

Introduction

The 2000 presidential election was among the most tumultuous in American history, arguably rivaled only by a smattering of presidential elections in the Nineteenth Century. Initially the 2004 election seemed to promise more of the same, or even worse. While the most dire predictions about 2004 did not come to pass, in combination these first two elections of the Twenty-First Century¹ provide ample reason for soul searching about American elections, including the most unusual way in which we choose the president and vice president in the United States. The American way of selecting our highest executive officials, and what might feasibly be done to make it better, are the subject of this book.

The president and vice president are formally chosen by a vote of “electors” making up what has now long been known as the “electoral college.” At the present time there are 538 of these electors allocated among the states (and the District of Columbia). They never meet as a body,² but rather vote separately for the two offices in mid-December meetings held in the electors’ respective jurisdictions. The votes of these state-by-state groups of electors are then aggregated in a counting session held by a joint meeting of the two houses of Congress in early January. If all authorized electors have voted, and all their votes pass muster, a vote of 270 electors—a majority of the 538—is required to choose the presidential and vice presidential winners.

No doubt because of the difficulties that surfaced in 2000, American news media seemed to lavish attention on the electoral college in the runup to the 2004 election. Despite this attention, in all likelihood most American voters remained then, and still remain, oblivious to the role of the electoral college, supposing instead that the president and his vice presidential “running mate” are

jointly voted into office by a process of popular voting held not in December but in early November.³ Those who pay a bit of attention may appreciate that the final accounting to declare a winner takes place on a state-by-state basis, leading to what I will call the “contemporary understanding of the presidential election process.” Pursuant to this understanding, political parties nominate candidates for president and vice president, and each state—including for this purpose the District of Columbia—then holds a November popular election to determine how its allotted electoral votes will be cast for the two offices, taken as a paired duo. At least in the typical case where there are only two sets of candidates who garner electoral votes, the winners can usually be determined on that November election night, or perhaps the next morning, by toting up the electoral votes after the state-by-state popular vote counts are in.

The populace can be forgiven for a set of “misimpressions” that leaves this contemporary understanding in the public consciousness, for the system regularly provides the electorate with signs of just such a popular voting process at work. To start with, the presidential electors are themselves all chosen by popular election in November on what is routinely called “election day.”⁴ In most states, moreover, the popular electorate indicates its presidential and vice-presidential preferences as a tied pair on “short ballots”⁵ on which the names of the electors nowhere appear. The typical voter thus signals a preference not for a group of electors as such but for a set of candidates for president and vice president. That designation is transformed into a vote for electors by virtue of fine print, perhaps appearing on the ballot, but often only to be found—should anyone really undertake to look—tucked away in the statutory tomes of the state.⁶ Even in those few states where the names of electors are still found on the ballot, those of the presidential and vice-presidential candidates are typically given considerably greater prominence.

This voting for electors takes place on a state-by-state basis, and the mass media report the results from one state at a time, though they also routinely and with great fanfare announce nationwide vote totals. Election “results” are then usually available on the night of election day, weeks before the presidential electors meet and cast their votes, and weeks more before those electoral votes are officially counted in the congressional joint meeting.⁷ Those latter two events are scarcely reported on at all. With rare exceptions, moreover, the electors vote in accordance with commitments they have publicly assumed before-

hand—to the very candidates for whom the majority of voters in each state have signaled a preference.

The electoral college's choices for president and vice president also usually coincide with the winners of the nationwide popular vote. In the Twentieth Century, “[n]o American President . . . [was] chosen by the electoral college after a definitive defeat in the [nationwide] popular vote.”⁸ The first election of the Twenty-First Century was remarkable in good part because it was not true to that pattern. The 2000 electoral college winner received more than half a million fewer popular votes than did his principal rival, producing what is sometimes called a “wrong winner” in the literature critical of the electoral college.⁹ But then the 2004 election returned to the prevalent pattern, with the electoral college winner capturing the nationwide popular vote as well, by more than three million votes.

In this way, both the electoral college process and the electoral college results are usually suggestive of presidential selection through one form or another of popular vote, and it is perfectly understandable that the electoral college fades into the deep background of the nation's political consciousness. In fact the electoral college vote and its later official counting have largely become a formality, and it may not even be fair to say that the electorate fails to appreciate what is *really* at work. As the late Chief Justice William Rehnquist stated in his recent book on the contentious election of 1876, “in normal presidential elections, the voting of the electors is a formality, predetermined by the popular vote cast in each state on [election day].”¹⁰

At the same time, there is peril in ignoring the ins and outs of the electoral college. For one thing, “usually” is not always, as the 2000 election brought home. But more than that, those intimately involved in presidential election campaigns must keep their eyes on the formalities. At least those who manage presidential campaigns for major party candidates must appreciate that it is the electoral college vote that is ultimately decisive, that it is possible to win the presidency without winning the nationwide popular vote. Their business is that of winning elections, and since it is the electoral college count that secures that end, successful campaigns for the presidency are waged with an “electoral college strategy.” Those campaigns are plotted on a state-by-state basis, and some states loom large in campaign efforts of candidates—in a two candidate race, it is typically the same states for both of them—while others can safely be ig-

nored. And if political insiders necessarily pay attention to the details of the electoral college, the rest of us seeking to evaluate, and perhaps improve, the process would also do well to pay attention.

Over the years, some presidential elections have highlighted the peculiarities of the electoral college, for those obliged or simply inclined to pay attention. In 1888, for instance, Grover Cleveland won the nationwide popular vote for president, but lost the election because Benjamin Harrison received a majority of the electoral votes. More recently, while Bill Clinton handily won both the popular and electoral college tallies in 1992, before election day the vigorous independent candidacy of H. Ross Perot had created a good deal of uncertainty about the electoral college outcome in a number of states. That state-by-state pre-election uncertainty left the final result of the presidential race also in doubt. Even if not professional political operatives, those who followed those campaigns with some care were inevitably alerted both to the role of the electoral college and to some of its intricacies.

And some elections highlight troubles in the process in a way that stimulates attention to the possibilities for electoral college reform. In 1800 an electoral college tie necessitated recourse in early 1801 to a contingent procedure in which the president was selected by the House of Representatives. It took thirty-six ballots in the House to choose Thomas Jefferson over Aaron Burr. This led directly to adoption of the Twelfth Amendment to the Constitution, which for the first time separated the electoral college balloting for president and vice president. The 1876 election, about which Justice Rehnquist wrote, provides a second example. A specially appointed commission resolved disputes in several states when rival slates laid claim to having won the statewide popular election for electors. The controversy that swirled around both the process and the outcome led directly to Congress's adoption of the Electoral Count Act a number of years later. That statute still governs the counting of electoral votes in the joint meeting of the two houses of the Congress, centrally including how many sorts of disputes over the *bona fides* of individual electors, or of entire slates, are to be resolved.¹¹

The 2000 election seemed from the start to be cut from this latter cloth. It was not simply that the winner of the nationwide popular vote lost the electoral college count. The election highlighted vulnerabilities in the electoral college process at almost every turn. Thus the Twelfth Amendment had continued the

limitation in the original constitutional provisions that electors could not cast both of their two votes for “inhabitants” of their own state. In the 2000 election this raised questions about the votes of Texas electors for the Republican ticket that was the odds-on favorite in the state, because both George Bush and Dick Cheney, the Republican nominees for president and vice president respectively, had called Texas home in the years immediately preceding their nominations.¹² Had the Texas votes for one or the other been disqualified, there would have been no decisive electoral college choice for that office, and a troublesome constitutional backup procedure for that office would have come into play. It was even possible in that event that we would have ended up with a president and vice president of different political parties.

Then there were the extraordinarily close and controversial results in the state of Florida, leading to the unparalleled heavy hand of the U.S. Supreme Court in the process. And had it not been for the attention paid to Florida, the contests for presidential electors in Texas—and in some other states as well—might well have commanded more attention and controversy. The close race in Florida was of interest, of course, because the electoral college count seemed to be extremely close, closer in fact than in any election since 1876. Finally, if anticlimactically, one of the 538 electors decided to abstain, rather than cast the vote that those who voted for her had fully expected. Each of these features of the 2000 election was suggestive of problems in the electoral college mechanism for choosing the nation’s two principal executive officers.

Despite this litany of danger signs, there was remarkably little push for electoral college reform in the wake of the 2000 election. This neglect was probably a product of various forces. Perhaps most important in turning the nation’s gaze away from the electoral college was the terrorist attacks on the United States in September of 2001. These diverted attention from the way in which the commander-in-chief is chosen to what he does in the office once there.

But there were also other electoral problems that made demands on a limited store of attention. Some of those problems have simply been more visible than the electoral college, and others more readily susceptible to reform. In the realm of visibility, scholarly attention has been lavished on the unprecedented involvement of the courts—and particularly the U.S. Supreme Court—in the selection of the president. In the past, state courts have occasionally played important roles in reviewing claims of election fraud or miscounting of votes,

even in federal elections.¹³ On rare occasions, federal courts have even invoked federal constitutional law in reviewing claimed instances of egregious electoral unfairness.¹⁴ But in the 2000 presidential election the Supreme Court found that the fact that different standards applied in different localities of a state in the official recounting of votes violated the norm of equality of treatment embodied in the Fourteenth Amendment's Equal Protection Clause.¹⁵ There was no precedent for this focus on intrastate variation *simpliciter*, or for the involvement of the U.S. Supreme Court, in a presidential election. Moreover the Court called a halt to the recounting process, leaving the initial vote tabulation in place, despite the virtual certainty that an evenhanded recount would have produced a different vote tabulation.¹⁶ Since the initial count was so close, it is entirely possible that a full and fair recount would have produced a different outcome in Florida and hence in the nation.

This jarring action was in large part because a presidential election operates under stringent time pressures. The more typical elections for members of legislative bodies present the luxury that the operation of government can proceed even if the identities of one or a few members of the legislature remain in doubt for some significant period of time. For the American president in contrast, the pressure is great to produce a new holder of the office before the old one departs.

Whatever the justification for the Court's action, when difficulties arose in earlier presidential elections the country worked through them without the intervention of the federal courts.¹⁷ Much of the academic world in general, and the law professoriate in particular, is preoccupied by the role of the courts in American governance, and particularly with that of the U.S. Supreme Court. The result has been that the Court's involvement had a ready-made set of observers with articulate commentary as its standard *modus operandi*.¹⁸

Another concern that attracted significant attention was the disenfranchisement of ex-felons in the Florida balloting. In the original constitutional scheme, eligibility to vote in federal congressional elections was left to state law.¹⁹ This state discretion is now very substantially hemmed in by constitutional amendments (amplified by some court decisions and federal statutes) that forbid discrimination in voting on various grounds.²⁰ The Constitution has little to say about qualifications to vote for presidential electors, because the states remain largely free to designate how those electors will be chosen. Despite

this possible opening for a different set of qualifications to vote in presidential elections, in recent years states have uniformly extended the right to vote for presidential electors to the same electorate that votes in other federal and state elections.²¹ And a number of states have used the residual discretion they retain over voting qualifications to exclude felons from voting.²² Some, including Florida, also exclude ex-felons from the franchise, and indeed Florida (along with Alabama) leads the nation in the disenfranchisement of black men on account of the felon and ex-felon population that is not permitted to vote.²³ This ex-felon disenfranchisement may well have changed the 2000 election outcome in Florida, and that brought the problem of felon qualification laws a large degree of media, public, and political attention. As a result, in the wake of the 2000 election a few states—not including Florida—reexamined the electoral treatment of felons and ex-felons.²⁴

Problematic aspects of the 2000 voting process itself became visible almost immediately and were probably especially important in diverting attention from the electoral college.²⁵ Surely foremost among them was that of ballot design. In part the intrastate disparities with which the Supreme Court grappled were the product of disparate ballot design.²⁶ Popular attention was especially fixated on these problems in the early phases of the Florida controversy, and this easily blended into problems of local discretion in deciphering votes on those ballots of imperfect design. After the selection of George Bush as president was an accomplished fact in the 2000 election, the Congress passed a statute that makes funding available to states that invest in improved voting processes.²⁷ Making use of the federal funds, a number of states have now enacted significant reforms.²⁸

A final possible reason for neglect of electoral college reform in the wake of the 2000 election is the decidedly uphill battle that such reform appears to face. For obvious reasons, it was the fact of a “wrong winner” in the 2000 election that commanded most of the electoral college concern, and the alternative of a nationwide popular vote that seemed the obviously responsive reform.²⁹ In virtually all other elections in the United States, the votes for the various candidates are cumulated, and the candidate with a plurality, or perhaps a majority, of the total is declared the winner. As mentioned, many American voters may well assume that we choose the president through an integrated nationwide vote that follows this pattern. It is thus not surprising that the most vocal advo-

cates of electoral college reform after the 2000 election joined generations of reformers before them in advocating that we replace the electoral college with a nationwide popular vote for president (and vice president).³⁰

At the same time, it is regularly assumed that a constitutional amendment would be required to institute a nationwide popular vote for president. In Chapter Ten I will raise questions about that assumption, but as long as the assumption holds sway it stands as a very substantial obstacle to change. There would be groups of winners and losers in instituting a nationwide popular vote, and the calculus of just where the populations of particular states fall in that accounting is not at all clear. We will also return to that set of questions in Chapter Ten. But in part because of the uncertainty, in a large number of states political elites and ordinary citizens alike might fear loss of influence. Yet constitutional amendment requires the assent of three-fourths of the states, in addition to two-thirds of each House of Congress.³¹ Constitutional amendment, in other words, would require agreement by a large number of actors likely to worry that the move to a nationwide popular vote would disserve their interests, or those of their constituents.³² In 1970, an amendment that would have instituted a nationwide popular vote for president actually received the required two-thirds vote in the House of Representatives, but then never got a vote in the Senate because of a filibuster. Even had the Senate hurdle been overcome, however, the required three-fourths of the states would have remained as a very formidable obstacle.³³

In winning reelection in 2004 George Bush captured majorities of both the electoral college and the nationwide popular vote. Had he instead won the popular vote but lost in the electoral college, then each of the two parties would have been “burned” by a “wrong winner” in successive elections. That scenario would have been unprecedented and might conceivably have provided a favorable political climate for a move to direct popular election of the president. Without that prod to action, however, there is likely to be little traction in any move to a nationwide popular vote through a constitutional amendment.³⁴

There is, however, an alternative way to think about electoral college reform. Instead of concentrating on one big change in moving to a nationwide popular vote, we might focus instead on a series of smaller ones that might be accomplished without constitutional amendment. And there is much to be said for this alternative agenda. For if the “wrong winner” was the most visible electoral

college quirk that the 2000 election brought into focus, it was not, as we saw earlier, the only one. Nor in my view was it the most perilous. Even among those with no direct interest in the outcome, a move to a nationwide popular vote would be controversial. We will delve more fully into that controversy in Chapter Four. But unless and until a nationwide vote is put in place, there are more serious problems to be avoided by a more finely grained approach to reform that can be pursued without constitutional amendment.

That, at least, is the working premise of this book. My aim is to explore how we might avoid the worst problems presented by the electoral college processes without doing so through constitutional amendment, at least directly and in the short term. I turn in Chapters Two and Three to a short critical history of the electoral college, highlighting the important ways in which the institution has changed over the years. This will yield a picture of the present operation of the institution and lay the groundwork for discussion of possibilities for reform. We will see that many of the difficulties brought to the surface by the 2000 and 2004 elections are the product of a formal structure laid down in the Constitution that is poorly adapted to political developments since that time. In any event, we will require the perspective of where the electoral college has been to help work our way to a more congenial future for it. Chapter Four is then devoted to explanation and evaluation of the large-scale reform proposals advanced over the years. With the difficulties posed by constitutional amendment in mind, I will then turn in Chapters Five through Ten to discussion of a variety of problems, along with suggestions of how at least some of them might be addressed without resorting to amendment.

I will first concentrate on some particularly awkward and potentially quite mischievous features of the electoral college mechanism for choosing the nation's two senior executive officers. Chapter Five deals with the backup procedures for selection of the president (and vice president) if the electoral college processes prove unavailing. The backup procedures—in the House of Representatives and the Senate, for president and vice president respectively—are constitutionally required whenever no candidate commands a majority of the electoral college. That may come about for a variety of reasons, and Chapter Six concentrates on one of them, an electoral college tie between just two candidates.

Chapter Seven deals with another possibility for relegating selection to the

backup proceedings—elector discretion, which surfaces in the votes of what are called “faithless electors.” Aside from calling the House and Senate contingent procedures into play, moreover, faithless electors can bedevil the process in other ways. Apart from problems in accurately tabulating the popular vote, the contingent procedures to select the president (and vice president) and the possibility of faithless electors are the two aspects of American electoral process that are potentially most subversive of the orderly and wholesome choice of a president. Neither of these played a decisive role in the 2000 or 2004 election, but each was just below the surface, poised to cause trouble. And each can be made less potentially mischievous by early attention that need not involve the difficult process of constitutional amendment.

Chapter Eight deals with the problem of a third (and additional) political party, electoral votes for the candidates of which can also throw the electoral college process into disarray in several ways, including sending the executive-office sweepstakes into the backup procedures. The role of minor parties in American politics is, however, a large and difficult subject. Minor parties can, for instance, change the dynamics of presidential politics in decisive ways, even though they never threaten to capture any electoral votes. Arguably that is what happened in the 2000 presidential election. But there is likely no effective way to exorcise this possibility without interfering with the operation of minor parties in American politics in a wholesale way. For the present I want to steer clear of that complexity. If we focus more narrowly on the possibility that minor parties may confound the process by capturing electoral votes, there may be progress that can be achieved without undue risk of ripple effects that might bring harm. Chapter Eight explores that possibility through use of a contingent selection procedure for electors that states could implement.

With these discussions of “mid-size” problems in hand, I then comment in Chapter Nine on a miscellany of other—“smaller”—problems that may call electoral votes into question. I will offer solutions to most of these problems, but they are partial solutions at best, and in some cases may be almost as impractical as constitutional amendment. I will try to be clear-eyed about the possibilities, but it may turn out that sweeping constitutional amendment retains some allure. If that is the case, I also think that a bit of indirection may hold some promise in charting a route to constitutional change. Chapter Ten is devoted to the possibility of popular election of the president without a constitu-

tional amendment. The mechanism of pulling off that change is closely related to the suggested way of dealing with the possibility that minor political parties may capture electoral votes. As a permanent means to a popularly elected president, it leaves much to be desired, because it skirts as many problems as it confronts. But it may have a great deal to recommend it as an interim step that would give the constitutional amendment possibility more visibility and impetus on the nation's agenda.

Finally, I will try to put the lessons of the book into perspective in a concluding Chapter Eleven. Presidential elections come every four years, and any given one of them is likely to serve the major purposes of elections well, engaging large segments of the populace, identifying with decisiveness those who will hold the nation's elected executive offices for the ensuing four years, and bestowing legitimacy on those selections. But the 2000 election in particular taught us that we should be alert to possibilities that all will not go so smoothly. Close examination of the electoral college drives home a certain urgency to that lesson. Simple odds may give us the time to respond to challenges that the electoral college poses, but we would do well not to prolong for too long the period of taking chances.