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Chapter 13

The Good, the Better, the Best: Improving on the “Acceptable” Electoral College

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The Electoral College is good—or at least good enough to serve adequately many of the functions of presidential elections that political scientists think important for the effective operation of various aspects of our political system. Such a verdict was rendered by thirty-seven political scientists in 2001, organized by Burdett Loomis and myself, in the aftermath of the 2000 presidential election.¹ Because the Electoral College has consistently conferred legitimacy on the candidate receiving a majority of electoral votes and because it has contributed to effective governance by sustaining a two-party system, two-thirds of the participants—including myself—cast approval ballots in favor of the Electoral College at the end of our project. Six major alternatives to our current system, including a direct popular election that would award the presidency to the candidate getting the most votes nationally, received significant support, but were thought to have limitations or possible unanticipated negative consequences.

Nevertheless, the many deficiencies that we (and others) have noted in the Electoral College prompt reformers to search for a better system, with most attention being focused on our second choice, the popular plurality system.² However, passage of a constitutional amendment to employ this alternative is unlikely—in part because it requires approval of three-quarters of the states, including the many small states that seem advantaged by the current system. As others in the volume discuss, many reformers have therefore rallied around a proposed “National Popular Vote Interstate Compact” that would bind the electors of signatory states to casting their ballots for the candidate attaining the most

1 The results of our collective deliberations were published in Paul Schumaker and Burdett A. Loomis, “Reaching a Collective Judgment,” in *Choosing a President: The Electoral College and Beyond*, ed. Paul D. Schumaker and Burdett A. Loomis (New York: Chatham House, 2002).

2 Among the many subsequent critical analyses of the Electoral College are those of Akhil Reed Amar and Vikram David Amar, “Why Old and New Arguments for the Electoral College Are Not Compelling,” in *After the People Vote*, ed. John C. Fortier, 3d ed. (Washington, DC: AEI Press, 2004), 55–65; and George C. Edwards III, *Why the Electoral College Is Bad for America* (New Haven, CT: Yale University Press, 2004).

popular votes nationally.³ Persuading enough states to sign on to the compact is problematic, but there is little doubt that achieving a popular plurality system via an interstate compact is much more likely than achieving it by a constitutional amendment.⁴ My focus here, however, is on the overall desirability of the popular plurality system, not just its feasibility. Judgments—ultimately collective ones by political analysts beyond the participants in our 2001 project, by political leaders, and by the public—must be made about the strengths and limitations of the Electoral College compared to the national direct election with plurality rule. I establish a framework for arriving at such judgments and apply that framework to render my judgment that the popular plurality system is better, on balance, than the Electoral College system.

But that is not the end of the story. In our study, another national popular vote system—known as “the single transferable vote” and “the alternative vote” in the comparative electoral systems literature, but more widely referred to as “instant runoff voting”—was thought to have many promising attributes by some participants in our project.⁵ Under this method, instead of simply indicating their first choice, voters would rank-order the presidential candidates they most preferred. Computerized voting systems would compile all votes cast nationally, potentially consider voters’ second (and even lower) ranked choices, and declare as winner the most widely supported candidate.⁶ Instant runoff voting is used to elect leaders of a few other nations, prompting it to be regarded as a “foreign import” with little appeal for Americans. However, some American cities—such as Cambridge and San Francisco—have adopted instant runoff voting, while others such as Minneapolis have passed legislation implementing it in 2009, enabling future empirical studies of its effects. Because participants in our study were highly concerned about the unanticipated consequences of adopting reforms whose effects had not been thoroughly investigated, they were reluctant to support instant runoff voting.⁷ But there are theoretical and analytical reasons for believing that instant runoff voting may be better than either the current Electoral College or the popular vote system sought by proponents of the interstate compact. While no electoral system is clearly best universally and against any future innovations, instant runoff voting may better satisfy widely accepted criteria for evaluating electoral systems than the current or

³ See, for example, John R. Koza et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (Los Altos, CA: National Popular Vote Press, 2006).

⁴ The status of this proposal in various states is available at National Popular Vote, <http://www.nationalpopularvote.com>.

⁵ See Schumaker and Loomis, “Reaching a Collective Judgment,” 192–95. The most prominent advocate of the instant runoff is FairVote, <http://www.fairvote.org/irv/>. Employing instant runoff voting in presidential elections is also advocated by Matthew J. Streb, *Rethinking American Electoral Democracy* (New York: Routledge, 2008), 130–31, 146–47.

⁶ How “the most supported” candidate is determined is developed below.

⁷ Schumaker and Loomis, *Choosing a President*, 204.

the popular plurality systems. It is in this sense that the next section of this chapter will argue that instant runoff voting is best.

Of course, adopting instant runoff voting would require a constitutional amendment, and the obstacles to amending our Constitution have been the graveyard of other reform proposals. This chapter will thus conclude by suggesting that it may be time to stop focusing on constitutional hurdles to electoral reform and instead begin to regard Electoral College reform as a vehicle for stimulating much broader constitutional revisions. While the Constitution remains a sacred text for most Americans, this understanding is based more on mythology than thoughtful analysis of the sorts of provisions that might enable American government to work more effectively in the twenty-first century and to avoid some of the crises and calamities that might occur but from which we receive little inoculation under our current Constitution—including the Electoral College. I will briefly develop such concerns in the conclusion of this chapter.

Evaluating the Electoral College, the Popular Plurality, and Instant Runoff Systems

Evaluations of the Electoral College and alternatives to it have typically taken the form of debates, with each side presenting a series of arguments for their favored method and criticisms of alternatives. Absent from these debates has been a clearly specified set of criteria and systematic analysis of how competing systems fare on these criteria. In 2001, we sought to improve on such evaluations by analyzing the effects of the Electoral College and alternatives to it on various aspects of American politics, such as our party system, the conduct of presidential campaigns, and the influence of various minorities. While organizing analysis along these lines was helpful, it now seems that deeper normative criteria drove the analyses of our experts on how alternative electoral arrangements affected or might affect performance in these various areas.

In their deliberations and commentaries, the participants in our 2001 project seemed to accept two conclusions from public choice theory. First, as some of the contributors of this book address, including Michael Korzi, Jody Baumgartner, and Rhonda Evans Case, there is no perfect voting system, as all methods of aggregating votes have strengths and weaknesses. Second, despite being stressed by opponents of the Electoral College, popular sovereignty is a vacuous criterion, because “the will of the people” can only be determined by counting votes, and different voting procedures can yield different estimates of public preferences.⁸

8 William H. Riker, *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco, CA: W. H. Freeman, 1982). While this second conclusion from public choice theory is fairly technical, the point can be easily grasped intuitively. Suppose that the distribution of preferences among candidates A, B, and C is 48 percent, 47 percent, and 5 percent, and that two methods are available to

Eschewing popular sovereignty, our participants focused on nine more useful criteria for evaluating alternative electoral systems: simplicity, equality, sincerity, neutrality, participation, legitimacy, governance, inclusiveness, and feasibility. While the importance of these criteria became apparent on the basis of the papers prepared by the groups of participants, they were not explicitly developed, defined, and applied in our previously reported analysis. In this section, I specify these criteria and, drawing primarily on the commentaries of participants in our project, but sometimes drawing from other (often subsequent) analyses, I suggest how the Electoral College, the popular plurality system, and instant runoff voting perform—or are likely to perform—on each of these criteria. Table 13.1 summarizes my evaluations.

Table 13.1 Evaluating Presidential Electoral Systems on Nine Criteria

Criterion	Electoral College	Popular Plurality	Instant Runoff
Simplicity	Complex	Simple	Intermediate
Equality	Unequal vote value	Equal vote value	Equal vote value
Sincerity	Discourages sincerity	Reduces insincerity	Encourages sincerity
Neutrality	Favors close states & major parties	Reduces close state biases	Reduces close state & major party biases
Participation	May decrease turnout	May increase turnout	Most likely to increase turnout
Legitimacy	Historically conferred; House contingency danger	Increases extremism & weak mandates	Eliminates most legitimacy threats
Governance	Difficult; may reduce difficulties	May reduce difficulties	May enhance or reduce difficulties
Inclusiveness	Historical virtue; problems alleged	Mixed with extremism danger	Should encourage
Feasibility	No change required	Possible by interstate compact	Possible by constitution overhaul

Source: Compiled by the author.

aggregate the votes and choose among the three candidates. In a popular plurality system, candidate A would win. But in a popular majority, a runoff would be required between A and B. If most of the supporters of the eliminated candidate C prefer B over A in the runoff, B would likely end up with more votes than A. As this illustration indicates, the understanding of “the will of the people” depends on which voting system is employed.

Simplicity

How simple or complex is each system in its design and operation? Do most citizens understand each system or are they confused by it? As originally conceived by the founders, and covered by the first three chapters of this volume, the Electoral College was a complicated method for finding and selecting the new nation's chief executive officer. The original operation of the Electoral College proved short lived, because both parties and the public became much more involved in the selection of electors, and because a Twelfth Amendment to the Constitution was approved in 1804. As a result of these changes, the Electoral College today functions much differently than the founders envisioned, but its operation remains complex.

Each state still has electors equal to its representation in the House and Senate, and state legislatures retain control over the selection of these electors, but each has adopted laws whereby its electors are determined by popular votes within the state. Electors are now normally loyal members of the party of the candidate winning the popular vote in the various states. Since selection of electors by popular vote became widely adopted by 1840, there have been only eleven inconsequential instances of "faithless" or "rogue" electors who failed to vote for the winner of the popular vote in their state.⁹ Since 1824, the electoral votes cast by the states have always resulted in majority support for one candidate, and thus the "House contingency" process—envisioned as playing a larger role by the founders—has not been necessary. Still, there is frequent speculation—particularly during very close presidential elections—about outcomes possibly being decided by a rogue voter or in the House.

In short, the design and operation of the Electoral College system are very complex. Many citizens do not realize that they are in fact voting for electors rather than directly for a candidate. Most voters have only the crudest understandings of the unit rule, the casting of electoral votes, or the possibility of rogue voters or the House deciding the final outcome.

The system that the proposed interstate compact seeks to implement is in principle very simple: the presidential candidate receiving the most votes nationally would win.¹⁰ The compact allows somewhat more complexity than the popular plurality systems used to elect state officials, because states could set different rules regarding voter eligibility (such as voting rights of former felons) and adopt different procedures for casting votes (such as the extensive use of the mail ballot in Oregon). For any election when a binding compact was in effect, candidates and voters could presume that a relatively simple popular plurality system would determine the outcome. But states whose electors were required to cast their ballots

9 Koza et al., *Every Vote Equal*, 88–89.

10 In the discussion of the popular plurality and instant runoff voting systems below, I refer to presidential candidates, even though these systems would probably retain the current practice of candidates being party tickets that included vice-presidential candidates.

contrary to statewide results would face pressures to withdraw from the contract in future elections, making the compact an insecure way to secure a popular plurality system on a continuing basis.

The instant runoff proposal is much less complex than the Electoral College system, but perhaps more complex than a popular plurality system. There would be a single popular election having uniform voting procedures throughout the nation. But such simplicity would be offset by the greater complexity confronting particular voters. Under most instant runoff voting proposals, voters would have to think beyond their first choice among candidates and instead rank-order the candidates they find most acceptable, indicating their first, second, and third choices. The top choices of all voters would be initially counted, and if one candidate received a majority, he or she would win. But if no one got a majority, computer technology would "instantly" recalculate the results in the following manner. The candidate getting the fewest first-place votes (probably a regional- or a fringe-party candidate) would be dropped from consideration, and votes cast for the eliminated candidate would be transferred to second-ranked candidates. If this reassignment of votes did not result in one candidate receiving a majority, the process would be repeated. The candidate with the next lowest first-place votes would be eliminated, and the votes for that candidate transferred to second- (or third-) ranked candidates on ballots cast for the eliminated candidate(s). If a plethora of candidates emerged and votes were widely scattered among them, it is possible that no candidate would be named on a majority of ballots, and so some sort of rules would be required to deal with that contingency. In a competitive society where rankings of football teams and other popular concerns are widespread, we can expect that having citizens rank-order their choices for the president would be widely understood. Still, the ranking aspect would require greater levels of information about the variety of choices available and greater analytical skill to achieve meaningful priorities among them.

In sum, evaluating the alternatives on the simplicity criterion leads to the judgment that both popular plurality and instant runoff voting systems would be improvements over the Electoral College. While the popular plurality system is simpler, instant runoff voting would not be too complex for most voters, and its procedures would only become more familiar over time if it were institutionalized by a constitutional amendment.

Equality

Do the votes of all citizens have equal formal value and thus count equally under each system? The Electoral College perpetuates inequality, as the value of a vote is not equal for all citizens. Because all states are provided two electors independent of population considerations, and because of other anomalies that arise in the allocation of electors among states (such as the changes in population size that occur between a census and an election), the value of voting is greater for citizens living in small states than for citizens of more populated ones. For example,

as George C. Edwards explains, “as of 2003, an electoral vote in Wyoming corresponded to only 167,081 persons, while one in California corresponded to 645,172 persons.”¹¹ Proponents of the Electoral College discount this problem. They argue that the resulting inequality is a legitimate element of our federal system, as the two electoral votes given to all states treat them as collective entities with equal roles in selecting the president. And they see the inequality as relatively inconsequential, because the value of a vote is miniscule for voters everywhere. However, what Lawrence Longley and Neal Peirce call “voter power” is even more unequally distributed under the Electoral College system.¹² Essentially, voters in “safe” uncompetitive states have no voting power, as their vote cannot possibly alter the outcome; in contrast, voters in competitive states could alter outcomes in their states, and if the national outcome depended on the outcome of their state, their vote could prove decisive. Of course, it is for just this reason that presidential candidates focus on only those states that are “in play” and ignore others.

Both popular plurality and instant runoff voting systems would eliminate these problems. Under them, the value of the vote for citizens in different states would be equal, and votes would matter equally, wherever they were cast.

Sincerity

Voters act sincerely when they can readily locate candidates who represent their principles and interests and when they are encouraged to vote for such candidates. Sincere voting is undermined when citizens have difficulty locating a candidate whose views match their own or when they are encouraged to be “sophisticated voters” who do not “waste” votes on sincerely preferred but unelectable candidates and vote instead for “the lesser of two evils” among those having a realistic chance of winning. Do the alternative electoral systems under consideration here promote or undermine sincere voting?

As many of our 2001 participants argued, the Electoral College may encourage major candidates to “move toward the center” as an election approaches and to mask their differences with their opponents in hopes of capturing “middle of the road” voters who are the last to make up their minds but who remain crucial to putting together a winning coalition in “up-for-grabs” states that could determine the national outcome. This move toward the center can make it difficult for voters to determine which candidate best represents their ideals and interests. The Electoral College may also encourage citizens to not waste their votes on preferred but unelectable third-party or independent candidates. While such disincentives for sincere voting can occur in any electoral system conferring victory on the candidate getting the most votes, the Electoral College is thought to exacerbate the problem. Voters might find their preferred candidate doing well nationally

11 Edwards, *Why the Electoral College Is Bad for America*, 39.

12 Lawrence D. Longley and Neal R. Peirce, *The Electoral College Primer 2000* (New Haven, CT: Yale University Press, 1999), 149–57.

but losing significantly in their own state and thus vote for another candidate for strategic reasons. And even if their preferred candidate trailed major-party candidates by relatively small margins, sophisticated voters may perceive that their least preferred candidate is close to capturing their state's large and crucial bloc of electoral votes, an outcome so distasteful that they choose to abandon their preferred candidate to support the more preferred of the major-party candidates.

The popular plurality system might enhance sincerity but it is unlikely to eliminate insincerity. Because the plurality rule permits a candidate to win with a fairly small percentage of votes, it would probably encourage more candidates to run, including those who might appeal to sincere voters with views outside the mainstream. But popular plurality elections still contain "first-past-the-post" decision rules that confer victory on the one candidate who polls the most votes. This gives candidates incentives to express more mainstream views while discouraging citizens from "wasting their votes" on fringe candidates.

Instant runoff voting would most facilitate sincere voting. It would encourage third parties to play a greater role in presidential elections, and they would offer voters a greater array of options enabling citizens to better locate a candidate that they thought best represented their ideals and interests. But instant runoff voting most encourages sincere voting by removing incentives for sophisticated voting. Its rank-order ballot would enable citizens to list as their first choice their sincere (but perhaps unelectable) preference among candidates and list as their second and third choices less preferred candidates who are nevertheless more acceptable than the despised candidate that would otherwise prompt them to be sophisticated voters.

Thus, one big advantage of instant runoff voting is that it encourages sincere voting. Perhaps by itself, there is not much reason for wanting citizens to be sincere rather than sophisticated voters. But as we shall see, sincerity seems to be related to achieving other desirable features in an electoral system.

Neutrality

Is each voting system neutral or do some contain built-in advantages favoring certain types of candidates or voters? Because the Electoral College encourages candidates to focus on "swing" (undecided) voters in large "battleground" states (those having competitive races for large blocs of electoral votes), all citizens are not treated equally under its current rules. Candidates do expend most of their resources seeking to add key groups to a winning coalition in battleground states. Unlike citizens elsewhere, key groups in competitive states may receive promises of favorable policies.¹³ Some conventional wisdom adds that minorities and the poor are disproportionately residents of such states, giving rise to the notion that the Electoral College contains a built-in advantage benefiting African Americans

13 Edwards, *Why the Electoral College Is Bad for America*, 107-14.

and the urban poor.¹⁴ While such an advantage might be considered desirable and even just,¹⁵ its existence can be doubted, both because minorities and the poor are not particularly concentrated in large battleground states and because such citizens are often ignored or taken for granted.¹⁶ While changes in the states regarded as important battlegrounds and in the groups seen as crucial to a winning coalition make it difficult to generalize about the Electoral College's persistent advantages or disadvantages for certain types of citizens, there is little question that in particular elections, some interests in crucial states will be more extensively courted and rewarded than others.¹⁷

Perhaps the major persistent bias in the Electoral College system is its favoring the major parties. This problem arises from the incentives the system provides for sophisticated voting, as discussed above; its operation increases the disinclination of voters to "waste votes" on third-party candidates for the presidency in states where such candidates are not competitive and capable of getting any electoral votes under the winner-take-all rules that are central to the current operation of the Electoral College.

Both the popular plurality and instant runoff voting systems should reduce bias toward key interests in competitive states. Under these systems candidates will still favor some interests over others, but what would matter is whether an interest can be mobilized behind a candidate and whether it is viewed as important to a national victory. The bias toward interests simply because they reside in key competitive states would disappear.

Under the popular plurality system, the bias against third parties is likely to remain and may even increase. Popular plurality elections still contain first-past-the-post decision rules that confer victory on the one candidate who polls the most votes. Thus, voters might still think it foolish to "waste" their vote on a third-party candidate if national polls indicated a tight race involving only the two major parties. Indeed, under the electoral system, minor parties need only be strong regionally or in a few states to be encouraged to compete, because they could capture enough electoral votes to require the leading parties to offer them concessions in exchange for their support. Minor parties would have no such opportunities in a popular plurality system and may thus soon abandon presidential elections.

Instant runoff voting would reduce these biases. As votes would no longer be aggregated on a state-by-state basis, this system would eliminate advantages for

14 Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, 10th ed. (New York: Chatham House, 2000), 246–47.

15 In *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), John Rawls argues that inequalities in favor of the least advantaged members of a society are justified.

16 Also see Edwards, *Why the Electoral College Is Bad for America*, 92–121.

17 Bonnie J. Johnson, "Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?" *Publius: The Journal of Federalism* 35, no. 2 (Spring 2005): 337–55.

citizens residing in large competitive states. Instant runoff voting would encourage third-party candidates to run and be among voters' top-ranked candidates. Citizens would be much less inclined to ignore third-party appeals, knowing they could put an attractive candidate from a minor party at the top of their ballot and have their choice among major-party candidates considered if their preferred third-party candidate were eliminated in a close battle involving the candidates of the major parties.

In conclusion, the most important biases in the Electoral College system seem to be short-term incentives for candidates to focus on particular interests in particular (battlefield) states during particular elections and long-term disincentives for third-party candidates to seek the presidency and for citizens to cast their ballots for such candidates even if they favor them over candidates of the major parties. While both the popular plurality and instant runoff voting systems would alleviate the short-term biases, instant runoff voting would most effectively minimize the enduring biases favoring the major parties.

Participation

Does a system encourage citizen participation by increasing the benefits of voting and the incentives of political organizations to get out the vote? Or does it reduce citizen participation by making voting inconsequential or by reducing incentives for the mobilization of supporters?

The Electoral College is often criticized for curtailing voter turnout, especially in states where the outcome is preordained. But our experts on citizen participation could uncover no convincing research demonstrating that the Electoral College significantly reduces citizen participation, perhaps because presidential elections occur simultaneously with other elections. Nevertheless, subsequent to our analysis, Pietro Nivola has found increases in voter turnout between 2000 and 2004, but observed that these were confined to battleground states; he argued this is due to voters elsewhere realizing their votes don't matter under the electoral system, even if national contests are highly competitive.¹⁸

A popular plurality system would give citizens more incentive to vote in a close national race, even if they are in a distinct minority within their own state. But it is doubtful that a popular plurality system would significantly increase voter turnout, as each voter's capacity to swing the election would remain miniscule and people's decisions to vote are predicated on many other factors.

Instant runoff voting does have an element that could increase voter participation. It would encourage third-party candidates, who could appeal to citizens who think their ideals and interests are little served by the major-party candidates. In short, instant runoff voting would seem to be the system that would

18 Pietro S. Nivola, "Thinking about Political Polarization," *Policy Brief No. 139*, Brookings Institution, Washington, DC (January 2005), http://www.brookings.edu/papers/2005/01politics_nivola.aspx.

most encourage voter participation by those disaffected with their current choices within the two-party system.

Legitimacy

Electoral victory is the principal means by which our presidents acquire legitimacy, the constitutional right to exercise the powers of the office and the moral obligation of others to obey the just commands of presidents. Legitimacy can be undermined when people question the fairness of the results because of the complexities and potential irregularities of the electoral process. Do various systems threaten the legitimacy of outcomes?

One of the greatest strengths of the Electoral College, according to the participants in our 2001 project, is that it has been extraordinarily successful at conferring legitimacy. The most basic function of an election is to enable a peaceful transfer of political power in which the results are widely accepted and disorder and violent resistance are avoided. The results of eight elections—such as in 2000 when George W. Bush was chosen as president by the Electoral College despite losing the national popular vote by over 500,000 votes—produced controversy and calls for reform of the Electoral College, but in these instances the electoral verdict was upheld and power peacefully transferred from one party to the other.¹⁹

Two aspects of the Electoral College are usually credited with enhancing the legitimacy of electoral results. First, it often converts slim popular vote margins into decisive electoral vote majorities. Second, it reduces the extensiveness of recount activities that are normally demanded in very close elections. Whereas a close national vote under a popular plurality system could result in challenges to votes in most precincts throughout the country in an effort to reverse the initial national count, the Electoral College makes recounts irrelevant in all but the most contested states, as in Florida in 2000 and Ohio in 2004.

Nevertheless, the Electoral College has “hidden landmines” that could create a true crisis of legitimacy.²⁰ One landmine is the possibility of electors being unfaithful in a very close election. The apparent winner of 270 electoral votes (the minimal majority) after state popular votes are counted could be denied victory if a single elector committed to him defected. While some states have prohibitions against defections, the electoral system would create incentives for the losing party to bargain with electors in very close contests. An outcome tainted by the acts of rogue voters would doubtless have little legitimacy.

Invoking of a House contingency election could be a second landmine. As previously mentioned, the House has not been required to resolve a presidential election since 1824, but the frequency of “near misses” is disconcerting. According

19 Donald Lutz et al., “The Electoral College in Historical and Philosophical Perspective,” in Schumaker and Loomis, *Choosing a President*, 40–44.

20 See Robert W. Bennett, *Taming the Electoral College* (Stanford, CA: Stanford University Press, 2006), 74–160.

to George Edwards, seven elections between 1836 and 1976 could have been thrown into the House by a small shift in popular votes.²¹

Having a president (and vice president) selected by Congress has numerous problems. Most basically, the newly elected House would be under no requirement to select the winner of the popular vote; indeed, if the party whose nominee came in second controlled the House, it would be unlikely to do so. Secondly, small states would have equal power with large states, leading to gross underrepresentation of the residents of the most populous states (and the residents of Washington, DC who, having no voting representation in the House, would be completely disenfranchised).²² Third, arriving at a clean outcome in the House could be difficult. The best that could be hoped for would be that one party would command a majority of state delegations (twenty-six or more) and that all representatives would vote for their party's candidate, resolving the matter. But no party might command a majority of state delegations, as some might be equally divided between Democrats and Republicans and thus deadlocked and forced to abstain. The Constitution, however, requires an absolute majority among the state delegations, and a few such abstentions could deadlock the House. However the House resolved such contests, the public could feel deprived of its right to determine the president and thus question the legitimacy of the person so selected. The contingency process could also result in the oddity of the House selecting the candidate of one party as the president and the Senate selecting the candidate of the other party as vice president.²³ And, of course, whomever the House named as president would be dependent on Congress in ways that undermined the separation of powers principle.

In short, the Electoral College system makes possible presidents being chosen by rogue voters or by a House contingency election. While rogue voters have thus far been inconsequential and while the House contingency seems like a remote historical curiosity, they remain, under our present electoral system, time bombs that could seriously undermine the legitimacy of our government.

Popular plurality elections have conferred legitimacy on most governors and legislators in the states throughout our history, but presidential elections of this sort may raise problems. First, as noted above, if the national popular vote were extremely close, the outcome could be in doubt as allegations of fraud and miscounts are made, investigated, and perhaps never completely resolved in precincts and counties throughout the country. Second, if citizens dispersed their votes broadly among many credible candidates, the winner could have far less than a majority of the votes, raising doubts that his mandate is sufficiently wide to confer legitimacy. For this second reason, many popular election schemes have

21 Edwards, *Why the Electoral College Is Bad for America*, 61-73.

22 Ibid., 73-77.

23 Robert Hardaway, "There Could be an Obama-Palin Administration," *Rocky Mountain News*, October 12, 2008, <http://www.rockymountainnews.com/news/2008/Oct/12/hardaway-there-could-be-an-obama-palin/>.

provisions for a runoff between the top two finishers in a multi-candidate race if no candidate achieves a certain threshold of votes, often 40 or 50 percent. Having no provision for such thresholds, the interstate compact provides no inoculation against selecting a candidate supported by relatively few voters.

Instant runoff voting would seem to best avoid these threats to legitimacy, at least assuming that the computer technology to compile and analyze votes is able to function without significant glitches. The dangers of rogue voters and a House contingency election under the Electoral College would be avoided. The danger of a candidate with a small plurality ascending to the presidency under a popular plurality system would be avoided. Indeed, a great strength of instant runoff voting is its provision that the winner will (normally) be supported by a majority. Voters would presumably list in rank-order only those candidates they found acceptable; thus transferring votes in a manner that takes into account voters' second- (or third-) ranked acceptable candidate(s) should enhance the legitimacy of a winner.

The main threat to legitimacy under instant runoff voting would be the same threats of miscounts and fraud that plague other systems. Effective election administration will still be required under this system, just as it is needed under other systems. There being no significant difference among systems in this threat to legitimacy, the ability of instant runoff voting to better deal with other threats to legitimacy gives it strong advantages on this criterion.

Governance

Effective governance occurs when public officials can enact and implement policies that address social and economic problems. The capacity to govern in a pluralist society requires achieving considerable consensus on policy goals and limiting the capacity of opposing interests to cause stalemate. This capacity is threatened by fragmentation and polarization, resulting in the inability of legislatures to act or in the capacity of actors in others institutions (like the Supreme Court or Congress) to block implementation of legislation. Governance is most difficult when control over governmental institutions is fragmented among many parties, each representing narrow interests or uncompromising ideologies, classically illustrated by the German Weimar Republic during the 1920s. Which electoral systems are most conducive of the kind of party system that enables effective governance given our separation of powers?

The American system of separation of powers is intended to make governance difficult but, historically, our party system—dominated by two relatively centrist parties—has enabled some effective governance. Proponents of the Electoral College argue that it contributes to our two-party system with such centralist tendencies and thus encourages effective governance. At worst, our present system can produce divided government, but, even then, complete gridlock has normally been avoided by the pragmatic, centrist tendencies of the major parties. At best, the two-party system encouraged by the Electoral College has resulted

in one party controlling both the presidency and Congress, enabling passage and implementation of programs responsive to widespread public concerns and preferences.

This is an important argument. While it is difficult to validate overall judgments about the extent of effective governance in a country and the causal role of electoral systems in such governance, the participants in our project tended to look to the overall increases in prosperity and power of our country in giving generally high marks to our system. Still, it is arguable whether our presidential system and the roles of the two-party system and the Electoral College have been responsible for whatever successes have historically occurred under our Constitution.

At least during the past forty years, more Americans have been impressed with the inadequacy of our institutions than with their capacity to solve social and economic problems. The declining support for governmental institutions and the major parties certainly is disconcerting.²⁴ The increasing polarization between parties suggests that we no longer have the centrist parties praised by Electoral College supporters. The historical variations that are evident in our party systems and in the capacity of our government to avoid stalemate on key issues suggest that effective governance in the United States is at best weakly linked to the system of electing the president, which, after all, has been a constant in the midst of variability in effective governance.

Finally, it is not clear that the American system of governance is now more effective than others. For example, drawing on comparisons of the United States and other democratic countries (that do not employ an Electoral College and usually have parliamentary rather than presidential systems), Robert Dahl notes that the United States is average or (well) below average on most measures of effectiveness. We rank in the middle on such matters as budget deficits, unemployment, inflation, and family policy. And we rank in the worst third on such matters as economic inequality, energy efficiency, social expenditures, and incarceration rates.²⁵ While effective governance is surely a key consideration, the role of the Electoral College in achieving it is uncertain; it is probably at most a minor factor.

The popular plurality scheme retains the advantages of two-party politics for achieving effective governance within our separation of powers system. Because the entire nation, not just a few competitive states, would be "in play," citizens everywhere would have incentives to not waste their votes on minor parties, and the relationships between a party's candidate for the presidency and its congressional candidates would be strengthened. The president's electoral "coattails" might help elect more members of Congress from the same party. As a result, we might end up with less divided government, and thus more effective governance under the popular plurality system.

24 Marc Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* (Princeton, NJ: Princeton University Press, 2005).

25 Robert A. Dahl, *How Democratic Is the American Constitution?* 2d ed. (2001; New Haven, CT: Yale University Press, 2003), 190–91.

Because instant runoff voting would almost certainly increase the role of third parties, it could complicate effective governance. Energized by their greater role in the presidential election, third parties might well gain strength in congressional elections, leading to more parties represented in Congress, which could of course lead to more fragmentation and perhaps more gridlock. However, multiparty systems are not necessarily associated with these problems. According to Dahl and Arend Lijphart, such systems have led to power sharing among parties and to their seeking and often attaining more consensual policy solutions to political problems than are attained in the United States.²⁶

In sum, it is not an unwarranted judgment to maintain that governance under the Electoral College over the course of American history has been adequate and perhaps even laudable, but it is not clear that the electoral system has contributed to such effectiveness, that we still have such effectiveness, or that our system performs better than alternative systems. While support for the Electoral College is probably rooted in perceptions of the effectiveness of our two-party system encouraged by the electoral process, it is possible and perhaps probable that other electoral systems could fare as well on the governance criteria. The best judgment here, therefore, is the Scotch verdict that no system is the clear winner in this regard, at least pending more convincing evidence than has thus far been provided.

Inclusiveness

Inclusiveness refers to the diversity of interests and ideals included within electoral and governing organizations. Inclusive parties and campaigns craft platforms that express broadly accepted principles and appeal to the interests of disparate groups. Inclusive governing coalitions embody widely accepted notions of the common good and adopt and implement policies that spread benefits and burdens broadly.²⁷ Not all campaign organizations are inclusive; sometimes they are committed to serving narrower interests even if they lose or because they believe they can achieve a narrow victory without having to compromise their ideological principles or having to spread broadly the spoils of victory. In contrast, inclusive organizations seek broad supra-majorities. Successful inclusive campaigns win support across the ideological spectrum and from groups representing many interests. Successful

26 Ibid., 103–9; and Arend Lijphart, *Patterns of Democracy: Governmental Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 1999).

27 Inclusiveness is related to centrism but is not identical to it. Centrist campaigns imagine that most citizens are grouped around a “median voter” having preexisting preferences known through such indicators as public opinion polls. Persons with views distant from the median voter feel excluded from elections dominated by centrist parties. Inclusive campaigns imagine that citizens have diverse preexisting views that a median voter may not represent well. The goal of an inclusive campaign is to articulate policy goals that appeal to and activate as many members of as many groups as possible.

inclusive governing coalitions find policies that are widely supported. Are some electoral systems better able to encourage inclusive campaigns than others?

Supporters claim that the Electoral College is particularly effective at building inclusive campaign and governing regimes, because its rules make clear to presidential aspirants that they need support that is broadly distributed across the states to win the requisite majority of electors.²⁸ Nevertheless, it is questionable whether the Electoral College generates the kinds of supra-majoritarian campaigns and governing coalitions attributed to it by its defenders. Certainly, various ideological and lifestyle groups feel ignored by both Democratic and Republican candidates. Other groups, like African Americans, have often felt taken for granted and not actively courted. Campaigns have clear notions about where their key votes do and do not lie, and they tend to ignore supporters in safe states and groups that they believe are unnecessary to building a winning electoral coalition in key swing states. In recent years, the parties have become adept at developing electoral strategies that target particular groups while demobilizing large portions of the electorate.²⁹

A national popular plurality system might remove such disincentives for inclusive politics, as all types of voters would be equally valuable in achieving electoral success. But incentives for building inclusive campaigns in a popular plurality contest would seem to depend on the competitiveness of the national race. If one party were dominant or one candidate had an insurmountable lead, there would be little incentive for campaigns to seek even larger majorities. If two parties were engaged in a close contest, each would be prompted to appeal to undecided and crucial blocs of voters. And if many parties competed in a closely contested election, some parties may opt for inclusive strategies while others pursued victory by appealing to an ideologically committed core group of supporters. Most problematic is the possibility that an extremist could win a popular plurality election in a multi-candidate field and govern in a manner that ignored the interests and ideals of most citizens.

Instant runoff voting would seem best structured for achieving inclusion. During the campaign itself, candidates would be encouraged to appeal to voters whose first choice was for another party, in order that they might be seen as reasonable second choices when voters cast their rank-order ballots. In general, candidates would probably see the electorate as less clearly divided into groups supportive and hostile to them, and this fluidity in the electorate would encourage them to increase the breadth of their appeals. After the election, candidates would know they have majority support and would probably understand that they were

28 Judith A. Best, *The Case against Direct Election of the President: A Defense of the Electoral College* (Ithaca, NY: Cornell University Press, 1975), 215–18; and Tara Ross, *Enlightened Democracy: The Case for the Electoral College* (Dallas, TX: Colonial Press, 2004).

29 Alan Wolff, *Does American Democracy Still Work?* (New Haven, CT: Yale University Press, 2006).

named on even more ballots; they may thus feel greater desire to generate inclusive policies that satisfy all their supporters, not just the party faithful. According to Dahl, it is possible to array political systems along a majoritarian–consensual continuum; the majoritarian end of the spectrum contains two ideologically distinct parties—one that governs and the other that opposes; the consensual end of the spectrum contains a variety of nondominant parties that share in governing authority after elections. Our present system most approximates the majoritarian system, while the instant runoff voting would create processes that could result in more consensual outcomes. Consensual politics results in “fewer losers” and conditions where “almost everyone can win, not everything they hoped for, perhaps, but enough to leave them basically satisfied with their government.”³⁰ In this way, instant runoff voting might well achieve not only more inclusion, but also greater legitimacy and even more effective policy performance.

Feasibility

What changes are feasible in our system of electing the president? It is not feasible to imagine the Electoral College functioning as envisioned by the founders and being a process likely to produce highly qualified nominees selected through minimal partisan conflict. The Electoral College is consistent with the aristocratic republicanism of the founders, but the American public now demands an electoral process that comports with the principles of democratic republicanism. Democratic norms and partisan politics have overwhelmed and will continue to overwhelm the process as initially envisioned and established. Barring any initiatives to change the system, presidential elections will continue to be waged under current provisions of the Electoral College.

Efforts to abolish the Electoral College and replace it with a national direct vote are not very feasible. There are huge institutional obstacles to amending the Constitution, including securing the approval of many states whose leaders believe they are advantaged by their being over-represented in the current system. Nor would major-party leaders support eliminating a system that has helped reduce competition from new and third parties. Passage of the interstate compact to achieve a national popular plurality election via an end-run of the Constitution is more possible. However, even if a national popular plurality system were to be set in motion by having enough state legislatures agree to the compact, as Michael Korzi, Brian Gaines, and Burdett Loomis in their respective chapters discuss, the constitutionality and legality of the compact would doubtless be challenged in Congress or in the courts or both. It is unclear if the compact could withstand these challenges.³¹

30 Dahl, *How Democratic Is the American Constitution?* 107–8.

31 For further discussions of this matter, see Koza et al., *Every Vote Equal*, chap. 5; and Meghan Reilly, “Constitutionality of Interstate Compacts,” *ORL Research Report*

The feasibility of adopting instant runoff voting is small because of the constitutional hurdles that confront it. The national interstate compact could not be amended to provide for instant runoff voting because rank-order balloting and the use of computer technology would have to be adopted throughout the nation and not just by the signatory states. Perhaps more than the other national direct election schemes, leaders of the dominant parties that benefit from the current system would oppose it. Thus, the most likely way to adopt instant runoff voting would be as part of broader initiatives—culminating in a Constitutional Convention—to consider a broad range of amendments to update the Constitution to achieve more effective government in the twenty-first century.³² Such a process would probably result in a broad public consensus for having popular presidential elections, and instant runoff voting would probably be considered when questions arose about the minimal threshold of voters needed to select a president and about the possible need for runoffs. At this point, the overall benefits of instant runoff voting might be readily apparent.

Conclusion

It is reasonable to claim that the Electoral College has served America well for 220 years, because it has provided peaceful transfers of executive power and given new presidents the legitimacy they have needed to govern. For much of our history, we have had reasonably effective governance. Some of the problems attributed to the Electoral College—its failure to express “the will of the people,” the unequal value of citizens’ votes, the incentives for insincere voting, and low voter turnouts—are often chimerical, contestable, or of only minor importance. Thus, perhaps the Electoral College is good enough.

A national popular plurality would, however, probably be a better system because it is simpler, it would ensure all votes are counted equally, and it might result in more inclusive campaigns and governance. But, most importantly, it would end the threats to legitimacy that can occur when the Electoral College fails to select the candidate supported by most citizens or, worse, that could occur if rogue voters or a House contingency election determined the outcome.

The best system, however, would probably be a national direct election using the instant runoff. This would provide the same benefits as the popular plurality system sought by proponents of the interstate compact, but it would also provide more. It would enable voters to cast sincere ballots. It would enhance the legitimacy of outcomes by making it almost certain that the president could claim

No. 0221, Connecticut General Assembly, Hartford, CT (April 9, 2008), <http://www.cga.ct.gov/2008/rpt/2008-R-0221.htm>.

32 See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006).

support among the majority of voters. It would reduce the possibility of having an extremist gain the presidency, as could happen under the popular plurality system. It could also lead to campaigns and governing regimes that are more inclusive than those achieved by the alternatives. Nevertheless, electing the president through national instant runoff voting would require a constitutional amendment. Because of (small-) state opposition to such an amendment, this reform will have to be packaged within a broader set of constitutional revisions.

There are many aspects of our Constitution that do not serve us well, including:

- vagueness about the extensiveness and limits on presidential and vice-presidential power;
- reliance on impeachment to remove corrupt, ineffective, or unresponsive presidents (with no provision for the public to act through recall of federal officials);
- lengthy interregnum between when presidents are elected and inaugurated;³³
- failure to provide for national control over presidential elections, leaving such crucial matters to the states as the rules governing party nominations of presidential candidates, resulting in a messy nomination process that is “unworthy of banana republics”;³⁴
- provision for an undemocratic Senate;
- obsolete and vague specifications of the authority of the national government in economies that are far more national and global than anticipated by the founders;
- leaving questions of the constitutionality of executive and legislative actions to the Supreme Court, whose members are shielded from democratic controls by their lifelong tenure; and
- retaining embarrassing provisions for slavery and the unequal consideration of all citizens.

Of course, such a listing could be greatly expanded. The point is not to suggest the contents of a better Constitution, but only to remind us of the limits of the one we have. The founders could neither anticipate the kind of world that exists in the twenty-first century nor have knowledge of alternative and innovative constitutional arrangements that have been conceived and effectively utilized elsewhere since they bequeathed their handiwork to us.

Most other nations have constitutions that have been thoroughly revised to reflect more recent understandings of their needs. Many American states have adopted

33 These features are highlighted by Garrett Epps, “The Founders’ Great Mistake,” *Atlantic*, January–February 2009, <http://www.theatlantic.com/doc/200901/founders-mistake>.

34 James W. Ceaser, “The Presidential Nomination Mess,” *Claremont Review of Books* 8, no. 4 (Fall 2008): 21–25, http://www.claremont.org/publications/crb/id.1571/article_detail.asp.

several constitutions or thoroughly revised their constitutions over the years.³⁵ Constitutional revision can be more of a means of conservation and inoculation against calamity than radical or revolutionary innovation. The Electoral College is a feature of our Constitution that invites such calamity and it is a feature that most people already oppose for its undemocratic features. As such, it can serve as a useful symbol for mobilizing larger but necessary constitutional changes.

35 George E. Conner and Christopher W. Hammons, eds. *The Constitutionalism of American States* (Columbia: Missouri University Press, 2008).