

# ELECTORAL STRUCTURE MATTERS: FIXING THE CREAKS AND CRACKS IN THE CONSTITUTION BY ITS QUARTER MILLENNIUM

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## ABSTRACT

*Our nation’s constitutionally prescribed governing structure has original problems (the Electoral College) and those that have developed over time (excessively long congressional tenures and, for the presidency, biased reelection timing and unequally productive terms that are equal in length). Repairing the erosion in any one or all three of these components by the Constitution’s 250th anniversary in 2037 constitutes a workable civic engineering timeframe. This article reviews the context for constitutional change; presents the Electoral College’s primary failings; identifies three objectives for its replacement (delivering majority outcomes, providing meaningful roles to states, and broadening the structural focus for such change); and explains which term limit and term length adjustments would provide such breadth while correcting for deficiencies that have emerged in their own roles.*

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## I. INTRODUCTION

Like any old house, our nation's constitutionally prescribed governing structure has both original problems and those that have developed over the years. The former includes the Electoral College, a creak that became a crack right away, roiling presidential elections in 1800 and 1824, and then more recently in 2000 and 2016, when the Electoral College vote and the popular vote diverged. The latter creaks, such as congressional tenures becoming excessively long and presidential term lengths remaining equal while their productivity becomes decidedly unequal, are now showing signs of stress. Repairing any one or all three of these components of our election infrastructure seems inconceivable today given the apparent impossibility of amending the Constitution. But doing so may not be so daunting in seventeen years, when we will celebrate the 250th anniversary of the Constitution. Taking a civic engineering look at the structure beneath our current political turmoil suggests that such repair, even if needed now, could be more achievable then; accordingly, identifying and vetting possible solutions should start today.

This article examines the three electoral structural problems in the Constitution, leading with the Electoral College. Fixing its many problems while preserving its few benefits will require an array of non-constitutional as well as constitutional steps. While the primary goals of these steps are to make each vote for president count the same and to ensure the electoral system's overall integrity, they are designed to serve three operational objectives: deliver majority outcomes; provide meaningful roles to states; and place the need to change the Electoral College in a broader, nonpartisan, structural framework. This last objective can be achieved by embracing select changes in term limits and term lengths.

## II. INSTITUTIONAL AND POLITICAL FACTORS AFFECTING CONSTITUTIONAL CHANGE

Amending the Constitution today is at best a thought experiment, made harder by hyper-partisanship and governing dysfunction. Nonetheless, constitutional change will occupy the nation at some point, and history indicates that election reform is a likely topic,<sup>1</sup> particularly in the direction of increased democratization.<sup>2</sup>

Second, the Electoral College is but one constitutional component of our electoral structure. Others are term limits and term lengths for both elected and appointed leaders of all three branches of government. These pillars form the foundation for the house that is our government, which supports the upper floors—the institutions and processes of democracy that include voting, elections and public service.

Third, after more than 230 years, the factors supporting the erection of these pillars, such as the roles of states, have changed consequentially. Similarly, the structures themselves have developed tendrils that reach beyond their specified

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1. Of the seventeen amendments adopted after the Bill of Rights and still in effect, ten concern the conduct of elections (12, 15, 17, 19, 20, 22, 23, 24, 25, 26). *U.S. Constitutional Amendments*, FINDLAW.COM, <https://constitution.findlaw.com/amendments.html> (last visited May 20, 2020).

2. George C. Edwards III, *Why the Electoral College is Bad for America* 77 (3d ed. 2019).

function. In particular, the Electoral College has considerable impact on voter turnout for all elections, campaign strategies for many others, and the overall maintenance of our two-party system.

Fourth, given the age of these structures, their erosion should not be a surprise. We face the civic engineering equivalent to vital infrastructure questions about older bridges and utilities: Is continuing to defer maintenance an acceptable response? Is repair possible, or might replacement be required?

Fifth, with specific regard to the Electoral College, its place in history warrants clarification. It was not a grand design of the Framers, worthy of preservation, but a flawed transactional compromise born of political expediency.<sup>3</sup> Indeed, deciding how to select the president was among the more contentious topics at the Constitutional Convention, necessitating more than sixty votes over the summer of 1787.<sup>4</sup> The Electoral College was proffered to reconcile competing calls to select the president either by the people or by Congress. The Electoral College would have independent electors who would exercise their judgment as *trustees*, and even act as a nominating committee to narrow the choices from which Congress would ultimately decide.<sup>5</sup> The immediate rise of political parties broke the original design in the 1800 election, which the 12th Amendment only partially fixed. The gradual rise of democratic practice during the first half of the nineteenth century led the institution to evolve toward electors acting as *delegates* relaying the voters' wishes,<sup>6</sup> and their being chosen by citizens, albeit via plurality, winner-take-all voting.<sup>7</sup>

Finally, there is the impact of partisanship combined with the ease of defeating or resisting constitutional change. Opponents need votes from just 34 percent of either congressional body or only thirteen of fifty states to stop an amendment.<sup>8</sup> Although there is not a red, small-state firewall against changing the Electoral College (think Vermont, Delaware and Rhode Island),<sup>9</sup> there are more than enough less populous states in the heartland and the South that are more rural, conservative and, for now, decidedly Republican.<sup>10</sup>

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3. EDWARDS, *supra* note 2, at 101–15.

4. Catherine Drinker Bowen, *Miracle at Philadelphia: the Story of the Constitutional Convention, May to September 1787*, at 189 (1966).

5. Edward B. Foley, *Presidential Elections and Majority Rule: The Rise, Demise, and Potential Restoration of the Jeffersonian Electoral College 13* (Oxford University Press 2020); Edwards, *supra* note 2, at 111.

6. Robert M. Alexander, *Representation and the Electoral College* 55–59 (2019).

7. See FOLEY, *supra* note 5, at ch. 4.

8. See U.S. CONST. art. V (requiring 66 percent of both congressional bodies and 37 states to ratify an amendment to the Constitution).

9. STEVEN MULROY, *RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM* 17 (2018); Justin Fox, *The Electoral College May Not Actually Help Smaller States*, BLOOMBERG OPINION (June 12, 2019, 4:00 AM), <https://www.bloomberg.com/opinion/articles/2019-06-12/electoral-college-may-not-give-advantage-to-smaller-states>.

10. George F. Will, *Opinion, The Electoral College is Here to Stay*, WASH. POST (Aug. 28, 2019, 3:00 PM), [https://www.washingtonpost.com/opinions/the-electoral-college-is-here-to-stay/2019/08/28/c80895e0-c8dc-11e9-a1fe-ca46e8d573c0\\_story.html](https://www.washingtonpost.com/opinions/the-electoral-college-is-here-to-stay/2019/08/28/c80895e0-c8dc-11e9-a1fe-ca46e8d573c0_story.html).

However, that does not mean efforts to address the Electoral College's failings should cease; would we have asked the suffragists who convened in Seneca Falls, NY, in 1848 to quit—seventy-two years before women finally earned the right to vote? But the fact that constitutional change can take decades or even generations requires advocates for eliminating the Electoral College to frame their approach accordingly, embrace broader structural concerns and use the intervening time to inform and vet their case, as well as educate citizens and build public support.

### III. THE ELECTORAL COLLEGE'S MAIN FLAWS

The Electoral College is an easy target for change. Seven of its flaws range from the inconceivable to the insidious; the first is occasional, the second is rare and the other five occur with every election. The first failing is the inverted outcome, when the Electoral College winner does not win the popular vote. Such “misfire elections” have occurred in at least five out of forty-nine elections since 1824, when the popular vote was first adequately recorded.<sup>11</sup> An error rate of 10 percent is rather significant for the highest office in the land. True, the Founders did not consider the popular vote to be the determinative measure it has become for the presidency, but it is now widely recognized to be the measure that should matter.<sup>12</sup> Leading presidential scholar George Edwards III describes how “[t]he Electoral College violates political equality . . . . [I]t favors some citizens over others, depending solely upon the state in which voters cast their votes for president.”<sup>13</sup>

Then there is the disaster that would occur if no candidate received a majority of Electoral College votes. Fortunately, this is a rare outcome, but if Donald Trump in 2020 repeats his 2016 performance, minus two states and one congressional district—Pennsylvania, Michigan and Nebraska's 2nd, respectively—the result would be a 269-269 tie.<sup>14</sup> Or a third-party or independent candidate could earn enough Electoral College votes to keep the 270 threshold out of the reach of either major-party candidate. The House of Representatives would then decide the outcome, with each state receiving a single vote. (The only positive thing from such a result is that it might finally galvanize enough public ire to dismantle the Electoral College).

The third flaw occurs every election and is arguably the most problematic; namely, that representation through the Electoral College is fundamentally imbalanced and politically unequal due to every state receiving two electors, one for each senator, plus one for every congressional district. For example, Wyoming

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11. Some election scholars argue that there were six misfire elections, if Alabama's Democratic votes in 1960 are allocated between Kennedy and Byrd, whom the state's unpledged Democratic Electors supported. *See, e.g.*, ALEXANDER, *supra* note 6, at 111–12; EDWARDS, *supra* note 2, at 70–73.

12. *See, e.g.*, MULROY, *supra* note 9, at 35–36; EDWARDS, *supra* note 2, at 38–42; ALEXANDER, *supra* note 6, at 194; Steven J. Brams, *Change How We Elect the President?*, N.Y. TIMES (Feb. 9, 2020), <https://www.nytimes.com/2020/02/09/opinion/letters/electoral-college.html>.

13. EDWARDS, *supra* note 2, at 77.

14. Charles Lane, Opinion, *A Nightmare Scenario for 2020: A Tie that Can't be Broken. It's Conceivable.*, WASH. POST (Oct. 28, 2019), [https://www.washingtonpost.com/opinions/a-nightmare-scenario-for-2020-a-tie-that-cant-be-broken-its-conceivable/2019/10/28/38879e20-f9a6-11e9-ac8c-8eced29ca6ef\\_story.html](https://www.washingtonpost.com/opinions/a-nightmare-scenario-for-2020-a-tie-that-cant-be-broken-its-conceivable/2019/10/28/38879e20-f9a6-11e9-ac8c-8eced29ca6ef_story.html).

has one elector for every 193,000 residents, whereas California has only one for every 718,000 residents (as of 2019).<sup>15</sup> Such an imbalance may be acceptable for the state-based U.S. Senate in our federal system, but it is unfair, unequal and unrepresentative for an election to a national office. More critically, Edwards documents how its premises are faulty: states are not voting entities; they have diverse interests; and local interests are conflated with state interests and ignored at the same time.<sup>16</sup>

Fourth is the swing or battleground-state phenomenon. Presidential campaigns, because of the Electoral College's plurality winner-take-all method of voting, focus on those few states where changing or securing a small portion of the popular vote can deliver a proportionately larger share of Electoral College votes. Meanwhile, they ignore citizens in safe states—large or small, blue or red. Florida provides the marquee example of a swing state: in the four presidential elections since 2000, when Bush v. Gore was effectively a tie, two Republicans and two Democrats won, and the losers received at least 47.1% of the vote. Out of 9.4 million votes cast for president in Florida in 2016, a swing of just 56,456 votes would have changed the winner of all twenty-nine of the state's electoral votes.<sup>17</sup> In other words, a change in *four-hundredths of one percent* of the more than 135 million votes cast nationwide would have changed 5.4 percent of all Electoral College votes cast.

This swing-state imbalance is tellingly reflected in campaign behavior: Florida received seventy-one major-party ticket visits in 2016, whereas twenty-five states received zero (and the Clinton/Kaine team visited only fourteen states).<sup>18</sup> Such skewed activity poorly serves the nation's democratic and republican interests (little "d" and little "r," respectively) and small states are not advantaged at all by the Electoral College; they are simply, and continually, ignored.<sup>19</sup> Presidential campaigns lack national effort, which compromises their perceived legitimacy or even relevance.

The fifth flaw is the Electoral College's effect on voter turnout. In a reliably blue state, both marginal red and marginal blue voters have an excuse not to vote—"my vote doesn't count"—because, at the presidential level, their perception is effectively correct. In non-swing states in 2012, for example, turnout was 11% lower than in swing states.<sup>20</sup> Down-ballot races also suffer, as does the opportunity to demonstrate more consequentially the difference between Electoral College and popular vote results. Turnout is a complicated subject—here are 20 reasons citizens

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15. *QuickFacts Wyoming; California*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/WY,CA/INC110218>.

16. EDWARDS, *supra* note 2, at 117–150.

17. *November 8, 2016 General Election, Official Results*, FLA. DEP'T STATE, DIV. ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2016> (use drop-down menu for "Select Offices" and choose "Federal Offices") (last visited May 20, 2020).

18. Alexander, *supra* note 6, at 79–82.

19. *Id.*, at 73, 81.

20. MULROY, *supra* note 9, at 27.

do not vote,<sup>21</sup> and 20 things we can do about it<sup>22</sup>—but this core disincentive contributed to the United States’ embarrassing turnout ranking in a 2017 Pew Research Center study: 26th of 35 member nations in the Organization for Economic Cooperation and Development.<sup>23</sup> It is well known that Donald Trump received three-million fewer votes than Hillary Clinton’s 66 million, but the more important number is the 94-million Americans who could have voted but did not.<sup>24</sup>

Sixth, the Electoral College anchors a non-majoritarian and leaky two-party system. While the Founders worried about factionalism, they did not anticipate political parties, which emerged almost immediately.<sup>25</sup> The Electoral College incentivizes the gravitation toward two parties; without post-election coalition building or a parliamentary system, first-past-the-post, winner-take-all voting compels the pursuit of majority or near-majority participation *before* an election. The resultant duopoly—which also rose quickly—has dominated our national political history with rare exceptions (and it has proven particularly polarizing and dysfunctional in recent decades).<sup>26</sup> Our bedrock principles, however, prevent us from outright denying minor parties’ access to the electoral process (although some states make it difficult for them to attain it). While independent or third-party presidential candidates only occasionally play the spoiler, they quite frequently receive enough votes to force the victor to win by a plurality; in 19 presidential elections since 1824, *a majority of voters chose someone other than the winner*.<sup>27</sup>

The last failing, and perhaps the hardest to address, is the partisan benefit that Republicans currently derive from the Electoral College. If only Democratic presidential candidates speak out against the Electoral College and only Democratic state governments back the workaround National Popular Vote Interstate Compact (discussed later in this article), eliminating the Electoral College remains theoretical at best. While one partisan amendment campaign did prevail—the Republicans’ drive in the 1940s for the 22nd Amendment to limit presidents to two terms—the issue and circumstances then were very different than they are today. Until Franklin Roosevelt, no president had served more than two terms, a revered tradition cemented early in the republic by Thomas Jefferson. He followed Washington’s

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21. Rick LaRue, *Voting: How We Prevent Abe’s Blisters*, STRUCTURE MATTERS BLOG (Mar. 26, 2019), <https://ricklarue.com/f/voting-how-we-prevent-abes-blisters>.

22. Rick LaRue, *Voting: Turnout Matters*, STRUCTURE MATTERS BLOG (Apr. 19, 2019), <https://ricklarue.com/f/voting-turnout-matters-part-iib-of-vi>.

23. Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. FACT-TANK (May 21, 2018), <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/>.

24. Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTION PROJECT (last updated: Sept. 5, 2018), <http://www.electproject.org/2016g>.

25. See, e.g., James L. Sundquist, *Constitutional Reform and Effective Government* 88 (1992); Sanford Levinson, *An Argument Open to All: Reading the Federalist Papers in the 21st Century* 194–96 (2015).

26. See LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* (2020) for insights into the dysfunctional impact in legislative politics of having hyper-partisanship and two sharply distinct, non-overlapping parties.

27. *United States Presidential Election Results*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> (last updated Feb. 3, 2017).

unintentional model and declared: “I should unwillingly . . . furnish the first example of prolongation beyond the second term of office.”<sup>28</sup> FDR threw this tradition out the window not once, but twice. His behavior was extraordinary enough to enable the GOP to successfully present its case for term limits as an institutional rather than a partisan issue.<sup>29</sup>

This is not the case—yet—with the Electoral College, as the nation still tolerates the occasional inverted outcome it produces. But what if the inverted outcome of 2016 is soon followed by another one?<sup>30</sup> Or if an Electoral College outcome is thrown to the House? Whether we as a nation decide to prevent such distortions before or after more of them occur, we need a roadmap with a route that goes through the Constitution, not around it.

#### IV. THE NONPARTISAN ROAD AHEAD: PROVIDING ELECTORAL STABILITY, ALTERNATE STATE ROLES, AND STRUCTURAL BREATH

The Electoral College’s constitutional anchor has produced numerous ideas to fix or even bypass it. For example, Edward Foley, who directs the election law program at Ohio State University, proposes a non-amendment change requiring the winner of a state’s Electoral College votes to win a majority of the popular vote in that state.<sup>31</sup> This would incentivize changes to a state’s voting methodology (e.g., toward instant runoff voting) and produce a “compound majority-of-majorities” result.<sup>32</sup> The Election Reformers Network’s Kevin Johnson seeks to go further and supports an amendment that would have states award their Electoral College votes proportionately to the top two popular vote recipients, the primary aims of which are to eliminate misfire outcomes and mitigate swing-state problems.<sup>33</sup>

Such changes would positively address certain Electoral College defects, but they would preserve its structure and leave several of the seven problems described above in place, particularly individual votes being valued differently. Which brings us to the current work-around idea, the National Popular Vote Interstate Compact. The NPV calls for a state’s electors to cast their votes for the winner of the national popular vote, irrespective of the winner of their state’s popular vote. It would take effect when enough states joined the compact that collectively represent at least 270 Electoral College votes. At least count, 16 states have signed on, representing

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28. Michael J. Korzi, *Presidential Term Limits in American History* 45 (2011).

29. See generally *id.* at chs. 4–5.

30. A tangential but related question derives from the effect of such clustered sequencing: would the 22nd Amendment have been pursued through ratification if FDR had not sought and won a fourth term?

31. See FOLEY, *supra* note 5, at ch. 9.

32. FOLEY, *supra* note 5, at chs. 3 and 4, particularly.

33. Kevin Johnson, *Is Presidential Elector Freedom One Risk Too Many?*, ELECTION REFORMERS NETWORK (Jan. 21, 2020), <https://electionreformers.org/is-presidential-elector-freedom-one-risk-too-many/>.

196 votes.<sup>34</sup> One signatory, Colorado, faces a referendum in 2020 to repeal its having just joined the compact in 2019.<sup>35</sup>

As bad as the Electoral College may be, the NPV could be worse. Its conceptual appeal is laudable: “One person, one vote,” within the entire nation and without regard to state boundaries. However, its implementation would create numerous post-election nightmares. Some issues could be resolved, such as nonuniformity among states (e.g., who can vote and how votes are cast) or when the compact would go into effect after it is passed in enough states.<sup>36</sup> However, one lasting flaw is the presumption that a participating state’s voters would continue to support the NPV if the loser of their state’s popular votes received their state’s Electoral College votes. This potential problem, detailed next, is exacerbated by the simple fact that retaining the Electoral College structure signals to voters that their state of residency does matter, that they should consider themselves a citizen of their state as well as of their nation when they cast their ballots for president.

The NPV’s most fatal flaw is the fact that states can leave the compact any time except within six months before an election; instability is sure to result.<sup>37</sup> Consider the first election that uses the NPV. If voters in a compact state supported the candidate who lost the national popular vote in a close election, the political and electoral uncertainty would be extraordinary. Imagine the lobbying of electors that would take place before they met in December. Think of the lawsuits, as aggrieved voters would challenge the results. And think of the state’s legislative and executive leaders acting together to leave the compact, or its residents, like those in Colorado already, pursuing repeal via referendum. Such delegitimizing activity would occur and likely cause the NPV to fall below the 270-vote threshold for the next election.

But this will never happen. The NPV will not recruit enough additional states to reach the threshold. The fact that the NPV is arguably unconstitutional<sup>38</sup> is irrelevant, as is the problematic partisan bias of its supporters; only blue states have joined the compact, as they have been on the wrong side of the Electoral College’s recent inverted outcomes.<sup>39</sup> Rather, if the NPV were ever to enlist enough states to get close to the 270-vote threshold, say 253 or 261, public attention would rise dramatically and its prospective implementation would be seriously scrutinized. The above flaws would be exposed, other concerns could be identified, no new states would sign on and existing states would drop out. The NPV is destined to collapse.

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34. *Status of National Popular Vote Bill in Each State*, NAT’L POPULAR VOTE (last visited May 20, 2020), <https://www.nationalpopularvote.com/state-status>.

35. Nathaniel Rakich, *The Movement to Skip the Electoral College May Take Its First Step Back*, FIVETHIRTYEIGHT (Aug. 13, 2019), <https://fivethirtyeight.com/features/the-movement-to-skip-the-electoral-college-may-take-its-first-step-back/>.

36. Vikram David Amar, *How to—Carefully—Surmount the Electoral College*, ATLANTIC (Jan. 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/national-popular-vote/604861/>.

37. ALEXANDER, *supra* note 6, at 189; EDWARDS, *supra* note 2, at 210.

38. *See, e.g.*, Norman R. Williams, *The Danger of the National Popular Vote Compact*, HARV. L. REV. BLOG (Mar. 13, 2019), <https://blog.harvardlawreview.org/the-danger-of-the-national-popular-vote-compact/>; EDWARDS, *supra* note 2, at 210–11; MULROY, *supra* note 8, at 41–47.

39. FOLEY, *supra* note 5, at 142–43.



While campaigns to work around or simply abolish the Electoral College have theoretical appeal, such “solutions” do not work in the near, mid, *and* long term. A credible replacement option is needed, which should include steps— non-constitutional as well as constitutional—that advance the following objectives:

- A. Developing an alternative that provides stability through majority outcomes (i.e., by including runoff elections, likely of the instant variety);
- B. Creating or strengthening non-constitutional contributions that states can make toward selecting the president (i.e., by randomizing and rotating the presidential primaries); and
- C. Clarifying that the overarching issue is the erosion of institutional infrastructure, not partisanship (i.e., by incorporating more definitively nonpartisan structural issues of term limits and term lengths).

#### A. Stability through Majority Outcomes

Majority rule remains a bedrock governing ideal in the United States. James Madison, for example, called it “the fundamental principle of free government.”<sup>40</sup> But we don’t use it to choose the president; we accept plurality rule. The Electoral College helps provide stability to non-majority outcomes by magnifying the mandate of plurality-only winners.<sup>41</sup> For example, presidents who won only 43% of the popular vote, Bill Clinton in 1992 and Richard Nixon in 1968, won 65% and 53% of the Electoral College vote (370 and 301), respectively.<sup>42</sup>

If the Electoral College is removed, this legitimizing function—albeit applied only indirectly, unreliably, and sometimes misleadingly —will go away with it. Without changing voting by plurality winner-take-all, we can be assured that: a) multiple presidential candidates will continue to enter the general election; b) non-major party candidates, no longer faced with the daunting Electoral College disincentive, will more easily remain durable through Election Day; and c) predictably and negatively, we will end up with an increasing number of winners with shrinking pluralities. Much as we tolerate the occasional inverted outcome, we tolerate the occasional plurality winner, like Bill Clinton in 1992. But when such plurality-only outcomes occur more frequently, and when the proportion of the popular vote that the winners receive declines, we will have serious problems: the winners’ mandates to govern will soon disappear; their administrations’ legitimacy will be more easily questioned; and the stability of our government will be jeopardized.

One way to address this flaw is to include a runoff election if the top vote getter doesn’t receive a majority. Second rounds could be held, as is done for the chief executives in nations such as France, U.S. states such as Georgia, and cities such as Chicago. Or there could be an instant runoff, which avoids the increased cost, added time, and reduced participation that accompany second-round elections. The instant runoff method gaining traction is called ranked choice

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40. THE FEDERALIST No. 58 (James Madison).

41. ALEXANDER, *supra* note 6, at 106.

42. *Presidential Election Results*, *supra* note 27.

voting.<sup>43</sup> Voters use RCV to indicate their first, second, third, etc. choice for office. If no candidate receives a majority, the candidate with the fewest first-place votes is dropped, and his or her voters' second choice receives their votes instead. This process is repeated, automatically, until a winner receives a majority.<sup>44</sup> More cities and other localities are using or introducing this method (New York City is just the latest example<sup>45</sup>), and *The New York Times* has editorialized in favor of RCV for the 2024 presidential primaries.<sup>46</sup> If Maine is able to use RCV for the presidential election in November as planned—at this writing, the Republicans are seeking to veto this plan via an initiative that would appear on the general election ballot instead<sup>47</sup>—it would provide a useful test of this method's suitability for selecting the president, as well as indicate whether it can overcome concerns that have been raised.<sup>48</sup> Such vetting of voting methods is one way to elevate the role of states, discussed next.

#### B. States Matter – Strengthen Existing Roles and Change the Primaries

It no longer makes sense, if it ever did, for states to serve as a formal intermediary for individual voters to select the nation's president; again, federalism in our national government is ably supported in the state-based structure of the U.S. Senate. But if the states no longer have Electoral College roles, they will need other, non-constitutional involvement in presidential elections. States will continue to administer all elections, but rising demands for best practices and more uniformly applied standards suggest that national guidance—including input if not direction from the national political parties—will likely grow. Accordingly, state roles can be strengthened politically and supported financially through federal grants and the like. As importantly, as Justice Louis Brandeis wrote in 1932, any state can enhance its role as a “laboratory”<sup>49</sup> for democracy by, for example, experimenting with the means for runoff elections. Validating such ideas at the state level before rolling them out nationally is Federalism 101 and should be incentivized.

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43. Lee Drutman, *If We're Abolishing the Electoral College, Let's Also Have Ranked Choice Voting for President*, VOX (Mar. 21, 2019, 11:26 AM), <https://www.vox.com/polyarchy/2019/3/21/18275785/electoral-college-ranked-choice-voting-president-democracy>.

44. FairVote is the organization advocating for RCV. *See More About Ranked Choice Voting*, FAIRVOTE, [https://www.fairvote.org/rcv#where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used) (last visited May 20, 2020).

45. Karen Matthews, *New York City Adopts Ranked Choice Voting for Some Races*, ASSOCIATED PRESS (Nov. 5, 2019), <https://apnews.com/0c63b9522ec54e13976bece30687cc47>.

46. Editorial, *The Primaries Are Just Dumb*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/opinion/democrats-primary-south-carolina.html>.

47. Michael Shepherd, *Judge Orders Portland to Allow Maine GOP to Collect Signatures for People's Veto Push*, BANGOR DAILY NEWS (Mar. 3, 2020), <https://wgme.com/news/local/judge-orders-portland-to-allow-maine-gop-to-collect-signatures-for-peoples-veto-push>.

48. See, e.g., Craig M. Burnett & Vladimir Kogan, Ballot (and Voter) “Exhaustion” Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections, 37 ELECTORAL STUD. 41 (2015); Simon Waxman, Ranked Choice Voting Is Not the Solution, DEMOCRACY (Nov. 3, 2016), <https://democracyjournal.org/arguments/ranked-choice-voting-is-not-the-solution/>.

49. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

One non-constitutional change could have widespread beneficial impact on states: break the locks that Iowa and New Hampshire have on the front end of the presidential nominating process. Tradition is all well and good, but not at the cost of diminishing every other state in the union. Proposals to randomize and rotate primaries are not new; for example, noted political scholar Larry Sabato has called for a regional lottery plan and a full array of reform proposals can even be found on Wikipedia's "presidential primaries" page.<sup>50</sup> Such reform, involving the national political parties, state elections administrators and the public, would add excitement across the country and give all states new opportunities to have influence.

State involvement in developing national practice will be critical and can include such things as contributing to the design of the methods for managing recounts in a close election. Other ideas to empower states in a revived presidential primary process should be explored.

#### C. Structure Matters – and Should Be Nonpartisan: Changes to Term Limits and Term Lengths

The Electoral College is not the only component of our civic infrastructure showing signs of pressure or erosion. Term limits (or their lack) and term lengths also are no longer working as envisioned.

##### i. Term Limits

Term limits affect the presidency, judiciary, and Congress. Presidents are limited to two terms, as discussed above, by the 22nd Amendment ratified in 1951. There are problems with this structure—a deepening array of second-term, lame-duck weaknesses and the detrimentally high odds of reelection—but they can be addressed by changing term *lengths*, discussed below.

For the federal judiciary, there are no terms to limit because judges and justices can serve for life.<sup>51</sup> The idea of a single, long term for Supreme Court justices has been floated, with eighteen years' service being the most frequently suggested length.<sup>52</sup> Although there is some sense to fixing the appointments at every two years and thereby granting each president two appointments per term, any such limit should be opposed. If there is concern now that the Supreme Court has become too politicized, imagine what a future presidential campaign would be like if it were definitively known that the winner would not only get to make replacement picks, but also which specific justices would be replaced.

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50. LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* 131 (2007); see also *United States Presidential Primary*, WIKIPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_presidential\\_primary](https://en.wikipedia.org/wiki/United_States_presidential_primary) (last visited May 20, 2020).

51. U.S. CONST. art. III, § 1.

52. Suzanna Sherry & Christopher Sundby, *Academic Highlight: The Risks of Supreme Court Term Limits*, SCOTUSBLOG (Apr. 5, 2019, 1:29 PM), <https://www.scotusblog.com/2019/04/academic-highlight-the-risks-of-supreme-court-term-limits/>.

Congressional term limits, however, merit serious consideration as tenures have lengthened over the last half-century. Early Congresses were marked by short tenures and frequent turnover; “citizen legislators” even maintained nonpolitical employment in their home states.<sup>53</sup> Shorter life spans in the late eighteenth century would also have made it understandable why long tenures were unanticipated or considered exceptional.

How things have changed. National legislative service has become its own career: Members of the House not seeking reelection dropped from 40% of the body before the Civil War to either side of just 10% over the last fifty years; incoming senators averaged four years’ prior service at the end of the nineteenth century and now average more than ten years; and thirty-four members of Congress—more than 6% — had at least thirty years of service in 2008, versus only nine across the institution’s first 112 years.<sup>54</sup> The emergent complexity and professionalization of congressional service may justify or rationalize such tenures, but concern over the potential sclerotic or corrupting influences accompanying lengthy service has led to durable, if marginal, calls for congressional term limits.

Such voices have mostly been rhetorical or partisan, such as when Republicans were out of power in Congress for decades in the last century or wanted to “drain the swamp” more recently.<sup>55</sup> Democrats have taken this “outsider” position as well, such as former presidential candidates Tom Steyer and Beto O’Rourke, who co-chaired the Term Limits Caucus when he served in Congress.<sup>56</sup> The critical flaw with all of these appeals has been that *the proposed limits are too short*, for example, just two terms for senators. A maximum tenure of just twelve years of service raises legitimate criticism about shifting legislative power and experience to outside and special interests, among other concerns.<sup>57</sup> Contemporary consideration of term limits has been adversely colored by this short-term orientation.

But longer limits, such as at least four Senate terms and a comparable length-of-service limit in the House, could address the twelve-year limit’s shortcomings. A longer limit would provide a fixed and gracious exit for more senior members, thereby opening leadership positions for institutional veterans with as much as two

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53. William T. Egar & Amber Hope Wilhelm, Cong. Research Serv., R41545, *Congressional Careers: Service Tenure and Patterns of Member Service, 1789-2019*, at 1 (2019).

54. *Id.* at 5; Mildred Amer, Cong. Research Serv., *Members Who Have Served in the Congress 30 Years or More 1* (2008), <https://www.everycrsreport.com/reports/RL34581.html>.

55. See, e.g., Mike Lee, *Use Term Limits to Drain the Swamp*, MIKE LEE US SENATOR FOR UTAH (Jan. 6, 2017), <https://www.lee.senate.gov/public/index.cfm/issue-in-focus?ID=31F262D2-2390-4A92-8DE3-EBB2A4D39140>; Conner Drigotas, *Term Limits Will Drain the Swamp and Stop Career Politicians*, WASH. TIMES (Feb. 6, 2020), <https://www.washingtontimes.com/news/2020/feb/6/term-limits-will-drain-the-swamp-and-stop-career-p/>.

56. Philip Bump, *What Problem Is Steyer’s Term-Limit Proposal Hoping to Fix?*, WASH. POST (Jan. 13, 2020, 5:34 PM), <https://www.washingtonpost.com/politics/2020/01/13/what-problem-is-steyers-term-limit-proposal-hoping-fix/>; David Siders, *How Beto O’Rourke Would Address Term Limits for Lawmakers*, *Money in Politics*, POLITICO (June 5, 2019, 12:12 PM), <https://www.politico.com/story/2019/06/05/beto-orourke-term-limits-1353485>.

57. See, e.g., Casey Burgat, *Five Reasons to Oppose Congressional Term Limits*, BROOKINGS: FIXGOV (Jan. 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/18/five-reasons-to-oppose-congressional-term-limits/>; and Bump, *supra* note 56.

decades' experience. Such a structurally based transition would help overcome the stagnating leadership tendencies we now see in Congress. Seniority only works if leaders step aside as their careers wane. Tenure limits of twenty-four years or even longer could enable Congress to benefit from incrementally younger leadership that is more energetic and creative while still being institutionally experienced.

Anecdotal evidence also confirms that multiple decades of service are not always a good thing *and* that the issue is decidedly nonpartisan. Consider the 2018 Judiciary Committee hearings to confirm Brett Kavanaugh to the Supreme Court. Senators Grassley (R) and Leahy (D) were serving their eighth terms, and Senators Hatch (R) and Feinstein (D) were serving their sixth.<sup>58</sup> A reasonable, albeit subjective assessment of their performances was that these senators were past their prime. How far past may be a more apt question; that it even is salient suggests the likely merit of congressional term limits, but longer than previously contemplated. The exact number of terms in each chamber beyond a floor of two decades' service is debatable, but longer limits would better balance the institution's need for vitality and experienced leadership.

#### ii. Term Lengths

Changing term *lengths*, however, presents an even more compelling case. Our two-year election cycle derives from the constitutionally mandated two-year length of representatives' terms, which fits with four-year presidential and six-year Senate terms. Maintaining such synchronization for all three offices must govern the altered lengths for any one office. Elections held more than four years apart can quickly be rejected, and a four-year cycle can probably be dismissed as well. Even if four-year terms in the House are not too long to consider, although they probably are, they would either always be in sync with presidential terms or always opposite them at the mid-terms. Neither scenario is tenable; the former would diminish legislative power, which is why LBJ's proposal to do just that in his 1966 State of the Union address never advanced,<sup>59</sup> and the latter would divisively enhance it.

A three-year cycle, however, could work. In one configuration, it likely could work well. The legislative changes are straightforward. House terms would change to three years—which James Madison persuaded the Constitutional Convention to adopt initially<sup>60</sup>—and terms in the Senate would be adjusted so that half the body would turn over every three years rather than one-third of the body every two.

The key change would be to the presidency. The first term would be six years, and the second term, three years. Such change is needed because the existing structure of presidential service—two equal terms totaling eight years—has become problematic. First, re-election at four years has become too easy; nine of the last twelve presidents who sought an additional term, including four of the last

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58. See *List of Representatives and Senators*, GOVTRACK, <https://www.govtrack.us/congress/members/current> (last visited May 20, 2020).

59. Charles O. Jones, *Every Second Year: Congressional Behavior and the Two-Year Term* 5 (1967).  
60. *Id.* at 1–2.

five, earned it.<sup>61</sup> If Donald Trump is reelected, he will be the fourth in a row to do so.<sup>62</sup> This ease or likelihood of reelection has become so dominant that I call it the “four-year crutch.”

Quite reliably, voters are giving incumbents the benefit of the doubt at four years. They respond to the considerable advantages presidents derive from holding the office or see insufficient reason to change horses midstream. For myriad other reasons—the permanent campaign, partisan hype, media hype, voter fatigue, too many distractions, or government dysfunction, real or perceived—four years no longer seems to provide an adequate basis for the people to evaluate the president.

The four-year crutch’s unfairness is matched by its incongruity, because the second terms that are won yield diminished results. As Lawrence Summers observed, “All re-elected presidents expect to beat the second-term curse. None has.”<sup>63</sup> The benefits to the incumbent of the four-year crutch are temporary, which becomes clear two years later at the “six-year itch.”<sup>64</sup> Kevin Phillips coined this phrase in 1984 to describe the American practice, reaffirmed since, of reelecting a president after four years, only to repudiate him two years later during the subsequent midterms.<sup>65</sup>

Reelection with such ephemeral support weakens lame ducks further and reveals a second problem with the existing presidential structure: first and second terms are equal in length, but their value and productivity have become significantly unequal. I document this problem and detail the solution, summarized below, in my *Election Law Journal* article, “Presidential Second Terms Are Not Cursed, But the Timing of Reelection Has Become So.”<sup>66</sup>

Varying presidential term lengths—extending the first term to six years and shortening the second term to three—addresses this inequality, anchors the three-year election cycle, and provides its key governing benefit. Yes, the time saved would be tangible, with less campaigning relative to governing and to citizens’ lives. The additional twelve months between elections would not be devoid of campaign activity, but if only a conservative four months were “saved,” that would mean more than one year each decade and a decade each century—considerable amounts in the lifetime of any person or institution. But actual governing also would improve under such a schedule. A single six-year term has been proposed in Congress more than 200 times since 1826<sup>67</sup> and has earned the support of at least fifteen presidents, mostly because six years would be enough time to accomplish something, and they could avoid the distracting, policy-skewing effects of

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61. *Presidents*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/presidents> (last visited May 20, 2020).

62. *Id.*

63. Lawrence Summers, *Second-Term Presidents Cost America 40 Lost Years*, FIN. TIMES (Aug. 10, 2014), <http://www.ft.com/cms/s/2/74dacab2-1e3e-11e4-ab52-00144feabdc0.html#axzz4EGzdta9Z>.

64. Kevin Phillips, *Reelection Paradox: Landslide and Loss of Power*, CHRISTIAN SCI. MONITOR (Nov. 2, 1984), <http://www.csmonitor.com/1984/1102/110212.html>.

65. *Id.*

66. Rick LaRue, *Presidential Second Terms Are Not Cursed, But the Timing of Reelection Has Become So*, 17 ELECTION L. J. 151 (2018), <https://www.liebertpub.com/doi/10.1089/elj.2017.0476>.

67. Thomas H. Neale, Cong. Research Serv., R40864, *Presidential Terms and Tenure: Perspectives and Proposals for Change* 22 (2009).

campaigning.<sup>68</sup> But without the incentive and accountability of reelection, it remains a flawed notion.<sup>69</sup> Similarly flawed would be repealing the 22nd Amendment,<sup>70</sup> which could enable a president less benign than FDR to secure power.

Fundamentally, making the first term six years and the second term three would more accurately reflect each term's relative value and better match voter behavior. This structure would likely have numerous benefits:

- A six-year first term would be long enough to accomplish objectives, and the three-year second term would constitute a less automatic bonus;
- The president, if reelected at this more suitable six-year benchmark, would have a more genuine second-term mandate; and
- A re-elected president would be a lame duck for only one-third of his or her presidency, rather than one-half now.

Among other features would be preserving midterm elections in the first term, but eliminating them in the shorter second term; raising the maximum term of service to nine years, just one more year than the current eight-year maximum; reducing the number of elections a two-term president must deal with after assuming office from three to two; providing a structural break on the permanent campaign; and reducing the stigma against one-term presidents, of which we would have more.

The main concern would be enduring two additional years of a poorly performing incumbent (e.g., Carter). But this risk is offset because we also reelect presidents at four years who likely would not have prevailed two years later (e.g., Bush II). We do not yet know whose example Trump will follow. If he is reelected in 2020, might his opponents have preferred the stronger chance of defeating him in 2022, resulting in two *fewer* years of his service? If Trump is defeated, his presidency will likely prove to have been so anomalous that it will have little relevance to any future designs for structural change or preservation; indeed, it may help compel consideration of a wider range of election-related issues, particularly the nomination process.

Accordingly, the case against the Electoral College need not stand alone; a broader, non-partisan treatment of constitutional structure that also includes term lengths and term limits would be stronger and merits consideration.

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68. Bruce Buchanan, *The Six-Year One Term Presidency: A New Look at an Old Proposal*, 18 *PRESIDENTIAL STUD. Q.* 129, 129 (1988).

69. Arthur Schlesinger, Jr., *Against a One-Term, 6-Year President*, *N.Y. TIMES* (Jan. 10, 1986), <https://www.nytimes.com/books/00/11/26/specials/schlesinger-6year.html>.

70. See, e.g., David Karol, *Pro: Resolved, the Twenty-Second Amendment Should Be Repealed*, in *DEBATING THE PRESIDENCY 50* (Richard J. Ellis & Michael Nelson eds., 2010); Jonathan Zimmerman, *Opinion, End Presidential Term Limits*, *WASH. POST* (Nov. 28, 2013), [https://www.washingtonpost.com/opinions/end-presidential-term-limits/2013/11/28/50876456-561e-11e3-ba82-16ed03681809\\_story.html](https://www.washingtonpost.com/opinions/end-presidential-term-limits/2013/11/28/50876456-561e-11e3-ba82-16ed03681809_story.html).

## V. CONCLUSION

Amending the Constitution, always a difficult proposition, is even harder to contemplate today when the ideals beneath it are under attack and the electoral institutions and processes above it are in disarray. Election reform is a very crowded field: presidential nomination processes are dysfunctional, voting rights are threatened, campaign spending is out of control, and our principal voting method—plurality winner-take-all—is both polarizing and non-majoritarian. But the civic engineering beneath the turmoil will only worsen if left unattended; the Electoral College is corrosive, senators and representatives are serving too long, and presidents are too easily serving for eight years because of the four-year crutch.

The good news is that ours is a resilient if plodding governing structure. Public receptivity to, and ultimately demand for, structural change will rise when problems prove egregious. It may take the disappearance of the single-term presidency to become a leading indicator of growing weakness in the foundations of our democracy or an Electoral College outcome to be thrown into the House to produce change. Regardless, opponents of the Electoral College need to take the long view and articulate a nonpartisan alternative that pursues majority outcomes through runoff elections, finds different roles for the states, and reflects broader structural interests. Constitutional change *is* in our future. While it is safe to predict that we will never again experience an era like the second decade of the 20th century, when four amendments were adopted, it is decidedly wrong to think we will never again add amendments. We may mark the Constitution's quarter-millennium in 2037 before we next alter the document, but amend it we will. As its creaks become cracks and its cracks spread, doing so will become a necessity.