A Note on the Effect of Elections
Subject to Judicial Review

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Abstract

The most recent U.S. presidential election raised the questions of whether or not agents who believe that losing candidates will contest the results of close elections perceive their vote as more important and whether or not they will be more or less likely to vote. The analysis involves a two-player voting game with one of the players initially in a weaker position because he loses all ties. The key variable is the probability of the weaker player winning the post-election judicial review process. The relationship between this probability and the level of voting for the weaker player is non-monotonic. Also, if this probability is sufficiently close to one-half, contesting close elections leads to increased voting, lowering social welfare. (JEL D72)

Introduction

A common refrain in the aftermath of the last U.S. presidential election was, “If you ever doubted that your vote counts, this close election shows that it does.” However, the nation did not simply experience a close election, but one in which a candidate contested the outcome ultimately determined by the judicial system. Contrary to the above sentiment, it is not immediately obvious how agents will react if they believe they are now in an environment with a substantial probability that close elections will be contested and placed under judicial review. Given the course of events, one could argue that the above refrain is false and that an individual vote is even less important.

Consider a close election that is not subject to judicial review. Clearly, a vote can have a marginal impact since it may be the tiebreaker or pivotal vote. The probability that the vote would be tied is negligible in an election involving a large number of people. Nevertheless, given a tie, an individual vote is decisive. Consider a scenario similar to the last presidential election. If the vote is not close, it stands, but if the margin of victory is close to zero, the loser contests the results and the outcome is decided in some other arena, such as a judicial or legislative body. A tie-breaking vote is not decisive because a one-vote victory is contested. In the first case, one knows with certainty that his vote will ensure victory. However, in the second case, there is only a probability of victory and that probability is the same, whether or not one votes. One’s vote truly makes no difference and is a waste of resources not only during a landslide but also during a close election. A rational voter should be even less likely to go to the polls.

However, there are at least two counter arguments. First, legislators are themselves elected and judges are either elected or appointed by elected officials. A broader view that considers not only a single election but all elections together suggests there might be increased voting. For example, an election for county judge today could affect the outcome of an election

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for governor or president tomorrow. The president elected now will affect the makeup of
the Supreme Court, which could, in turn, affect the selection of a future president. This
argument presents a bundle of votes in a variety of elections and is not inconsistent with the
idea of a single vote in a single election becoming less important. The fact that a vote in
a particular election matters less could induce people to vote more in a variety of elections.
Another possible outcome is that agents will gravitate toward the two extremes, those who
never vote and those who vote all the time.

A second counter argument is the possibility of an election that is neither a landslide nor
close, but almost close. In this case, an individual vote could alter the outcome by giving the
losing side a fighting chance. There is still the possibility of a pivotal voter when the vote
count is on the margin of becoming contestably close. To illustrate this possibility, suppose
there is a community of 20 people voting on a proposition, where the proposition fails if
a majority votes no or the vote is tied. If the margin of victory is two votes or less, the
loser contests the election and the courts make a ruling which determines the outcome. If 11
people vote yes and 8 vote no, a voter who wants the proposition to fail would have a strong
incentive to vote. If they abstain, the proposition will pass with certainty. However, if they
vote no, the vote is contested and there is a positive probability that the proposition will fail.
The individual’s vote has a marginal impact that may lead to more voting.

Suppose agents know that the losing side will contest all future elections with a narrow
margin of victory. It is unclear what net effect this will have on voting. Depending on
the circumstances of the election, some voters may have a stronger incentive to vote while
others may have a weaker one. Some of the factors affecting the outcome would include
the proportions of the population for and against a candidate or proposition, the expected
voter turnout for each side, polling data before the election, and early exit poll results.
Incorporating these and all other relevant variables into a formal model would be challenging.

The model presented in this paper simplifies this by assuming that one player represents
each side of a proposition and voting takes place simultaneously. The outcome of the election
determines which of the two players receives a differential benefit. One of the players starts
out in a weaker position because he loses all ties. If the election cannot be contested, then his
vote has no impact when the other player votes. Since the election outcome does not affect
efficiency and voting is costly, a social planner who cares only about efficiency would prefer
less voting to more. In fact, such a social planner would prefer to avoid voting altogether
and use a coin flip. From an efficiency perspective, voting is a waste of resources because
the outcome is the same regardless of the level of voting. This view of politics as a zero-sum
game, although not without controversy, is well established and goes back to at least Riker
[1962]. In reality, agents may feel more satisfied, or less dissatisfied, with a policy or law if
they feel it is the result of a democratic process. The model below ignores this possible effect
of voting on social welfare.

The main goal of this paper is to formalize the effect of the possibility of judicial review
on voting behavior, particularly for an agent whose vote is irrelevant when the other player
votes. The analysis starts with a benchmark model of uncontestable elections and proceeds
to a model of contestable elections subject to judicial review.

A Simple Model

There are two players, Yea (Y) and Nay (N), who are on opposing sides of a proposition,
where Y benefits if the proposition passes and N benefits if it fails. The proposition passes
if Y has a majority and fails if N has a majority or there is a tie. The players move
simultaneously and choose one of two actions: vote or abstain. Voter Y is at a disadvantage