achieve the necessary number of votes in the Senate, it must then be approved by the legislatures (or, an unused alternative, conventions) in three-fourths of the states; thus it can be blocked by one-fourth of the states plus one more, or thirteen states.

From the Census of 2000 it is easy to calculate that an amendment could be blocked by

thirty-four senators from the seventeen smallest states
with a total population of 20,495,878,
or 7.28 percent of the population of the United States.

If miraculously the amendment were to pass the Senate it could then be blocked by

thirteen state legislatures in the smallest states
with a total population of 10,904,865,
or 3.87 percent of the population of the United States.

The power of a geographical minority of the American populations consists not only in its constitutional ability to veto amendments. In principle, at least, a law could be passed in the Senate by

fifty-one senators from twenty-six states with a total population of 50,025,674, or 17.92 percent of the population of the United States.

As I mentioned earlier, Madison and his colleagues vigorously opposed equal representation in the Senate in 1787 at a time when his own state of Virginia, the biggest, was already twelve times larger in population than the smallest, Delaware. Imagine their dismay if they had foreseen the enormity of the difference in 2000, when the largest, California, was nearly seventy times larger than Wyoming, the smallest! If Madison were alive today I have little doubt he would support a constitutional amendment to abolish the electoral college, or at the very least an amendment to reduce the degree of inequality of representation in its composition. But he would immediately discover that no such amendment would be likely to overcome the power of tiny geographical minorities to block constitutional changes by exercising their vetoes in the Senate and the state legislatures.

Does It Really Matter?

A skeptic might reasonably ask, Does this formula for inequality really matter? To begin with, it clearly violates the basic principles that, in my view, are at the foundation of democratic government, provide its legitimacy, and render it, with all its defects, superior to all feasible nondemocratic alternatives. These principles are as follows:

- The principle of *political equality* among citizens.
- The moral judgment that we ought to regard the good of every human being as intrinsically equal to that of another, and therefore in arriving at its decisions the government must give equal consideration to the good and interests of each person.
- A prudential judgment derived from powerful historical evidence about the way groups of people once excluded from full citizenship were treated (for example, women, working classes, poor people, persons without substantial property, African Americans, American Indians). The only reasonable conclusion from this mass of evidence is, I believe, that except on a very strong showing to the contrary in rare circumstances, protected by law, every adult subject to the laws should be considered sufficiently well qualified to participate as a political equal in a democratic process of governing (Dahl, 1998: 62–76; Dahl, 1989, 83–97).²

Still, you might wonder whether the formula leads to any practical consequences for public policies. The answer is yes.

Although no comprehensive study of the consequences of equal state representation in the Senate for the passage of legislation over the nation's history seems to have been undertaken, an excellent analysis of some of the more recent effects of the constitutional requirement is provided in a work aptly entitled *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (Lee and Oppenheimer, 1999).

Here we learn that an American who happens to live in a state with a small population automatically

gains at least three kinds of political advantages over any citizen who happens to live in a larger state:³

- first, as I've already emphasized, the vote of a citizen in a small state counts for more in determining the composition of the Senate than the vote of citizen in a larger state;
- second, this constitutionally ordained political inequality is further exaggerated because the smaller number of citizens in a less populated state enables them to gain much easier access to their senators;
- third, political inequality is exaggerated even further because senators from small states have more time available for activity and even leadership within the Senate itself.

For federal expenditures the consequences are striking. Controlling for other relevant factors, the citizens located in small states are clearly the winners. For example, Wyoming's annual share of federal expenditures is likely to be around \$209 per capita compared with California's \$132 (Lee and Oppenheimer, 173–76). On what general principle is a citizen living in Wyoming entitled to half again as much in federal funds as a citizen in similar circumstances who is living in California?

Supermajorities: With and Without Principle

A change in laws or constitutional arrangements that requires more than a simple majority—a supermajority—and thereby allows a minority to veto the pro-

posed change seems to contradict a fundamental principle of democratic government: the principle of majority rule. Should the principle of majority rule always be upheld in a democracy? Can supermajorities never be justified on basic democratic principles?

These questions are too profound and difficult for simple answers. The proper place of majority rule and supermajorities in a democratic system presents problems that have been much discussed among democratic theorists, philosophers, and others. Because a responsible response to that complex discussion would far exceed my limits here, I am going to limit myself to five propositions that I believe are necessary assumptions for any fruitful dialogue among those of us who believe in democracy and wish to sustain and advance it, as I assume most of my readers do:

1. A requirement for a supermajority—that is, a minority veto—must be justified by an *explicit principle that is itself justifiable*. So once again: what reasonable principle can justify the unequal representation of citizens in the Senate? Anyone who defends this form of unequal representation is, I believe, obligated to set forth and defend a general principle that will provide an acceptable rationale for such an extreme violation of political equality among American citizens.
2. In rejecting this particular form of minority veto on democratic grounds, we do not thereby imply that a majority is entitled to do whatever it wishes. No majority is morally entitled to infringe on rights, liberties, and opportunities that are essential to the

existence and operation of democracy itself, rights and liberties such as free speech, free, fair, and reasonably frequent elections, freedom of association, and the like. As I argued earlier (153), it is a logical self-contradiction to employ democratic principles and processes to justify an action by a majority that would violate those very principles and processes. To say that a majority is capable of destroying democracy is not to say that a majority is morally entitled to destroy democracy.

3. The interests of geographical minorities can be protected in two ways. The fundamental rights that members of a geographical minority possess as citizens in a democracy can be protected by the legislative and judicial enforcement of existing guarantees in the Bill of Rights and later amendments to the Constitution. In addition, authority to make decisions over matters that are predominantly of local concern can be protected both by statute and by the federal principles built into the existing Constitution.
4. Even though a majority is capable of destroying democracy, the likelihood that it will do so is often greatly exaggerated. I am not aware of any instance of a country where all the essential democratic institutions were fully in place for a generation or more in which a majority has actually decided, by democratic procedures, to replace their democratic system with a nondemocratic regime. Although the fall of the Weimar Republic in 1933 is sometimes offered as an example, the Nazi party never received a majority of votes in a free and fair election.⁴ And in any case, at the time of its demise the Weimar Republic had existed for fewer than fifteen years.

5. Although no judicial system could prevent a determined majority, or probably even a determined minority, from destroying democracy, the first two propositions imply, I believe, that a democratic constitution might properly endow an independent court with the power to exercise a veto over laws and policies that are demonstrably harmful to the essential institutions of democracy.

Although many Americans are unaware of the fact, no such judicial veto provision explicitly exists in the written American Constitution. Nonetheless, the authority of the Supreme Court to overrule laws and policies that, in its view, violate the Constitution has become a widely accepted part of our unwritten constitution since 1803, when the Supreme Court first claimed that authority.

And thereby created an enduring problem. Because the written constitution often provides little clear-cut guidance, and on many questions the "intentions of the Framers" are highly elusive, unknowable, or ambiguous, the Supreme Court has often used its power to impose policies that were little more than reflections of the political ideologies of a majority of members of the Court (Dahl, 1958; Rosenberg, 2001; Sandler and Schoenbrod, 2003).

Yet I see little prospect for changing this part of our unwritten constitution. The Supreme Court will continue to exist, I expect, as the unelected policy-making body that it has been since 1803.

Changing the Unwritten Constitution

If the prospects for amending the written constitution to remove its remaining undemocratic features are slight, and the chances for democratizing some aspects of our unwritten constitution, like the policy-making role of the Supreme Court, seem little better, what if any changes in the unwritten constitution might make it more democratic?

One feature of our unwritten constitution that we could alter, and in my view should, is the electoral system (supra, 55–61). Although electoral reform isn't the only democratic innovation that we might want to consider, and perhaps isn't the most consequential, it provides us with an excellent example of possibilities that I believe need to be given serious public discussion and consideration. Fortunately, several recent works provide an excellent foundation for a wider discussion (Thompson, 2002; Hill, 2002; Amy, 2003).

So I'm going to conclude by offering a brief recapitulation of the deficiencies of our existing electoral system and a summary of some feasible alternatives that would be considerably more democratic.

Winner Take All

As I have mentioned (57), perhaps the most obvious consequence of winner-take-all elections is the disproportion—often quite extreme—between the percent-

age of votes won by a party's candidate and the percentage of seats the party gains in a legislative body.

Defenders of winner-take-all voting often present this disproportion as an advantage: by reinforcing the legislative strength of the winning party, winner take all enables a majority government to carry out its policies more effectively. It is true that a winner-take-all system may be satisfactory for elections that meet two requirements: voters are divided on a single type of policy, such as the economy, and their attitudes are located pretty much along a single dimension, ranging, let us say, from Left to Center to Right, with most voters holding views near the middle. If this were a steady state, then winner-take-all elections would probably result in a competitive two-party system in which almost all voters would support the party that advocates a policy closest to their own views. In this highly idealized situation, the party that wins the election would probably represent the views of a majority of citizens more adequately than the losing party, and its overrepresentation would ensure that it could enact the policies for which a majority of voters had expressed their support.

But this abstract situation is rare. Today, governments affect citizens in so many different ways—taxes, education, the environment, social security, foreign policy, military policy, health, jobs, abortion, human rights, education, housing, transportation, immigration, and many more—that the views of voters don't fall nicely along just one dimension. In this case,

a winner-take-all voting system is highly unsatisfactory for many reasons:

- A candidate may win office without receiving a majority of votes. In a three-way race, theoretically a candidate could gain office with just 34 percent of the votes, in a four-way race with only 26 percent, and so on. Though these extreme outcomes are unlikely, winning office without gaining a majority of votes is far from uncommon.
- If the winner has obtained less than 50 percent of the vote, a clear majority of voters might have preferred the candidate who came in second. Thus if the second choices of voters were taken into account, the loser among the two top candidates might instead become the winner, in some cases by a substantial margin.
- In states or districts that are perceived to be preponderantly in favor of one candidate, the incentives to vote are greatly reduced among supporters of all the other candidates. If you know in advance that your vote won't make any difference in the outcome, why vote?
- Citizens who believe that they aren't represented by either of the two major parties may entirely give up on politics and elections. In the extreme case they may become alienated from democracy itself.
- As I pointed out earlier (107-08), winner-take-all elections typically result in a larger number of clear-cut losers than proportional systems. Under winner take all, theoretically up to just under half the voters can be losers. In proportional systems, "losers" can still win a share in governing when representatives of their party join a coalition government in which its views are taken into account. In any event, they

can reasonably feel that their votes have been fairly weighed in determining the outcome.

- As a result, in proportional systems, "losers" are more inclined to be satisfied with the way democracy works in their country (supra, 108).

Gerrymandering

If election districts are used for choosing representatives to legislative bodies, as Americans do for elections to the House of Representatives and most state legislatures and city councils, it strongly encourages gerrymandering. Designing the boundaries of a district to favor certain candidates over others is an old American practice. (The term *gerrymandering* goes back to 1811, when the governor of Massachusetts, Elbridge Gerry, signed a redistricting bill creating a district shaped so much like a serpent that a newspaper editor promptly announced that it was not a salamander but a *Gerrymander*.) The result of gerrymandering is the election of a candidate who wins overwhelmingly in a district that has been deliberately shaped to include sympathetic voters and exclude unsympathetic voters.

This rude fact generates a political dynamic:

- Elected politicians naturally have strong incentives to gerrymander the electoral districts in favor of themselves or their party.
- To do so they will, of course, engage in horse trading with elected politicians of the opposing party,

thus guaranteeing that both parties end up with gerrymandered districts that are considered safe for their candidates.

- To keep control of the process of redistricting, elected politicians will try to ensure that they—not an independent commission—are entrusted with the task of designing district boundaries. In 2002 only six states provided for an independent commission. In all the rest, the state legislature had the final say, either directly (in thirty-six states) or by acting as the final authority (in eight states) (Thompson, 173, 242).
- Consequently, after each decennial census the shape of the state's districts is determined in most state legislatures by an unseemly round of partisan strong arming, bickering, bargaining, and log rolling—as anyone could have observed after the census of 2000.
- The upshot is that safe seats are created and the number of potentially competitive districts is reduced. Partisan redistricting after the 2000 census led to an election in 2002 in which only thirty-five to forty seats in the House of Representatives were competitive.⁵ Gerrymandering ensured that all the rest, nearly nine out of ten, had been rendered safe for one party or the other.

As a result, even our House of Representatives may not always be very representative.

Alternatives to Winner Take All

As I noted earlier, with only two exceptions, Britain and Canada, all the other mature democracies employ an alternative to winner take all. Because the various alternatives are too many to describe, I'll briefly men-

tion only a few of the possibilities with which I think Americans should be more familiar.⁶

If no candidate receives more than 50 percent of the vote, a *runoff* (or *second round*) election takes place between the two candidates with the largest number of votes. This system is used in France for elections to the parliament and the presidency. Its main disadvantage is the additional time, effort, and money it requires; in the United States, with our acute problem of campaign finance, this would be especially problematic.

This drawback could be removed, however, by *preferential voting*, (sometimes called an *instant runoff*). Although preferential voting has many variations, basically it allows or requires voters to rank the candidates in the order of their preferences. Here is one advocate's description: "If no candidate receives more than 50 percent of the initial vote, the candidate with the fewest votes is eliminated and his votes transferred to the candidates designated as the second choice on these ballots. This process of elimination and transfer goes on until one candidate receives more than 50 percent of the vote" (Thompson, 71).

A system along these lines has been used in Australia since 1901 and in Ireland since 1922.

Another alternative is *proportional representation* (PR), an electoral system that ensures a strong relation between the percentage of votes cast for a party and the percentage of parliamentary seats a party wins. Among the twenty-two advanced democracies, more employ PR than any other electoral system (see table 3, p. 166).

PR Plus Single-Member Districts

In many countries that use PR, voters don't have an opportunity to elect a candidate to represent their own district. Most Americans would probably view this as a drawback.

However, *PR can be combined with single-member districts*. Here is how it might work in the United States. For illustrative purposes, let's assume a House of Representatives with 600 seats rather than the present 435. Half of these seats would be filled by elections held in 300 congressional districts, in each of which the single seat would be won, as it is now, in a winner-take-all election. Voters would also cast a second vote, however, for a *list* of statewide candidates nominated by the voter's preferred *party*. These would be allocated so that the percentage of each party's seats in the House would closely match the percentage of votes it received in the election. Thus if one party wins 40 percent of the national vote for members of Congress, but gains only 20 percent of the total House seats in the district elections, enough candidates from the national list would then be added to match the party's percentage of House seats with its percentage of the national vote. A party with, say, 40 percent of the national votes could expect to gain about 40 percent of the seats in the House.

Because this system combines the advantages of district elections with the fairness of proportionality, some observers regard it as the best of both worlds. It

has been used in Germany since the Federal Republic was inaugurated in 1949, and in 1993 it replaced winner take all in New Zealand. In Italy it is used for elections to both chambers of parliament, though in a country in which dissatisfaction with electoral systems is more endemic, it also evokes a considerable amount of criticism and proposals for change.

Some Words of Caution, Some Words of Hope

Lest we expect too much, let me now append a few words of caution. First, as with a great many, perhaps most, political choices, as best I can judge no electoral system is entirely without some drawbacks. Second, as with other political institutions, an electoral system that works well in one country may be less satisfactory in another. Third, then, an electoral system should be designed to meet the conditions of a particular country—in the case we're considering, the United States.⁷

And some words of hope.

Nearly a century ago a distinguished Supreme Court Justice, Louis Brandeis, argued that the states provide an accessible testing ground for possible changes. Indeed, some of the most important amendments to the Constitution—abolition of slavery, direct election of senators, women's suffrage—first gained acceptance at the state level, where they helped to build up a powerful national constituency that ultimately

prevailed. Possibilities can also be tried out at the municipal level.

As I said earlier, our winner-take-all electoral system is only one undemocratic legacy that we need to confront. Other undemocratic features of our unwritten Constitution are also open to change.

Most Americans would probably agree that the basic *rights* necessary to democratic institutions should be fairly distributed among our citizens. But as I pointed out in the previous chapter, democratic principles also require a fair distribution of *opportunities* to act on those rights and the *political resources* necessary if citizens are to be able to take advantage of the opportunities. Yet we have barely begun to explore ways to reduce the huge disparities in the political resources that citizens require if they are to participate more effectively in campaigns, elections, and influencing policy. For example, despite recent and very hard-fought changes, the way that electoral campaigns are financed still remains an egregious failure to meet elementary democratic standards.



CONTRARY TO A BELIEF WIDELY HELD AMONG AMERICANS, our great and enduring gift to the world was not our Constitution, which was little imitated and indeed largely rejected as a model among the successful and enduring democratic countries that would emerge in the next century. No, far greater were two other gifts.

One was the demonstration by Americans that among a relatively free and independent people a *written constitution* prescribing the political structures of a democratic republic could be designed, ratified, occasionally amended, and sufficiently respected among political leaders and ordinary citizens to endure indefinitely. Even if the specific features of the American Constitution failed to serve as a model for other countries that would successfully pursue their own paths toward a stable democracy, the United States offered living proof for all the world to see that a written constitution could help to create and maintain the durable structures needed for a representative democracy.

Yet a greater gift, I believe, was what foreign travelers like Alexis de Tocqueville observed and reported to Europe and beyond: to a degree that had hitherto been thought far beyond mortal reach, the idea and the ideals of democracy and political equality could profoundly shape political life, beliefs, culture, and institutions in a huge, growing, diverse, progressive, and prosperous country.