CHAPTER 3

The Constitution as a Model: An American Illusion

MANY AMERICANS APPEAR TO BELIEVE THAT OUR constitution has been a model for the rest of the democratic world.[1] Yet among the countries most comparable to the United States and where democratic institutions have long existed without breakdown, not one has adopted our American constitutional system. It would be fair to say that without a single exception they have all rejected it. Why?

Before I explore that question, I need to clarify two matters. As you may have noticed, rather than speaking simply of "the constitution," I've sometimes used the phrase "the constitutional system." I do so because I want to include in a constitutional *system* an important set of institutions that may or may not be prescribed in the *formal* constitution itself: these are its electoral

arrangements. As we'll see, electoral systems can interact in crucial ways with the other political institutions and thereby determine the way they function.

Also, I've just referred to the countries where democracy is oldest and most firmly established. We could call them the older democracies, the mature democracies, the stable democratic countries, and so on, but I'll settle on "the advanced democratic countries." Whatever we choose to call them, in order to compare the characteristics and performance of the American constitutional system with the characteristics and performance of the systems in other democratic countries, we need a set of reasonably comparable democratic countries. In short, we don't want to compare apples and oranges—or good apples and rotten apples.

I've noticed that we Americans often assure ourselves of the superiority of our American political system by comparing it with political systems in countries ruled by nondemocratic regimes or in countries that suffer from violent conflict, chronic corruption, frequent chaos, regime collapse or overthrow, and the like. On voicing or hearing criticism of political life in the United States, an American not infrequently adds, "Yes, but just compare it with X!," a favorite X being the Soviet Union during the Cold War and, after its collapse, Russia. One could easily pick more than a hundred other countries with political systems that by almost any standard are unquestionably inferior to our own. But comparisons like this are absurdly irrelevant.

To my mind, the most comparable countries are those in which the basic democratic political institutions have functioned without interruption for a fairly long time, let's say at least half a century, that is, since 1950. Including the United States, there are twenty-two such countries in the world.[2] (See Appendix B, Tables 1 and 2.) Fortunately for our purposes, they are also comparable in their relevant social and economic conditions: not a rotten apple in the bunch. Not surprisingly, they are mostly European or English speaking, with a few outliers: Costa Rica, the only Latin American country; Israel, the only Middle Eastern country; and Japan, the only Asian country.

When we examine some of the basic elements in the constitutional structures of the advanced democratic countries, we can see just how unusual the American system is. Indeed, among the twenty-two older democracies, our system is unique.[3]

Federal or Unitary

To begin with, among the other twenty-one countries we find only seven federal systems, in which territorial units—states, cantons, provinces, regions, Länder—are endowed by constitutional prescription and practice with a substantial degree of autonomy and with significant powers to enact legislation. As in the United States, in these federal countries the basic territorial units, whether states, provinces, or cantons, are not

simply legal creatures of the central government with boundaries and powers that the central government could, in principle, modify as it chooses. They are basic elements in the constitutional design and in the political life of the country.

As with the United States, so too in these other five countries federalism was not so much a free choice as a self-evident necessity imposed by history. In most, the federal units—states, provinces, cantons—existed before the national government was fully democratized. In the extreme case, Switzerland, the constituent units were already in place before the Swiss Confederation itself was formed from three Alpine cantons in 1291, five centuries before America was born. Throughout the following seven centuries the Swiss cantons, now twenty in number,[4] have retained a robust distinctiveness and autonomy. In the outlier, Belgium, federalism followed long after a unitary government had been imposed on its diverse regional groups. As the brilliant period of Flemish painting, weaving, commerce, and prosperity in the sixteenth and seventeenth centuries reminds us, profound territorial, linguistic, religious, and cultural differences between the predominantly Flemish and Walloon areas existed long before Belgium itself became an independent country in 1830. Despite the persistent cleavages between the Flemish and Walloons, however, federalism did not arrive until 1993 when the three regions—Wallonia, Flanders, and Brussels—were finally given constitutional status. I should point out

that the deep divisions between Walloons and Flemish continue to threaten the survival of Belgium as a single country.

The second and third features follow directly from the existence of federalism.

Strong Bicameralism

A natural, if not strictly necessary, consequence of federalism is a second chamber that provides special representation for the federal units. To be sure, unitary systems may also have, and historically all have had, a second chamber. However, in a democratic country with a unitary system, the functions of a second chamber are far from obvious. The question that was posed during the American constitutional convention is bound to arise: Exactly whom or whose interests is a second chamber supposed to represent? And just as the Framers could provide no rationally convincing answer, so too as democratic beliefs grow stronger in democratic countries with unitary governments, the standard answers become less persuasive—in fact, so unpersuasive to the people of the three Scandinavian countries that they have all abolished their second chambers. Like the state of Nebraska, Norway, Sweden, and Denmark also seem to do quite nicely without them. Even in Britain, the gradual advance of democratic beliefs created an inexorable force opposed to the historical powers of the House of Lords. As early as 1911

the Liberals wiped out the power of the Lords to veto "money bills" passed by the Commons. The continuing advance of democratic beliefs during the past century led in 1999 to the abolition of all but ninety-two hereditary seats, whose occupants would be elected by hereditary peers.[5] The future of that ancient chamber remains in considerable doubt.

By the end of the twentieth century, then, a strongly bicameral legislature continued to exist in only four of the advanced democratic countries, all of them federal: in addition to the United States, these were Australia, Germany, and Switzerland. Their existence poses a question: What functions can and should a second chamber perform in a democratic country? And in order to perform its proper functions, if any, how should a second chamber be composed? As the deliberations of the Parliamentary Commission on the future of the House of Lords indicate, these questions admit of no easy answer. It would not be surprising, then, if Britain ends up with no real second chamber at all, even if a ghostly shade of the upper house persists.

Unequal Representation

A third characteristic of federal systems is significant unequal representation in the second chamber. By unequal representation I mean that the number of members of the second chamber coming from a federal unit such as a state or province is not proportional to

its population, to the number of adult citizens, or to the number of eligible voters. The main reason, perhaps the only real reason, why second chambers exist in all federal systems is to preserve and protect *unequal* representation. That is, they exist primarily to ensure that the representatives of small units cannot be readily outvoted by the representatives of large units. In a word, they are designed to construct a barrier to majority rule at the national level.

To make this clear, let me extend the range of the term unequal representation to include any system where, in contrast to the principle of "one person one vote," the votes of different persons are given unequal weights. Whenever the suffrage is denied to some persons within a system, we might say that their votes are counted as zero, whereas the votes of the eligible citizens are counted as one. When women were denied the vote, a man's vote effectively counted for one, a woman's for nothing, zero. When property requirements were required for the suffrage, property owners were represented in the legislature, those below the property threshold were not: like women their "votes" counted for zero. Some privileged members of Parliament, like Edmund Burke, referred to "virtual representation," where the aristocratic minority represented the best interests of the entire country. But the bulk of the people who were excluded easily saw through that convenient fiction, and as soon as they were able to they rejected these pretensions and gained the right to vote for their own M.P.s. In nine-

teenth-century Prussia, voters were divided into three classes according to the amount of their property taxes. Because each *class* of property owners was given an equal number of votes irrespective of the vast difference in numbers of *persons* in each class, a wealthy Prussian citizen possessed a vote that was effectively worth almost twenty times that of a Prussian worker.[6]

To return now to the United States: as the American democratic credo continued episodically to exert its effects on political life, the most blatant forms of unequal representation were in due time rejected. Yet, one monumental though largely unnoticed form of unequal representation continues today and may well continue indefinitely. This results from the famous Connecticut Compromise that guarantees two senators from each state.

Imagine a situation in which your vote for your representative is counted as one while the vote of a friend in a neighboring town is counted as seventeen. Suppose that for some reason you and your friend each change your job and your residence. As a result of your new job, you move to your friend's town. For the same reason, your friend moves to your town. Presto! To your immense gratification you now discover that simply by moving, you have acquired sixteen more votes. Your friend, however, has lost sixteen votes. Pretty ridiculous, is it not?

Yet that is about what would happen if you lived on the western shore of Lake Tahoe in California and moved less than fifty miles east to Carson City, Nevada,

while a friend in Carson City moved to your community on Lake Tahoe. As we all know, both states are equally represented in the U.S. Senate. With a population in 2000 of nearly 34 million, California had two senators. But so did Nevada, with only 2 million residents. Because the votes of U.S. senators are counted equally, in 2000 the vote of a Nevada resident for the U.S. Senate was, in effect, worth about seventeen times the vote of a California resident. A Californian who moved to Alaska might lose some points on climate, but she would stand to gain a vote worth about fifty-four times as much as her vote in California.[7] Whether the trade-off would be worth the move is not for me to say. But surely the inequality in representation it reveals is a profound violation of the democratic idea of political equality among all citizens.

Some degree of unequal representation also exists in the other federal systems. Yet the degree of unequal representation in the U.S. Senate is by far the most extreme. In fact, among all federal systems, including those in more newly democratized countries—a total of twelve countries—on one measure the degree of unequal representation in the U.S. Senate is exceeded only by that in Brazil and Argentina.[8]

Or suppose we take the ratio of representatives in the upper chamber to the populations of the federal units. In the United States, for example, the two senators from Connecticut represent a population of slightly above 3.4 million, while the two senators from its neighbor New York represent a population of 19 million:

a ratio of about 5.6 to 1. In the extreme case, the ratio of over-representation of the least populated state, Wyoming, to the most populous state, California, is just under 70 to 1.[9] By comparison, among the advanced democracies the ratio runs from 1.5 to 1 in Austria to 40 to 1 in Switzerland. In fact, the U.S. disproportion is exceeded only in Brazil, Argentina, and Russia.[10]

On what possible grounds can we justify this extraordinary inequality in the worth of the suffrage?

A brief digression: rights and interests. A common response is to say that people in states with smaller populations need to be protected from federal laws passed by congressional majorities that would violate their basic rights and interests. Because the people in states like Nevada or Alaska are a geographical minority, you might argue, they need to be protected from the harmful actions of national majorities. But this response immediately raises a fundamental question. *Is there a principle of general applicability that justifies an entitlement to extra representation for some individuals or groups?*

In searching for an answer, we need to begin with an eternal and elementary problem in any governmental unit:[11] whether the unit is a country, state, municipality, or whatever, virtually all of its decisions will involve some conflict of interests among the people of the relevant political unit. Inevitably, almost any governmental decision will favor the interests of some citizens and harm the interests of others. The solution to this problem, which is inherent in all governmental

units, is ordinarily provided in a democratic system by the need to secure a fairly broad consent for its decisions by means, among other things, of some form of majority rule. Yet if decisions are arrived at by majority rule, then the possibility exists, as Madison and many others have observed, that the interests of *any* minority will be damaged by a majority. Sometimes, fortunately, mutually beneficial compromises may be found. But if the interests of a majority clash irreconcilably with those of a minority, then the interests of that minority are likely to be harmed.

Some interests, however, may be protected from the ordinary operation of majority rule. To a greater or lesser degree, all democratic constitutions do so.

Consider the protections that all Americans enjoy, not just in principle but substantially in practice as well. First, the Bill of Rights and subsequent amendments provide a constitutional guarantee that certain fundamental rights are protected whether a citizen lives in Nevada or California, Rhode Island or Massachusetts, Delaware or Pennsylvania. Second, an immense body of federal law and judicial interpretation based on constitutional provisions enormously extends the domain of protected rights—probably far beyond anything the Framers could have foreseen. Third, the constitutional division of powers in our federal system provides every state with an exclusive or overlapping domain of authority on which a state may draw in order to extend even further the protections for the particular interests of the citizens of that state.

The basic question. Beyond these fundamental and protected rights and interests, do people in the smaller states possess *additional* rights or interests that are entitled to protection from policies supported by national majorities? If so, what are they? And on what general principle can their special protection be justified? Surely they do not include a fundamental right to graze sheep or cattle in national forests or to extract minerals from public lands on terms that were set more than a century ago. Why should geographical location endow a citizen or group with special rights and interests, above and beyond those I just indicated, that should be given additional constitutional protection?

If these questions leave me baffled, I find myself in good company. "Can we forget for whom we are forming a government?" James Wilson asked at the Constitutional Convention. "Is it for *men,* or for the imaginary beings called *States?*" Madison was equally dubious about the need to protect the interests of people in the small states. " Experience," he said, "suggests no such danger. . . . Experience rather taught a contrary lesson. . . . The states were divided into different interests not by their differences in size, but by other circumstances."[12]

Two centuries of experience since Madison's time have confirmed his judgment. Unequal representation in the Senate has unquestionably failed to protect the fundamental interests of the *least* privileged minorities. On the contrary, unequal representation has sometimes served to protect the interests of the *most* privi-

leged minorities. An obvious case is the protection of the rights of slaveholders rather than the rights of their slaves. Unequal representation in the Senate gave absolutely no protection to the interests of slaves. On the contrary, throughout the entire pre–Civil War period unequal representation helped to protect the interests of slave owners. Until the 1850s equal representation in the Senate, as Barry Weingast has pointed out, gave the "the South a veto over any policy affecting slavery." Between 1800 and 1860 eight anti-slavery measures passed the House, and all were killed in the Senate.[13] Nor did the Southern veto end with the Civil War. After the Civil War, Senators from elsewhere were compelled to accommodate to the Southern veto in order to secure the adoption of their own policies. In this way the Southern veto not only helped to bring about the end of Reconstruction; for another century it prevented the country from enacting federal laws to protect the most basic human rights of African Americans.

So much for the alleged virtues of unequal representation in the Senate.

Suppose for a moment we try to imagine that we actually wanted the constitution to provide special protection to otherwise disadvantaged minorities by giving them extra representation in the Senate. What minorities most need this extra protection? How would we achieve it? Would we now choose to treat certain states as minorities in special need of protection simply because of their smaller populations? Why would we want to protect these regional minorities and not

other, far weaker minorities? To rephrase James Wilson's question in 1787: Should a democratic government be designed to serve the interests of "the imaginary beings called States," or should it be designed instead to serve the interests of all its citizens considered as political equals?

As I have said, the United States stands out among twenty-two comparable democratic countries for the degree of unequal representation in its upper chamber. Of the half dozen that have federal systems and an upper house designed to represent the federal units, none come even close to the United States in the extent of its unequal representation in its upper house.

We begin to see, then, that our constitutional system is unusual. As we continue our exploration we shall discover that it is not merely unusual. It is one of a kind.

Strong Judicial Review of National Legislation

Not surprisingly, other federal systems among the older democracies also authorize their highest national courts to strike down legislation or administrative actions by the federal units—states, provinces, and the like—that are contrary to the national constitution. The case for the power of federal courts to review state actions in order to maintain a federal system seems to me straightforward, and I accept it here. But the authority of a high court to declare unconstitutional legislation that has been properly enacted by the coordinate con-

stitutional bodies—the parliament or in our system the Congress and the president—is far more controversial.

If a law has been properly passed by the law-making branches of a democratic government, why should judges have the power to declare it unconstitutional? If you could simply match the intentions and words of the law against the words of the constitution, perhaps a stronger case could be made for judicial review. But in all important and highly contested cases, that is simply impossible. Inevitably, in interpreting the constitution judges bring their own ideology, biases, and preferences to bear. American legal scholars have struggled for generations to provide a satisfactory rationale for the extensive power of judicial review that has been wielded by our Supreme Court. But the contradiction remains between imbuing an unelected body—or in the American case, five out of nine justices on the Supreme Court—with the power to make policy decisions that affect the lives and welfare of millions of Americans. How, if at all, can judicial review be justified in a democratic order? I'll discuss that question in my last chapter.

Meanwhile, let me return to another aberrant aspect of the American constitutional system.

Electoral Systems

Earlier I explained that I wanted to use the term constitutional *system* because some arrangements that are

not necessarily specified in a country's constitutional document interact so strongly with the other institutions that we can usefully regard them as a part of the country's constitutional arrangements. In that spirit, we might want to reflect on the peculiarities of our electoral system, which, natural as it may seem to us, is of a species rare to the vanishing point among the advanced democratic countries. Closely allied with it is an equally rare bird, our much revered two-party system.

To be sure, our electoral system was not the doing of the Framers, at least directly, for it was shaped less by them than by British tradition. The Framers simply left the whole matter to the states and Congress,[14] both of which supported the only system they knew, one that had pretty much prevailed in Britain, in the colonies, and in the newly independent states.

The subject of electoral systems is fearfully complex and for many people fearfully dull as well. I shall therefore employ a drastic oversimplification, but one sufficient for our purposes. Let me simply divide electoral systems into two broad types, each with a variant or two. In the one we know best, typically you can cast your vote for only one of the competing candidates, and the candidate with the most votes wins. In the usual case, then, a single candidate wins office by gaining at least one more vote than any of his or her opponents. We Americans tend to call this one-vote margin a plurality; elsewhere, to distinguish it from an absolute majority it may be called a relative majority. To describe our system, American political scientists

sometimes employ the cumbersome expression "single member district system with plurality elections." I prefer the British usage: on the analogy of a horse race where the winner needs only a fraction of a nose-length to win, the British tend to call it the "first-past-the-post" system.

If voters were to cast their ballots in the same proportion in every district, the party with the most votes would win every seat. In practice, as a result of variations from district to district in support for candidates, a second party generally manages to gain some seats, although its percentage of seats will ordinarily be smaller than its percentage of votes. But the representation of third parties usually diminishes to the vanishing point. In short, first-past-the-post favors two-party systems.

The main alternative to first-past-the-post is proportional representation. As the name implies, proportional representation is designed to ensure that voters in a minority larger than some minimal size—say, 5 percent of all voters—will be represented more or less in proportion to their numbers. For example, a group consisting of 20 percent of all voters might win pretty close to 20 percent of the seats in the parliament. Consequently, countries with proportional representation systems are also very likely to have multiparty systems in which three, four, or more parties are represented in the legislature. In short, although the relationship is somewhat imperfect, in general a country with first-past-the-post is likely to have a two-party

system and a country with proportional representation is likely to have a multiparty system.

In the most common system of proportional representation, each party presents voters with a list of its candidates; voters cast their votes for a party's candidates; each party is then awarded a number of seats roughly in proportion to its overall share of the vote. Countries with a list system may also permit voters to indicate their preferences among the party's candidates. The party's seats are then filled by the candidates who are most preferred by the voters. Twelve of the twenty-two advanced democratic countries employ the list system of proportional representation, and another six use some variant of it. (See Appendix B, Table 3.)

Of the four countries without proportional representation, France avoids one of the defects of single-member districts by providing that in parliamentary districts where no candidate receives an absolute majority of votes, a second election will be held in which the two candidates with the highest number of votes compete. This run-off, two-round, or double-ballot system, as it is variously called, thereby ensures that all the members have been elected by a majority of the voters in their constituency.

This leaves the three oddballs with first-past-the-post, a plurality system in single member districts: Canada, the United Kingdom, and the United States. Even in the United Kingdom, the original source on which the Americans drew, the traditional system was

replaced by proportional representation in the 1999 elections to the newly created legislative bodies in Scotland and Wales. Four parties won seats in the Scottish Parliament, and four too in the Welsh Assembly. What is more, the Independent Commission on the Voting System set up by the Labor Party in 1997 to recommend an alternative to first-past-the-post proposed in its report a year later that members of the House of Commons be elected by means of a proportional representation system—a hybrid, to be sure, but one that would ensure greater proportionality between votes and seats in that ancient house.[15] It is altogether possible that one day not far off, Britain will be added to the list of proportional representation countries, leaving only Canada and the United States among the advanced democracies with first-past-the-post.

Although few Americans know much about experience in the other advanced democratic countries with proportional representation and multiparty systems, they seem to have strong prejudices against both. Unwilling to conceive of an alternative to first-past-the-post and under pressure to ensure fairer representation for minorities in state legislatures and Congress, our legislatures and federal courts in recent years have sometimes gerrymandered weirdly shaped districts. . . well, yes, rather like a salamander. But neither legislatures nor courts seem willing to give serious thought to some form of proportional representation as quite possibly a better alternative.

The extent to which we take first-past-the-post for granted was clearly revealed in 1993, when it was discovered that a well-qualified candidate to head the Civil Rights Division of the Department of Justice had written an article in a law journal suggesting that a rather sensible system of proportional representation might be worth considering as a possible solution to the problem of securing more adequate minority representation.[16] From the comments the author's innocent heresy generated, you might have thought that she had burned the American flag on the steps of the Supreme Court. Her candidacy, naturally, was stone dead.

First-past-the-post was the only game in town in 1787 and for some generations thereafter. Like the locomotive, proportional representation had not yet been invented. It was not fully conceived until the mid-nineteenth century when a Dane and two Englishmen—one of them John Stuart Mill—provided a systematic formulation. Since then it has become the system overwhelmingly preferred in the older democracies.

After more than a century of experience with other alternatives, isn't it time at last to open our minds to the possibility that first-past-the-post may be just fine for horse races but might not be best for elections in a large and diverse democratic country like ours? Might we not also want to consider the possible advantages of a multiparty system?

I do not say that we should necessarily make these choices. But should we not at least give them serious

consideration? Shouldn't we ask ourselves this question: What kind of electoral and party systems would best serve democratic ends?

Party Systems

Nearly a half-century ago, a French political scientist, Maurice Duverger, proposed what came to be called Duverger's Law: first-past-the-post electoral systems tend to result in two-party systems. Conversely, proportional representation systems are likely to produce multiparty systems.[17] Although the causal relation may be more complex than my brief statement of Duverger's Law suggests,[18] a country with a proportional representation system is likely to require coalition governments consisting of two or more parties. In a country with a first-past-the-post electoral system, however, a single party is more likely to control both the executive and the legislature. Thus in countries with proportional representation–multiparty systems and coalition governments, minorities tend to be represented more effectively in governing. By contrast, in countries with first-past-the-post and two-party systems, the government is more likely to be in the hands of a single party that has gained a majority of seats in the parliament and the most popular votes, whether by an outright majority, or more commonly, a plurality. To distinguish the two major alternatives, I'll refer to the proportional representation–multiparty countries as "propor-

tional" and countries with first-past-the-post electoral systems and only two major parties as "majoritarian."[19]

Where does the United States fit in? As usual: in neither category. It is a mixed system, a hybrid, neither predominantly proportional nor predominantly majoritarian. (See Appendix B, Table 4.) I am going to return to the American hybrid in Chapter 5, but three brief observations may help to put it in perspective here. First, the Framers had no way of knowing about the major alternatives to first-past-the-post, much less fully understanding them. Second, since the Framers' time most of the older and highly stable democratic countries have rejected first-past-the-post and opted instead for proportional systems. Third, our mixed design contributes even further to the unusual structure of our constitutional system.

Our Unique Presidential System

As we make our way through the list of countries that share some constitutional features with the United States, the list, short to begin with, diminishes even further. By the time we reach the presidency the United States ceases to be simply unusual. It becomes unique.

Among the twenty-two advanced democracies, the United States stands almost alone in possessing a single popularly elected chief executive endowed with important constitutional powers—a presidential system. Except for Costa Rica, all the other countries govern

themselves with some variation of a parliamentary system in which the executive, a prime minister, is chosen by the national legislature. In the mixed systems of France and Finland, most of the important constitutional powers are assigned to the prime minister, but an elected president is also provided with certain powers—chiefly over foreign relations. This arrangement may lead, as in France, to a president from one major party and a prime minister from the opposing party, a situation that with a nice Gallic touch the French call "cohabitation." Yet even allowing for the French and Finnish variations, none of the other advanced democratic countries has a presidential system like ours.

Why is this? The question breaks down into several parts. Why *did* the Framers choose a presidential system? Why *didn't* they choose a parliamentary system? Why have all the other advanced democratic countries rejected our presidential system? Why have they adopted some variant of a parliamentary system instead, or as in France and Finland a system that is predominantly parliamentary with an added touch of presidentialism?

To answer these questions in detail would go beyond our limits here. But let me sketch a brief answer.

Before I do so, however, I want to admonish you not to cite the explanation given in the Federalist Papers. These were very far from critical, objective analyses of the constitution. If we employ a dictionary definition of propaganda as "information or ideas methodically spread to promote or injure a cause, nation,

etc.," then the Federalist Papers were surely propaganda. They were written post hoc by partisans—Alexander Hamilton, John Jay, and James Madison—who wanted to persuade doubters of the virtues of the proposed constitution in order to secure its adoption in the forthcoming state conventions. Although they were very fine essays indeed, and for the most part much worth reading today, they render the work of the convention more coherent, rational, and compelling than it really was. Ironically, by the way, the task of explaining and defending the Framers' design for the presidency was assigned to Hamilton, who had somewhat injudiciously remarked in the Convention that as to the executive, "The English model was the only good one on this subject," because "the hereditary interest of the king was so interwoven with that of the nation. . . and at the same time was both sufficiently independent and sufficiently controuled [*sic*], to answer the purpose." He then proposed that the executive and one branch of the legislature "hold their places for life, or at least during good behavior."[20] Perhaps as a result of these remarks, Hamilton seems to have had only a modest influence in the Convention on that matter or any other.

How it came about. What is revealed in the most complete record of the Convention[21] is a body floundering in its attempts to answer an impossibly difficult question: How should the chief executive of a republic be selected, and what constitutional powers should be assigned to the executive branch? The question was im-

possibly difficult because, as I emphasized in the previous chapter, the Framers had no relevant model of republican government to give them guidance. Most of all, they lacked any suitable model for the executive branch. To be sure, they could draw on the sacred doctrine of "separation of powers." Not surprisingly, the references to that doctrine recorded in Madison's notes were all positive. And up to a point, its implications were obvious: a republic would need an independent judiciary, a bicameral legislature consisting of a popular house and some kind of second chamber to check the popular house, and an independent executive.

But how was the independent executive to be chosen? How independent of the legislature and of the people should he be? How long should his term of office be? ("He" is, of course, the language of Article II and, like most Americans until recently, the only way the Framers could conceive of the office.) The British constitution was a helpful model for the Framers in some respects. But as a solution to the problem of the executive, it utterly failed them. Despite the respect of the delegates for many aspects of the British constitution, a monarchy was simply out of the question.[22]

Even so, they might have chosen a democratic version of the parliamentary system, as the other evolving European democracies were to do. Although they were unaware of it, even in Britain a parliamentary system was already evolving. Why then didn't the Framers come up with a republican version of a parliamentary system?

Well, they almost did. It has been too little emphasized, I think, that the Framers actually came very close to adopting something like a parliamentary system. What is more, it is far from clear, to me at least, why they rejected it and ended up instead with a presidential system.[23] One obvious solution—even more obvious to us today than it would have been in 1787—was to allow the national legislature to choose the executive. In fact, throughout most of the Convention this was their favored solution. Right off the bat on June 2, only two weeks after the Convention opened, the Virginia delegation, which contained some of the best minds and most influential delegates, proposed that the national executive should be chosen by the national legislature. In Madison's notes, the subsequent course of that proposal and the alternatives to it has left a fascinating and often mystifying trail.

The meandering trail they pursued, as best I can reconstruct it, looks something like this.[24] On three occasions—July 17, July 24, and July 26—the delegates vote for the selection of the president by "the national legislature," the first time by a unanimous vote, the last by a vote of 6–3. With one exception every other alternative is defeated by substantial majorities: in a puzzling detour on July 19, with Massachusetts divided, they vote 6–3 for electors appointed by the state legislatures. On July 26, their favored solution, election by the national legislature, is forwarded to a Committee on Detail. On August 6 the committee duly reports in favor of election by the national legislature.

On August 24 two other alternatives fail once again. A new committee to consider the issue reports back on September 4. By now the delegates are eager to wind up a convention that has already gone on for three months. In contradiction to the recommendation of the previous committee, however, this one recommends that the executive be chosen by electors appointed by the state legislatures. Two days later, with nine states in favor and only two opposed, the impatient delegates adopt this solution.

Well, not exactly. What they adopt actually states that: "Each state shall appoint, *in such manner as the legislature thereof may direct*, a number of electors, equal to the whole number of Senators and representatives to which the State may be entitled in Congress." Whatever the Framers intend by these words, they will offer a huge opportunity for the democratic phase of the American revolution to democratize the presidency.

Ten days after they agree on this provision, the constitution is signed and the Convention adjourns.

What this strange record suggests to me is a group of baffled and confused men who finally settle on a solution more out of desperation than confidence. As events were soon to show, they had little understanding of how their solution would work out in practice.

So the question remains with no clear answer: Why, finally, did they fail to adopt the solution they had seemed to favor, a president elected by the Congress, a sort of American version of a parliamentary system? The standard answer no doubt has some validity: they feared

that the president might be too beholden to Congress. And all the other alternatives seemed to them worse.

Among these alternatives was election by the people, which had been twice rejected overwhelmingly. Yet it was this twice-rejected solution, election by the people, that was quickly adopted de facto during the democratic phase of the American revolution.

How their solution failed. Perhaps in no part of their work did the Framers fail more completely to design a constitution that would prove acceptable to a democratic people. As I have mentioned, their hope for a group of electors who might exercise their independent judgments about the best candidate to fill the office came a cropper following the election of 1800. But as I shall describe in the next chapter, more was still to come. If the election of 1800 first revealed how inappropriate the electoral college was in a democratic order, the presidential election of 2000, two centuries later, dramatized for all the world to witness the conflict between the Framers' constitution and the democratic ideal of political equality.

Ironically, had they adopted the Virginia Plan and placed the choice of the chief executive in the hands of the legislature, as would become the practice in parliamentary systems, the Framers would have put a bit more distance between the people and the president than their solution provided in practice. Here again, in 1787 they could not anticipate a constitutional design that was yet to evolve fully in Britain and, even later, in other countries on the path to democracy.

The continuing democratic revolution would bring about an even more profound change in the presidency. However deftly Jefferson steered the Congress as he rode the tide of the democratic revolution, he never publicly challenged the standard view that the only legitimate representative of the popular will was the Congress, not the president. Nor did any of his successors, Madison, Monroe, John Quincy Adams, lay down such a claim.

Andrew Jackson did just that. In justifying his use of the veto against Congressional majorities, as the only national official who had been elected by *all* the people and not just by a small fraction, as were Senators and Representatives, Jackson insisted that he alone could claim to represent *all* the people. Thus Jackson began what I have called the myth of the presidential mandate: that by winning a majority of popular (and presumably electoral) votes, the president has gained a "mandate" to carry out whatever he had proposed during the campaign.[25] Although he was bitterly attacked for this audacious assertion, which not all later presidents supported, it gained credibility from its reassertion by Lincoln, Cleveland, Theodore Roosevelt, and Wilson and was finally nailed firmly in place by Franklin Roosevelt.

Whatever we may think of the validity of the claim—I am inclined to think it is little more than a myth created to serve the political purposes of ambitious presidents—it is simply one part of a transformation of the presidency in response to democratic ideas

and beliefs that has produced an office completely different from the office that the Framers thought they were creating, vague and uncertain as their intentions may have been.

And a good thing, too, you may say. But if you approve of the democratization of the presidency—or, as I would prefer to say, its pseudo-democratization—aren't you suggesting in effect that the constitutional system *should* be altered to meet democratic requirements?

Why other countries became parliamentary democracies. There is still one more reason why the Framers didn't choose a parliamentary system. They had no model to inspire them. One hadn't yet been invented.

The British constitutional system they knew, and in some respects admired, was already on its way to history's attic of abandoned or failed constitutions. Although no one saw it clearly in 1787, even at the time of the Convention the British constitution was undergoing rapid change. Most important, the monarch was swiftly losing the power to impose a prime minister on the parliament. The contrary assumption was gaining strength: that a prime minister must receive a vote of confidence from both houses of parliament, and that he must resign if and whenever he lost their confidence. But this profound change in the British constitution did not become fully manifest until 1832, too late for the Framers to see its possibilities.

In addition, there was the problem of a monarch. How could a country have a parliamentary system

without a symbolic head of state who would perform ceremonial functions, symbolize the unity of the country, and help to confer legitimacy on the parliament's choice by anointing him as prime minister? After the evolution of a parliamentary system in Britain, in due time monarchies also helped the Swedes, the Danes, and the Norwegians—and much later Japan and Spain—to move to a parliamentary system that the monarchy helped to legitimize. But in 1787 the full development of parliamentary democracy in countries with a monarchy was still a long way off. For Americans, a monarch, even a ceremonial monarch, was completely out of the question. So why didn't they split the two functions, ceremonial and executive, by creating a titular head of state to serve in the place of a ceremonial monarch, and a chief executive, the equivalent of a prime minister, to whom executive functions would be assigned? Although that arrangement may seem obvious enough to us now, for the Framers in 1787 it was even more distant than the system that was gradually evolving in Britain, the country they knew best. It was not until after 1875 and the installation of the Third Republic in France that the French evolved a solution that would later be adopted in many other democratizing countries: a president elected by the parliament, or in some cases by the people, who serves as formal head of state, and a prime minister chosen by and responsible to the parliament, who serves as the actual chief executive. But for the Framers this invention, which now seems obvious enough to us, was al-

most as far off and about as difficult to imagine, perhaps, as a transcontinental railroad.

Without intending to do so, then, the Framers created a constitutional framework that under the driving impact of the continuing American Revolution would develop a presidency radically different from the one they had in mind. In time American presidents would gain office by means of popular elections—a solution the Framers rejected and feared—and by combining the functions of a head of state with those of a chief executive the president would be the equivalent of monarch and prime minister rolled into one.

I can't help wondering whether the presidency that has emerged is appropriate for a modern democratic country like ours.

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So: Among the older democracies our constitutional system is not just unusual. It is unique.

Well, you might say, being unique isn't necessarily bad. Perhaps our constitutional system is better for it.

Better by what standards? Is it more democratic? Does it perform better in many ways? Or worse?

These questions are by no means easy to answer—probably impossible to answer with finality. But before turning to them, we need to take one more look at that anomalous vestige of the Framers' work, the electoral college.