

THE ELECTORAL COLLEGE:

A CRITICAL ANALYSIS

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## ABSTRACT

This paper looks critically at several of the principal arguments employed for and against the continued use of the Electoral College, as opposed to a system of direct popular vote. The Electoral College does not merely diverge from our common American practices of direct popular vote, but it does so in ways that arbitrarily benefit some states at the expense of others. While federalism clearly has desirable features for the United States, and a two-party system may be desirable, neither is threatened by the removal of the Electoral College. Many of the criticisms of the College appear to indicate a skepticism toward holding a large-scale national election, but, to the extent that such skepticism is justified, the Electoral College system, which is essentially a national election with some arbitrary twists, is not a reasonable alternative.

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I. INTRODUCTION

One of the strange beliefs of the defenders of the present system--a myth of very considerable convenience--is that the American democracy is so fragile that the very slightest constitutional jolt will have an apocalyptic effect. Thus, presumably we would fall apart if President Nixon were impeached. We would fall apart if President Nixon were not pardoned. We would fall apart if FDR were elected to a third term. We would fall apart if the Supreme Court seriously implemented *Brown vs. Board of Education*. The defenders of the status quo will always invoke the specter of a constitutional crisis when in fact constitutional crisis is contemplated by the Constitution itself. -- Theodore Lowi<sup>1</sup>

In November and December of 2000, the inevitable finally occurred: after a gap of 112 years, a presidential election produced a split result, with one candidate winning the popular vote, and the other the electoral vote. The furor that such a result might have been expected to cause was largely absent. Of course, loyal Democratic voters were outraged, and there has been a renewed interest in discussing the Electoral College among some scholars, but the event had only a brief impact on editorial pages, and produced little outcry in the public as a whole. No citizens'

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<sup>1</sup> Lowi wrote this in the context of advocating a multi-party system, but the argument is quite relevant here. (1983, 704)

movement to change the College has sprung up, and Congress' discussion of the topic has been minimal.

The democratic, majoritarian aspects of our system increased in those 112 years. Consider, for example, the switch to directly electing senators (in 1913), the granting of *actual* suffrage to almost all adult citizens (via the Civil Rights Movement in the 1950s and 1960s), and the rise of public opinion polling (in the last half of the twentieth century), just to name a few significant changes. Thus, resistance to a non-majoritarian institution such as the Electoral College might be expected. The relative lack of outcry may have something to do with just how few Americans care that much who gets elected president in the current era. Moreover, as Jack Rakove noted, "the tedious business of considering a constitutional amendment with little prospect for adoption could hardly compete for public attention with the tumult in Florida." (2001, 203) But that is a slightly different topic. Here I wish to examine the Electoral College itself, and whether we ought to be concerned that it is still an integral, functioning part of our political system.

The specific purpose of this paper is to critically analyze some of the major claims that scholars make both for and against the Electoral College's continued existence. It is my conviction that many of these claims have not been carefully pondered, certainly not sufficiently for the current relevance of the topic.

Ultimately, I will argue that the supporting arguments for the Electoral College fail to satisfactorily explain why such an institution is appropriate in a modern democracy (or even a democratic republic.) I will begin with discussion of the most significant criticisms of the College. The first, and most obvious, is that it is anti-democratic, or, at the least, anti-majoritarian. The second, related (but much less discussed) point is that the specific ways that the Electoral College differs from national majority rule and advantages some states at the expense of others are quite arbitrary.

The defenses of the Electoral College are interesting, in part because they have shifted in emphasis. A prominent defense traditionally has been the College's

support for a moderate, two-party political system. This is an important argument that I will analyze, but it is less prominent in many recent discussions. A more constant defense through the years has been the College's role in promoting federalism. A popular third point since 2000 has been the problems of vote counting and voter fraud in a close national popular election. This is a variant on the general theme of the difficulties of a true popular national election in the United States. Finally, and relatedly, defenders point to the problems with either of the direct popular vote alternatives, run-offs or simple plurality elections.

I think it is a waste of time to talk about changing the Electoral College. I would predict that 200 years from now, we will still have the Electoral College.

-- Jimmy Carter (quoted in Rakove 2001, 201)

Given the presumed low probability of any change in a system that requires the passage of a constitutional amendment, one might reasonably ask: why bother discussing the College at all? First, prospects for change are presumed to be low in part because of a widespread belief that most states (especially small ones) are greatly advantaged by this system so that they will not ratify a popular vote amendment. It is my conclusion that this belief is at least somewhat mistaken, that the College leads many states to be ignored now. Secondly, there is value in examining our systems and comparing them with alternatives, if only to better understand their functioning and effects. Finally, related to the above two points, I believe that there are many weak arguments and false claims made about the Electoral College, even by intelligent scholars, which should be disputed for the sake of truth and good scholarship.

## II. ARGUMENTS AGAINST MAINTAINING THE ELECTORAL COLLEGE

The case against the Electoral College is perhaps simpler than the case for it. The two main (related) ideas that I will discuss here are the anti-democratic nature and arbitrary effects of the College. In discussing these arguments, I will consider

the counter-arguments of the College's defenders. Thus, arguments for and against are intertwined here, as in the next section on arguments for the Electoral College.

### The Electoral College as Undemocratic

The most frequent criticism of the Electoral College is simply that it runs counter to our accepted principles of democracy in that it allows a president to be elected even if that person has received fewer popular votes than an opponent. As prominent Electoral College critic Lawrence Longley puts it:

The Electoral College is not a neutral or fair counting device for tallying popular votes cast for president in the form of electoral votes. Instead, it counts some votes as more important than others, according to the state in which they are cast. (Longley 1996, 85)

Of course, this distortion from pure majority rule occurs because of the winner-take-all rule within each state and the constant two votes that each state receives regardless of population.

This criticism is so simple and obvious that defenders do not dispute it, but instead point out something equally obvious: our system is not, nor should it be, completely democratic or majoritarian. Of course, the Constitution contained many other aspects that are not wholly majoritarian or democratic, such as the many checks and balances built into the Constitution that may thwart the wishes of a majority.

Defenders of the Electoral College state that democracy does not necessarily mean simple majority (or plurality) rule. Judith Best describes this criticism of the College as a desire to reduce democracy to mere numbers. To this, she responds that "the right winner must be defined politically not arithmetically." (1996, 30)

Paul Schumaker and Burdett Loomis, in explaining why their group of scholars chose the Electoral College over all the major alternatives, respond to the majoritarian criticism as well: "this criticism is problematic because it misunderstands democracy and has an oversimplified conception of 'the public will.'" (2002, 185) They then make several thoughtful and important points along these lines:

Because no one set of election rules is clearly best, the critical issue for democracy is that agreement exists on electoral rules...Public choice theorists have demonstrated that the concept of public will is often vacuous, an abstraction intended to signify what most members of the public want, but a concept that is impossible to operationalize precisely. (185)

These points are all well-taken. And indeed, from the standpoint of some social choice theorists, most discussions of the meaning of particular elections are useless, since elections are so arbitrary and manipulable<sup>2</sup>. But that is an extreme view. A reasonable conclusion from the 2000 election is that the public was split; any democratic theorist would be hard-pressed to show why either Gore or Bush deserved to be president more than the other by some democratic criteria. It may be that such a choice is so arbitrary that national public elections of this kind should not be held.<sup>3</sup>

But *if* we are to hold elections that tally the votes of all citizens, the burden of proof would seem to be on those who would hold them under conditions in which the votes of these citizens are treated unequally. There are indeed many reasons why the desires of a simple majority or plurality should not hold sway, such as the defense of important individual rights. But why weight the votes *in this particular way*? These leads to the next point.

### The Arbitrary Nature of the Electoral College's Effects

The Electoral College emphasizes states, to be sure, and thus federalism provides one set of justifications for it, as will be seen in the section on defenses of the College. But first I wish to explore some of the actual effects of the College on campaigning.

At the heart of most practical discussion of the Electoral College today is the question of whom is advantaged by it. What is intended by this question,

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<sup>2</sup> For example, see William Riker (1982).

<sup>3</sup> But virtually no-one seems to be arguing this. A return to actual electors deciding, for example, is seldom entertained. See more on this train of thought in the conclusion.

specifically, is how do candidates (and perhaps presidents) behave differently from the way that they would in a direct popular vote system? For such an essential question, the answers are elusive. This is an excellent example of the relative neglect from which the Electoral College has suffered as a topic of study.

American government and presidential election textbooks routinely state that the College's existence operates to the benefit of the largest states.<sup>4</sup> The logic of this argument is that the winner-take-all process magnifies the influence of large states by making them often-decisive huge blocs of votes. This can be supported with so-called power indices, which measure the percentage of the time that each state would make the difference among all possible winning coalitions of states. Using this type of reasoning, for example, Brams and Davis developed the "3/2s Rule," arguing that candidates will spend resources at a rate of 3/2 times the electoral votes of the state. (1974)<sup>5</sup>

Yet popular wisdom also has it that the College benefits small states. Indeed, one of the major impediments to any change is assumed to be the reluctance of small states to give up this advantage, which arises from the constant two votes added to each state's number of representatives.<sup>6</sup> Thus, the smallest states get a larger share of the total than they would in a pure popular vote. Rainey and Rainey point out that the largest nine states in 1990 contained 52% of the population but only 45% of electors. (2001, 7) Furthermore, they calculate that removing the constant two would have affected some electoral outcomes, including that of 2000.

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<sup>4</sup> For example, see Polsby and Wildavsky, perhaps the best-known presidential elections text. (2000, pp. 52-53) Most American government texts also draw this conclusion (see Wilson and Dilulio (2001, 340-341) and Lowi and Ginsberg. (2000, 421)

<sup>5</sup> But note the counter-argument by Rainey and Rainey that such models falsely assume that all states are equally likely to form coalitions with all other states. (2001, 6) The great swath of mountain states that vote steadily Republican, for example, are a decisive bloc just as New York is.

<sup>6</sup> For example, Gerald Pomper writes that "the present system works to the advantages of small states, which could prevent such an amendment from passing." (2001, 149) Amazingly, advocates of the small states are advantaged school and of the large states are advantaged school often ignore each other's existence: Pomper is an example.

(11) In other words, it can be argued that Gore lost because of the small state advantage.

It may well be that large states *and* small states are advantaged at the expense of middle-sized states. If so, it cannot be a very large advantage. To be fair, I must conclude that the jury is still out on this question, but the Rainey's case for small states' advantage is powerful. Of course it begs the question: *why should* small or large states be advantaged? As many commentators have pointed out, small versus large states *per se*, while an important issue at the 1787 convention, is not a significant issue division in the U.S. now, nor has it been.

And, though this fact is strangely absent from most textbooks, there is little dispute that the Electoral College over-emphasizes states in which the election is expected to be close, since the winner-take-all rule makes other states' exact popular vote total unimportant. And one could search constitutional history and democratic theory for a long time to find philosophical justification for that distinction. As Rakove ably points out, the winner-take-all provision itself gained favor in the early Nineteenth Century for political gain in particular elections. (2001, 215-220)

Among the best recent evidence for this tendency is the paper by Hagen, Johnston, and Jamieson, in which they measure actual candidate appearances and ad spending, state-by state, in the 2000 presidential election. Closeness of the 1996 presidential election in each state predicted both of these variables well. Not only did Brams and Davis' 3/2 rule of extra attention to large states not hold, but there was little clear relationship between state size and candidate attention. (2002, 5-6)

Thus, especially when combined with more-and-more refined marketing and polling techniques of recent elections, the winner-take-all rule used in states leads to campaigning that is pin-pointed to particular media markets. The 2000 election was almost the opposite of what some defenders of the Electoral College describe when they discuss the College's role in promoting broadly-based, national

campaigns. The argument has been made that the College encourages such widespread campaigns because, without it, a candidate could ignore large sections of the country.<sup>7</sup>

The logic of that argument is questionable, since winning coalitions made up of relatively small portions or broad samples of the nation can be easily imagined in both the Electoral College and in a popular vote system. But the 2000 election example ought to dismiss the point altogether. No national ads were run by either Gore or Bush; they were replaced completely by spot ads in key markets in swing states. As Rakove puts it,

Although the national electorate was closely divided, whole swaths of the country, comprising large and small states alike, essentially sat the campaign out because there was never any doubt in whose column their electoral vote would fall. (2001, 206)

This is an excellent example of arbitrary effects of the Electoral College. The College in 2000 positively *discouraged* a broad national campaign in this close election.

### III. ARGUMENTS FOR MAINTAINING THE ELECTORAL COLLEGE

#### The Electoral College and the Federal System

There is little doubt that the Electoral College was federal in its origin, as writers such as Gregg, Best, and Stoner argue (Gregg 2001, Best 1996, and Stoner 2001). These defenders are on relatively strong ground when emphasizing the importance of federalism for our system overall, and the extent to which the College was a significant part, both politically and philosophically, of the federal system developed by the Framers. The difficult and important questions then become: just how federal is the College now, and in what important ways would replacing it with direct popular election change federalism in the twenty-first century?

Judith Best points out that counting votes by state is part of the many ways in which our system works through states rather than through simple, equal counting of

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<sup>7</sup> Examples of such views include Best (1975).

all persons in the country. The Senate's equal votes for each state, and the constitutional ratification process are good examples. Interestingly, she draws a parallel to the way faculty senates in universities may represent faculty in departments, as departments, rather than as equally-weighted individual faculty. (1996, 33-34)

Changes in popular attitudes over time are a relevant point to consider here. Best rightly states that the Constitution itself had to be ratified by each state before that state would join it (New York could not, for example, outvote New Jersey because it is larger, and force both to join.) (33) Such a process was both natural and politically necessary at the time, when states were more important units than the national government, both in their power and in the attachment individual citizens felt towards them.

But is that the case today? I suggest that the faculty parallel is not a good fit with the current U.S. While many Americans feel an attachment to their state, they are *far* more likely to move from one state to another than a faculty member is to change disciplines. They may well live in one state and work in another. They are more likely to vote in national elections than in state and local ones, despite the lesser likelihood of one citizen affecting national election outcomes.

The trends toward nationalism mentioned in the above paragraph may be decried by adherents of a stronger state version of federalism, but they do suggest that in current times it is not necessarily more natural to count by state. I do not by any means suggest eradicating or even eroding the federalism that remains in our Constitutional system, but proponents of keeping the College to promote federalism need to be more concrete and clear on how the one leads to the other. Best, for example, states that the existence of the College

means that to be successful a presidential candidate must win states. This means the states as political units have an influence on the presidency as well as on the Congress. And because they have an influence on the president, who nominates all the members of the federal bench, as well as on the Senate, which confirms the nominations, the states have an influence on the federal judiciary. The federal principle is the fulcrum, the fixed support, for the whole national government and for the Constitution. It is the base upon

which the three branches of government turn. Applying the principle to the presidency establishes balance in the arrangement of the three branches. (1996, 34)

This is as close to a precise argument as one finds. But even if one accepts the debatable point that federalism is the base of the system<sup>8</sup>, why is this one aspect (the College), so important to that base? Any successful candidate for president will "win states" in either an Electoral College or direct popular vote system. For almost two hundred years states have not been decision-making units as much as counting units in the Electoral College system. Returning to Best's college faculty parallel: it would be perfectly reasonable to have faculty in departments or divisions be represented by someone else at another level, and to thus aggregate faculty members' preferences by department. Ideally, in such a process, individuals would discuss issues within a department and their representatives would take the issues to the next level, representing each distinct constituency. But if a college or university chose to poll each faculty member individually on an issue, we would think it odd indeed to add all these votes up within each department, and then sum weighted numbers for each department's plurality view on the issue. Yet that is a close parallel to the Electoral College: no collective decision is being made by a group called a state; numbers are merely being tallied at that level.

The existence of the College leads to a lot of *discussion* of states in the campaign, but candidates in the modern era are at least as concerned with other levels of analysis, such as demographic groups or media markets.

Even at the time of the founding, it is less than clear that the Electoral College was an essential part of federalism, since it did not appear until late in the convention, when other aspects of federalism were in place. Ranney and Ranney interestingly observe that no other federal system in the world has seen the need for such an electoral mechanism to guarantee federalism. (2001, 16)

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<sup>8</sup> The horizontal checks among the three branches are arguably at least as important as the vertical ones of federalism, and there are many crucial aspects of the Constitutional system, including the defense of rights and popular sovereignty.

Thus, the notion that the Electoral College's removal would threaten the core of federalism is unsupported. Lowi's quote at the start of this paper makes a relevant point on the strength of the American system. The actions of state government, Congress and the Supreme Court, for example, appear to be much more important variables for the viability of federalism.<sup>9</sup>

### Defense of Our Two-Party System

The two-party system is as American as apple pie, and, to quote expert commentator on American politics Michael Barone, the Electoral College is a "great institutional support of the two-party system." (82) The College, according to this line of reasoning, penalizes third-party candidates by requiring them to win whole states in order to receive any electoral votes. Thus, third parties, and extreme views in general, must compromise and fold themselves into our traditional centrist two-party universe. Barone's essay focuses on the importance of discouraging third parties, but it contains little evidence that the Electoral College is necessary to do so.

I will not mince words and argue that, while this has been a popular argument for the Electoral College, it is among the weakest. My argument takes three parts:

1) the Electoral College is not necessary for promoting two-partyism because single-member districts (and other U.S. laws) do so quite effectively.

2) Neither the Electoral College nor single-member districts can completely eliminate third parties from playing a significant role because regionally-strong parties can gain seats or electoral votes.

3) it is at least a debatable proposition that the two-party system *should* be discouraged.

The first point is so obvious because the connection between single-member districts and two-partyism is among the most well-established relationships in political science. Sometimes called Duverger's Law, after Maurice Duverger, this

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<sup>9</sup> A few decades ago, when federalism was perceived to be threatened by an ever-expanding national government, the Electoral College was in place. And it has been actions of these other institutions (Congress, courts, and state governments) that have helped to revive federalism in recent decades.

relationship says that virtually all political systems that employ single-member districts in which there is one winner per geographical area<sup>10</sup> have two dominant parties. (Beck and Hershey 2001, 34-36) Any other parties tend to be weak and/or short-lived, because there is continuous electoral incentive for other parties to merge into one of the larger ones. Only polities with some variant on the proportional representation system, where all vote-getting parties receive some representation in multi-representative areas, are likely to have more than two significant parties. In such systems, several parties can thrive electorally, and then compromise at the legislative level to form governing coalitions.

This analysis is very familiar to political scientists, because it appears in every American government textbook.<sup>11</sup> The absence of powerful third parties in most non-presidential elections testifies to the effectiveness of single-member districts, along with other electoral laws in the U.S., such as those limiting ballot access and campaign finance to minor parties. There have been a small number notable exceptions to the two-party dominance of late, such as Jesse Ventura in Minnesota, and a few other independent office-holders. But, as in other periods of U.S. history, these exceptions tend to be short-lived. Indeed, it is notable that third parties have made so few inroads in recent decades, given the low levels of support for the two major parties.<sup>12</sup>

My second, less crucial, point is that some third parties may actually thrive, at least for a while, in a system with single-member districts or an Electoral College. Those are regionally-based parties. Thus, Populists gained some power and elected many officials in the Midwest in the 1890s, and George Wallace garnered forty-six electoral votes in a few Southern states in 1968. But any attempt at

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<sup>10</sup> This system is also called "winner-take-all" or "first-past-the-post."

<sup>11</sup> And it is not much disputed, unlike the large-state advantage theory that appears in textbooks.

<sup>12</sup> Since the 1970s, about one-third of the public considers itself "independent," rather than tied to either major party. Fewer than one-third consider themselves "strong Democrats" or "strong Republicans" (Beck and Hershey, 119)

building a broader-based third party runs into the problems inherent in winner-take-all systems.

Finally, the assumption that two-partyism ought to be defended in open to question. Barone argues that the Electoral College is good because it discourages small and dangerous third parties; "it restrains the fissiparous tendencies of political ideologues and idealists, who seek to impose their will on a majority of those who reject their views." (2001, 80) Whether more viable third parties are desirable is a large topic, worthy of a separate essay. But a few remarks are in order here.

Barone's view of the motivations and tendencies of third parties is a bit of hyperbole: certainly one could not classify the leaders of all small parties in multi-party systems this way. Twenty years ago, Theodore Lowi wrote a thought-provoking essay, challenging various defenses of two-partyism. He challenges various dire scenarios of what would occur if we elected a third-party president and/or many third party members of Congress, such as the idea that government would often be deadlocked (more than now?!) (1983)

At minimum, it should be concluded that reasonable observers of American politics may differ in the two-versus-multi-party issue. It comes down to values, such as representation of more views, versus belief in moderate compromise, or belief in increasing participation levels versus the need for stability. But, based on point number one, the supremacy of two parties in the U.S. is hardly in doubt, so this cannot be a basis of the Electoral College's defense.

#### The Magnifier Effect and Clear Winners

Another argument for the Electoral College is that it magnifies the margin of victory and that it produces clear winners. The argument essentially is that the College usually produces a clear, large margin of victory for the winner, who has had an absolute majority of electoral votes in every election since 1824 . Thus, the winner is clear, and therefore considered legitimate. Our system is kept stable, and presidents, with a reasonable claim for legitimacy, are able to govern.

Small popular vote margins of victory are usually magnified for much the same reason that a party that gets only slightly more votes nationally in U.S. House elections than the other party usually rules the House by more than just a few seats. If one candidate or party fairly consistently wins narrow elections in winner-take-all units, that candidate or party will usually wind up with a larger overall victory.

Aside from the presumed benefit of having clear results and legitimate government, Judith Best argues that the "magnifier effect" tends to work for candidates with broad-based victories in various geographical areas, and this idea does make sense in light of the discussion in the paragraph above. (1996, 11) Thus, the magnifier is not just "smoke and mirrors," but a reward for successfully mounting a broadly-based campaign. This argument would be stronger if Best could provide us with examples of deserving and undeserving candidates. E.g., have there been candidates who won both the popular and electoral votes but did not gain larger victories in the electoral tally due to a lack of a broadly-based campaign?<sup>13</sup>

Best's analysis especially emphasizes the clear results and lack of deadlocks. She concedes that the Constitution's contingency plan for deadlocks when there is no electoral majority is problematic: voting in the House is skewed by being one vote per state, and the possibilities of deal-making in the House are disturbing. (13)

But the Electoral College works so decisively, she argues, that majorities virtually always occur. She cites the 1992 Perot example, when, despite much concern over the possibility of a deadlock due to his popularity, he of course received no electoral votes and no deadlock was remotely likely. (12) And even George Wallace in 1968, with a regional campaign, could not deadlock the College. (13)

These points hearken back to my discussion of the two-party system. It is true that third-party candidates are unlikely to impede an Electoral College victory (or to impede a popular vote victory in any elections in our winner-take-all system), and the College makes it less likely they will even deny a majority. One could argue, however, that there are some smoke and mirrors here. Perot was

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<sup>13</sup> The broadly-based campaign issue was discussed also in Section II of the paper.

supported by a fifth of the electorate, and the count that matters, the Electoral count, says he received nothing. This distorted the reality of the public's views in 1992.

More relevant to Best's argument, she dismisses the regional candidates such as Wallace too easily. The Electoral College makes a strong regional candidate *more likely* to affect the results than would be the case in a popular vote system. Such a candidate can receive *more* electoral votes than she "deserves," precisely because we are counting by states. A candidate such as Wallace can be almost completely devoid of support outside one region, yet he can garner significant electoral votes. While Wallace did not deny Nixon an electoral majority, such a result is quite possible, and only requires a closer electoral margin, such as we had in 2000, combined with a strong regional candidate.

The clear results from the College are often contrasted with the alleged problems of runoffs in a popular system. Some such problems are discussed briefly below. For now, it is interesting to read Best's description of a hypothetical "contingency election" (runoff) and its threats to stability and legitimacy in light of the 2000 election that dragged on for weeks:

We don't want delay, uncertainty...We don't want to have the outcome uncertain for weeks or even months...while the world watches in dismay...(14-15)

No real crisis of legitimacy, either domestic or international, occurred when the winner was in doubt for weeks in November and December of 2000 due to the Florida vote-counting problems. This lack of crisis may owe more to the stable political culture and rule of law in the United States than to any particular method of selecting the president. Again, as Lowi pointed out, our system is not as fragile as sometimes argued.

In conclusion, there is evidence that the magnifier effect occurs, and the Electoral College does have a history of being decisive. The latter is rather faint praise: many systems, including hereditary despotism, can be decisive in choosing a leader. Evidence on the significance of the magnifier is lacking. As mentioned in the

introduction, only small segments of the public seem to get worked up about who is the president in most cases. Die-hard supporters of losing candidates have no problem disputing the legitimacy of winners in any case.<sup>14</sup>

#### Problems of Vote Counting and Fraud

The Electoral College served to center the post-election battles in Florida. Without it, I fully expect we would have seen vote recounts and court battles in nearly every state of the Union. Can you imagine the problems in Florida multiplied 10, 25, or even 50 times? Rather than being an argument against the Electoral College, the 2000 election was a strong and forceful warning against its abolition. -- Mitch McConnell (2001, xv)

Prospects for controversies over voting and ballots, as well as the temptation for actual vote fraud, are said by proponents of the Electoral College to be decreased by that body. While these arguments have not been written about as extensively as some of the above points for the College, they are mentioned so often since 2000 that they are worthy of analysis.

The argument is essentially that when the election is close nationwide, as in 2000, every vote among millions matters a great deal, and this in turn pressures participants to cheat, or, at least, to engage in more challenges to results, or "50 Floridas," as some would put it. Paul Rahe, in the same volume as McConnell, makes a similar point (2001, 68-69), as do Pomper (2001, 149-150), and Herron, et.al. (2002, 144).

This is one of the most plausible arguments for the Electoral College. It is difficult to come out in favor of a Florida-like recount in many states simultaneously, and such a result might have been more likely in 2000 with a direct popular vote system. However, several important counter-points should be made.

First, like some other arguments for the Electoral College, it implies skepticism about popular elections in general, at least large-scale national ones. Recounts and fraud in close elections are part of what we have to live with and deal

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<sup>14</sup> After each of Clinton's presidential election victories, staunch Republicans quickly pointed out that he lacked popular vote majorities. Apparently the magnifier effect and decisive majorities in the Electoral College were not enough to mollify them.

with if we wish to use elections at all. Would anyone suggest that large states such as California, or populous countries newly turning to democracy avoid national elections for this reason? If so, would something like our modified Electoral College be proposed in its place, something close to popular national elections, but with some odd differences<sup>15</sup>?

Second, with regard to 2000 specifically, some aspects of the Florida situation were likely in any close vote, but some were avoidable and may be less likely in the future and in other states. One can reasonably hope, for example, that states will be sure that their recount standards are relatively clear, and that their rules for carrying out and completing such recounts are clarified as well. Florida was not a model for good government in these respects. Independent elections commissions might help as well. Furthermore, some aspects of the Florida fiasco were a direct result of the Electoral College and related rules, e.g., the confusion over whether the legislature could or should counteract decisions by Florida courts, and concerns about specific deadlines imposed by the presentation of electoral votes to the Congress.

Finally, the Electoral College system of counting by states could *cause* more recount problems. It is not hard to imagine a scenario in which the total popular count is relatively close but more clear cut than in 2000, yet the Electoral College vote is tight and hangs on the result of just one or two states. Suppose, for example, that Al Gore had received slightly more votes than he did in several of the states that he won in 2000, enough to receive an overall popular vote victory of one or two percentage points (as opposed to the difference of less than .5% that he actually had,) but the count in Florida and some other states was still very close. In such a plausible scenario, the existence of the College could *cause* a recount crisis that would not otherwise exist, by placing all the weight of victory or loss on a one state, or a few states.

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<sup>15</sup> See the discussion of arbitrariness in Section II.

Despite this third point, it is possible that making all votes count equally would in many cases make stealing or contesting them more likely across the country. Is this the price we pay for more democratic elections, and, if so, is it worth paying?

#### Weakness of Alternatives to the Electoral College

All of the above arguments compare the Electoral College, explicitly or implicitly, with its alternatives, generally direct popular election of some kind. Some arguments, however, more specifically refer to the alleged flaws of alternatives, and these I will address briefly here.

Judith Best criticizes direct popular election on several counts. Many of her arguments refer to points above, e.g., that direct election is not federal, or that it harms the two-party system. (1996, 55) Much of her other discussion involves problems with either a popular election allowing a winner with less than fifty percent or having a minimum percent requirement (usually between forty and fifty percent is suggested) that would frequently lead to a runoff.

Best argues that any popular vote system allowing a candidate with less the fifty percent to win is undemocratic: "unless you hold a runoff election there is no accurate way to assert that a candidate who won a plurality has or would have the support of the majority." (56) This is a reasonable point, but it sounds rather odd coming from an opponent of direct popular vote. Were the many presidents who failed to achieve a majority of the popular vote acceptable winners because the Electoral College gave them a majority? Clearly, Best would say yes, but the point is questionable. And what of all the non-majority winners in non-presidential elections across the country for governor, senator, mayor, etc.?

Best and other proponents of the Electoral College also dislike the runoff election needed to ensure a majority. This is in part because it encourages too much splintering of the vote in the first round, and also because a runoff is not "swift and sure." (58) The splintering of the vote can be a problem: France's recent

presidential election provides a good example of the worst of such a system: several parties split the vote into such small parts that extremist candidate Jean-Marie Le Pen made it to the runoff before being defeated by President Jacques Chirac. That said, runoffs are used around the world without serious problems, and they have been used in some states of the United States. Innovative voting systems, such as an "instant runoff" in which voters list second choices might work better than the conventional runoff, but the simple plurality system without runoffs is well-tested across the United States and avoids most of these problems.

This discussion of alternatives makes a reasonable segue to my conclusions. It should be clear that I have not found the defenses of the Electoral College very convincing. The direct popular vote alternatives mentioned above are so well tested that it seems odd to consider them too radical to adopt. The Electoral College clearly is unnecessary for defense of the two-party system, which is well (too well?) defended without the College. Federalism has many aspects, and the Electoral College, operating merely as a tallying mechanism (with no state-by-state deliberation) is barely a federal property of the Constitution at all. The problem of vote fraud is somewhat more convincing, but its overall seriousness is not certain. And the magnifier effect, while often present, is of doubtful value.

#### IV. CONCLUSIONS: SKEPTICISM TOWARD POPULAR ELECTIONS IN A DEMOCRACY

Some of the most plausible arguments for maintaining an Electoral College over a direct popular vote plan seem to be based, in part, on skepticism of popular national elections. One of the better arguments against direct popular vote is the possibility of widespread voter fraud and recounts in close, important elections. Such a possibility is inherent in any election system made up of real, flawed humans. And there is consideration among defenders of the Electoral College of the issue of whether popular majorities really ought to choose a president in every case. Thus, some arguments for the College seem to be arguments against applying democratic

elections to the presidency, despite our use of such methods for all other elected offices.

Some of this skepticism makes for awkward arguments, because the current Electoral College is "most of the way down the road to the choice of the president by the people." (Peirce and Longley, 22) Thus, if popular national elections are not generally a good way to choose presidents, then some alternative to them besides our modified Electoral College system would be in order. One can make a reasonable argument that hundreds of millions of people cannot choose one person to lead them in anything like a rational process. And by what right should Gore or Bush have won in 2000 when the race was closer than any counting system's margin of error?

If one takes such views to their logical conclusion, we should do something altogether different, such as return to the original Electoral College system or something like it, in which small groups of people weigh the choices. Or perhaps we should adopt a parliamentary system, in which leaders are chosen in part by the public, but in part by elected political leaders. Yet almost no-one seems to be advocating such radical solutions, since popular democratic elections are so entrenched in the United States.

In concluding I also should briefly consider the burden of proof on such an issue. Classical conservatives, in the tradition of Burke, would say that no major institution should be changed except slowly and carefully, considering the problem of unintended consequences.<sup>16</sup> The difficulty of amending our Constitution makes this view prevail in practice. Yet we should recall again Lowi's point on the alleged fragility of our system. More radical democratizing changes such as mass suffrage, votes for women and Blacks, and the direct election of Senators did not shake the system, indeed they have presumably improved it. And the alternatives are hardly untried and dangerous. As mentioned above, virtually all major elective offices in the U.S. use direct popular vote (usually with no run-off.) These elections leave the

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<sup>16</sup> See many of the arguments in Schumaker and Loomis (2002)

powerful two-party system intact and seldom lead to any splintering or radical results. A crucial question is whether the presidency is different, and if so how?

Walter Berns states, provocatively, that he has "yet to encounter a critic of the Electoral College who argues that a president chosen directly by the people is likely to be a *better* president." (2001, 118) But the conservative argument of skepticism towards any change in presidential selection would be on sounder ground if defenders could seriously claim the recent choices of president were of too high quality to risk any change--is there that much to lose from moving just a little further toward democratization of our political system?

A classical liberal might ask whether our Electoral College system, as modified, is a system that we would choose. He or she might also think it is an amazing coincidence that, in the eyes of some ardent defenders of the status quo, it just so happens that the institutions we have at this point in time are the best ones possible. Given the obvious limitations of any election system, and conceding the point that majorities are often wrong and we should limit their power in our system, why do we choose *this* particular method, with its arbitrary advantages to certain types of states? Is not, truly, the Electoral College an odd product of the incomplete grafting of democratic movements onto older traditions of a more republican and mixed system? Ultimately, the answer to such questions does depend in large part on one's attitudes toward change in the American system.

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