

Repairing the Electoral College

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In one respect the Electoral College is like the weather, everybody complains about it, but no one does anything about it. Frederic D. Schwarz, in a recent American Heritage article, does not think anything can be done:

In reviewing the writing on the Electoral College, it quickly becomes clear how little anybody has to offer that is new.... what has killed all the reform efforts has been the lack of a single alternative that all the reformers can agree on.

In another respect the Electoral College is not like the weather, not much can be done about the weather, but I think some useful things might possibly be done to improve the College.

Arguments for and against the College have been raging for more than two hundred years. That the College has survived not all that much changed since it was first embodied in Article II of the 1787 Constitution indicates that it must have quite a lot going for it. While the Twelfth Amendment in 1804 made significant changes, it did not alter the basic form of the College. Electors appointed by the states' legislatures still elected the President and Vice President, but by separate votes for each office. The House still elected the President if no person had a majority of the whole number of electors, but perhaps from the top three not the top five candidates. The House still voted by ballot by states, and a majority of all the states was still necessary for the choice.

The argument for popular election of the President on its face seems overwhelming. It's the democratic or republican thing to do. But we should recall that the Electoral College has elected the popular vote winner in the 45 presidential elections since 1820, except in 1824, 1876, 1888, maybe 1960 and of course 2000. Only four or five exceptions out of 45 is not a bad batting average.

But election of the President is not baseball, and we are rightly concerned as a democracy to reevaluate our political institutions and to try to improve them if we can.

Nevertheless, those who argue against the College clearly have the burden of proof. The framers rejected popular election and election by the Congress in favor of election by the states through representatives appointed as the states' legislatures provided. If only (1) because apportionment of the states' representatives in the House can never be mathematically perfect and (2) certainly because adding to the number of representatives each states' two senators to determine the total number of electors deliberately skews the College in favor of the smaller population states and to a lesser extent in favor of the large population states, Electoral College reformers have to propose a constitutional amendment that will be supported by two-thirds each malapportioned the Senate, as well as the representative House, and three-fourths of all of the states.

Dividing the current 535 Electoral College votes by 50 states and the District of Columbia yields an average of 10.4 Electoral College votes per state. Only eighteen states have more than 10.4 electoral votes, and four of the 18 have only 11.

Since the District of Columbia does not vote on constitutional amendments, probably it and its three electoral votes should be excluded from this calculation. That raises the average number of electoral votes to 10.7 among the 50 states but does not

change the improbability that even the 33 small states, let alone 38 of the states, an absolute majority of the 50, would vote for abolishing the College in favor of direct popular election of the President.

To beat this particular horse to death (1) the mean state Electoral College vote is eight, i.e. twenty-five states have eight or fewer electoral votes, and twenty-five have eight or more, and (2) eleven states have 270 electoral votes, an absolute majority and more than the median of 267.5 or 269, depending on whether or not the District of Columbia's three electors are being counted.

So, it is incumbent on proponents of Electoral College reform to formulate constitutional amendments that two thirds of each house of Congress and three fourths of the states all support. They should keep in mind that in 1959, 1969, and 1977, although the approximately one-person-one-vote-apportioned House passed direct popular presidential election constitutional amendments, they died in the Senate. In 1959 the Senate rejected two popular vote amendments with 60 or more Senators opposed. In 1969 only 54 senators voted to close debate on a popular election amendment. In 1977 the Senate rejected one 51 for and 48 against.

In Repairing the Electoral College, my co-author, Beverly J. Ross, and I proposed one useful Electoral College constitutional amendment that should not be controversial. In a close popular election the possibility remains that a statute could be enacted by the lame duck House and Senate and outgoing President advancing the dates of elector balloting, Congress counting the Electoral votes and the House electing a President in case the Electoral College did not, so that the lame duck Congress would do so, as was the case before the 199 Twentieth Amendment. We think the political case for

eliminating this possibility and ensuring that the newly elected Congress counts the ballots and the newly elected House elects the President (and Senate the Vice President) is so overwhelming that the Congress and the states would support a constitutional amendment that so ensured.

In The Electoral College and the Popular Vote we agonized, as even more recently did the Florida and United States Supreme courts, over the proper construction of the Electoral Count Act of 1887 and over whether or not, in counting electoral votes, Congress has the power not to count or to recount, to which issue can now be added whether or not there should be any federal judicial review of the states' appointing of electors or of the casting or counting of their ballots.

Because the framers generally rejected congressional election of the President and Vice President in favor of their election by the states, we think that two-third of each house of Congress and three-fourths of the states might support a constitutional amendment that said that, in counting the electoral votes, Congress could not reject any elector ballot that a state considered valid, and a state's decision with respect to validity of the state's appointment of electors and their casting of their ballots was final and unreviewable by the federal judiciary.

Among other things, such a constitutional amendment could leave it to the states to decide whether or not their electors are bound by their respective popular votes except when on or both of the candidates dies, becomes disabled or otherwise unqualified. At the moment, the states are about evenly divided on this issue, and such an amendment also could resolve the debate over what the United States Supreme Court held in Rav v. Blair and whether or not that holding was correct. In Rav v. Blair the Supreme Court

reversed five to two a holding of the Alabama Supreme Court that a political party pledge agreement was unconstitutional. The Court, however, reserved the question whether or not the states themselves could bind electors directly.

Each time the possibility arises that the presidential election might have to be decided by the House of Representatives, the Nation, and I think the House too, shudders. There are some good reasons for this that a constitutional amendment could eliminate without removing the House from the process. After all there does have to be a mechanism for dealing with the possibility that the electors will not elect a President, and there are not many alternative institutions, certainly not a rerun of the popular election, one of which is bad enough, not the Supreme Court, and not the malapportioned Senate.

I would not propose to change the constitutional requirement that the House elect the President voting by state delegations in favor of each member voting. Voting by state delegations is consistent with the framers' decision that the states, not the people nor the Congress, elect the President. Moreover, I doubt if the Senate or the states would support a constitutional amendment that diluted the power of the smaller states in the House any more than they would support an amendment that diluted small state control of the Electoral College itself. However, as we shall see, some modification of the constitutional rules under which the states' House representatives vote may be desirable.

Let us now review briefly exactly how the House elects a President under the Twelfth Amendment:

...and if no person have such majority [a majority of the whole number of electors appointed], then from the persons having the highest numbers not exceeding three on the list of

those voted for as President, the House of Representatives shall chuse immediately by ballot, the President, but in chusing the President, the votes shall be taken by states, the representation from each state having one vote; A quorum for this purpose shall consist of a member of members from two-thirds of the state, and a majority of the states shall be necessary to a Choice

(emphasis added). Let me now discuss the other issues I have emphasized, “not exceeding three,” “immediately,” and “by ballot” before I return to the issues raised by voting by states delegations.

Article II, under which the electors did not vote separately for President and Vice President, said the House would choose “from five highest on the list.” Cutting the number from five to three when balloting separately for President and Vice President, as the Twelfth Amendment does make sense, but why is the formulation “not exceeding three”? Why not from the three highest on the list? Who decides to submit less than three? How is that decision made? The Twelfth Amendment is silent. What if there was a three-way tie? Could one be eliminated? What if there was a four or more way tie?

I think it best to go back to something like the Article II formulation:

And if there be more than one who have the highest numbers, and have an equal number of votes, then the House of Representatives shall immediately chuse by Ballot one of them for President.

And if there are no ties among the highest, I would continue:

And if no person have a Majority, then from the three highest on the list the said House shall in like Manner chuse the President.

“Immediately” I would not change. No business before the House could be more important than promptly electing the President.

“By Ballot” raises more complex issues. Both in 1801 and 1825 the House met in executive session. Both in 1805 and 1825, separate ballot boxes were provided for each state’s House delegation, and an impartial procedure was established for counting the state ballots.

While not clearly consistent with current views of openness and transparency in government, arguments can still be made in favor of executive session and secret balloting. Like the electors themselves, who ballot secretly, the framers apparently thought that each Representatives should be able to vote her or his conscience free from accountability to the candidates or to her or his electorate, let alone to special interests. The roughly half of the states that have chosen not to try to bind their electors apparently still think that way. Since we are trying to formulate proposals that must be supported by 38 states, my instinct is not to rock this particular boat. On the other hand, all states have enacted Freedom of Information and Open Meetings laws, so perhaps my instinct is wrong.

I think the best way to reexamine the issue of voting by states’ House delegations is to look at what might have happened in January 2001:

Alabama – five Republicans, two Democrats

Alaska – one Republican

Arizona – five Republicans, one Democrat

Arkansas – one Republican, three Democrats
California – 20 Republicans, 31 Democrats
Colorado – four Republicans, two Democrats
Connecticut – three Republicans, three Democrats
Delaware – one Republican
Florida – 15 Republicans, eight Democrats
Georgia – eight Republicans, three Democrats
Hawaii – two Democrats
Idaho – two Republicans
Illinois – ten Republicans, ten Democrats
Indiana – six Republicans, four Democrats
Iowa – four Republicans, one Democrat
Kansas – three Republicans, one Democrat
Kentucky – five Republicans, one Democrat
Louisiana – five Republicans, two Democrats
Maine - two Democrats
Maryland – four Republicans, four Democrats
Massachusetts – ten Democrats
Michigan – seven Republicans, nine Democrats
Minnesota – three Republicans, five Democratic-Farmer-Labor
Mississippi – two Republicans, three Democrats
Missouri – five Republicans, four Democrats
Montana – one Republican

Nebraska – three Republicans

Nevada – one Republican, one Democrat

New Hampshire – two Republicans

New Jersey – six Republicans, seven Democrats

New Mexico – two Republicans, one Democrat

New York – 12 Republicans, 19 Democrats

North Carolina – seven Republicans, five Democrats

North Dakota – one Democrat

Ohio – 11 Republicans, eight Democrats

Oklahoma – five Republicans, one Democrat

Oregon – one Republican, four Democrats

Pennsylvania - eleven Republicans, ten Democrats

Rhode Island – two Democrats

South Carolina – four Republicans, two Democrats

South Dakota – one Republican

Tennessee – five Republicans, four Democrats

Texas - 13 Republicans, 17 Democrats

Utah – two Republicans, one Democrat

Vermont – one Independent

Virginia – six Republicans, four Democrats, one Independent

Washington – three Republicans, six Democrats

West Virginia – one Republican, two Democrats

Wisconsin – four Republicans, five Democrats

Wyoming – one Republican

Let us now assume that each Representative would have voted by party affiliation, that all would have been present and voting, that the Vermont Independent would have voted for Vice President Gore, because he votes with the Democrats to organize the House and that the evenly divided states would not have voted.

Governor Bush would have had the votes of 28 states' House delegations, an absolute majority, and Vice President Gore the votes of 18. Connecticut, Illinois, Maryland and Nevada would not have voted, because their delegations were evenly divided, but this would not have affected the outcome.

I have also considered the suggestion of a House rule or a law binding each state delegation to vote in accordance with the certified popular vote of that state, assuming but not deciding, that such a rule or law would be constitutional. The difficulty is that in almost all, if not all, cases this would reproduce the Electoral College result to no purpose.

In a very close election, a variant that might have merit is awarding the vote of each state that did not vote in the House presidential election, because it was evenly divided or lacked a quorum, a possibility particularly in the six one Representative states, to the winner of the popular vote of that state. This would insure that each state voted and would break any state delegation deadlocks in a democratic way. Because each such state's popular vote would be controlling, the states presumably would ratify such an amendment.

So, here are five modest but useful constitutional amendments: (1) eliminate the possibility that a Lame Duck Congress and President could choose the President or Vice

President; (2) provide that Congress only counts the states' elector votes and the states' judgment as to their votes is final; (3) make it clear that the states have the discretion to bind or not to bind their electors; (4) clarify the House presidential candidates in case of ties and eliminate any discretion as to House voting for less than the top three (or more if ties) and (5) allocate in accordance with each state's popular vote for President the vote of each House state delegation that did not vote for President for whatever reason, death, incapacity, deadlock, lack of a quorum, abstention.

Before closing we need to turn our attention to what happens if the House should not choose a President by January 20, under the Twentieth Amendment the end of the incumbent's term. The Twelfth Amendment provides:

And if the House of Representatives shall not choose a President whenever the right to choice shall devolve upon Them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

While sections three and four of the Twentieth Amendment deal with the contingencies that a President elect or Vice President elect shall have failed to qualify or the death of any of the persons from whom the House may choose a President or the Senate a Vice President, the Twentieth Amendment does not deal with the contingency that the House is still voting for President on January 20. Nor does it make clear whether or not the Amendment modifies the apparent March 4 deadline for ending the House's effort to choose a President and for vice presidential succession. Nor does it deal with the possibility that the Senate may not elect a Vice President by January 20 or March 4.

The Twelfth Amendment provides:

...and if no person shall have a majority [of elector votes as Vice-President], then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and majority of the whole number shall be necessary to a choice.

Notice two differences from the House presidential voting provisions: (1) the Senate need not vote “immediately” and (2) it does not vote for Vice President by ballot, as it originally did under Article II, section one, clause three.

Presumably, the Senate does not vote immediately so that it has the opportunity to choose a Vice President who is compatible (or Not) with the House’s choice of President. But there is no requirement that it delay or that it choose a compatible Vice President nor is there any requirement that the Senate vote by January 20, only an apparent requirement that it vote by March 4.

This leaves open the question of who acts as President between January 20 and the Senate’s election of a Vice President thereafter or if, for another example, an evenly divided Senate fails to do so. There is a question as to whether or not the incumbent Vice President could break such a tie if the Senate voted before noon on January 20. As we have seen, the Twelfth Amendment says that “a majority of the whole number [of Senators, i.e., 51] shall be necessary to a choice.” On the other hand, Article I, section three, clause four says “The Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.”

For technical reasons too complicated to explain in a lecture already overlong, it is not clear that the void is filled by the Presidential Succession Acts, authorized by Article II, section one, clause six or the law authorized by section three of the Twentieth Amendment but apparently never enacted. So some further constitutional repairs appear to be required.

Thus (6) a constitutional amendment should make clear that if the electors fail to elect a Vice President, the Senate must do so before January 20. (7) If the Senate fails to do so, it makes sense, as the Presidential Succession Acts now provide, for the Speaker of the House, as the next most popularly elected (even if indirectly) federal officer, to act as President, even though this gives her or him an incentive for the House not to choose a President.

Perhaps then the precedent of section two of the Twenty-fifth Amendment could be followed, and as Acting President, the Speaker would nominate a Vice President who would take office upon majority votes of both Houses of Congress.

The Acting President Speaker could then revert to Speaker, thus limiting his incentive for the House failing to choose a President, and the newly elected Vice President would become President with the power to nominate another Vice President until the next presidential election as Article II, section one, clause six and section three of the Twentieth Amendment provide.

So, here are seven, perhaps eight or nine, useful constitutional amendments about which a consensus might develop. I'd appreciate your comments.