

REFORMING THE ELECTORAL COLLEGE ONE STATE AT A TIME

*Thomas W. Hiltachk** †

INTRODUCTION

The genius of our United States Constitution is the delicate balance our Founding Fathers struck between empowering a national government and preserving the inherent sovereignty of individual states. Any proposed governmental reform that would interfere with that balance should be looked upon skeptically. Recent proposals to do away with the Electoral College in favor of a national popular vote for President deserve such careful examination. But that does not mean that reform is out of reach. We have only to look to the Constitution itself to find that the answer lies in the self-interest of each state.

I am an attorney specializing in election law in California. I recently authored a proposed statewide initiative that would change California's winner-take-all system of awarding its fifty-five electoral votes to a system currently employed by the states of Maine and Nebraska. In each of these two states, the presidential candidate winning the popular vote in each of the state's congressional districts is awarded one electoral vote while the winner of the state's overall popular vote is awarded two electoral votes. Pundits and partisans immediately questioned my motivation in offering such a proposal, suggesting that I was trying to rig the election—you see, I am a Republican living in a predominantly Democratic state. The truth, however, is that I am a Californian first and foremost.

I. THE NEED FOR REFORM IN CALIFORNIA

One would think that with fifty-five electoral votes (nearly twenty percent of the total needed to win election) presidential candidates would be falling all over themselves trying to woo California voters. That is not the case. In fact, no presidential candidate has seriously campaigned in California in decades. Interestingly, California has historically been either a reliably “red” or “blue” state for extended periods of time. (It chose the Republican nominee from 1968–1988 and the Democratic nominee from 1992–2004, though concededly the Republican nominees were favorite sons Nixon and Reagan and near-favorite son Ford.) Yet our state is also extremely diverse—ethnically,

* Managing Partner, Bell, McAndrews & Hiltachk LLP; has served as legal counsel to California Governor Arnold Schwarzenegger and the California Republican Party.

† Suggested citation: Thomas W. Hiltachk, Commentary, *Reforming the Electoral College One State at a Time*, 106 MICH. L. REV. FIRST IMPRESSIONS 90 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/hiltachk.pdf>.

geographically, and politically. We have had a Democratic-controlled legislature for decades, and yet three of our last four governors have been Republicans. Populations on our coastline are generally liberal, while the state's great central valley and desert regions are mostly conservative. Yet both political parties recently have been losing ground in voter registration to those choosing to "decline to state" any party affiliation.

Moreover, California is simply too large in population and geography to compare to any other state. With fifty-five electoral votes, California has twenty-one more than its nearest rival, Texas. Indeed, this twenty-one electoral vote difference is equivalent to the electoral vote *total* of other "big" states such as Illinois and Pennsylvania. California's individual congressional districts have about 640,000 residents, more than reside in each of three different states and the District of Columbia (each with three electoral votes). Meanwhile, California has six congressional districts covering a geographic area in excess of 10,000 square miles, bigger than nine states and the District of Columbia.

In the last presidential election, President Bush received over 5.5 million votes in California, but no electoral votes, since his opponent John Kerry received a majority of the statewide votes that year. Similarly, Democrat nominee Bill Clinton received all of California's electoral votes in 1992 even though he won only a plurality of the popular vote in California (and in the nation). It is no wonder that voter turnout in California has declined steadily in successive presidential elections.

There are consequences to candidates taking California for granted, no matter who wins the White House. For example, according to the nonpartisan California Institute for Federal Policy Research, for over two decades Californians annually have sent billions more in federal taxes to Washington than they received back in federal grants, payments, and other program services. In 2003, California's federal tax payment deficit was a staggering \$50 billion, nearly \$1,400 for every man, woman, and child in California. In sum, California receives a return of only about seventy-nine cents on every dollar it sends to Washington.

I have watched with amusement as our legislature has continuously moved the date of our presidential primary in an attempt to chase the candidates—first from June in a presidential election year to late March, then to early March, and now to early February—all to no avail. In fact, both political parties in California have now changed the manner in which they award convention delegates in the primary from a winner-take-all system to an allocation based on congressional districts. Indeed, the Democratic Party has had this district-based system since the 1970s.

There is no doubt that our winner-take-all system does not inure to the benefit of all Californians. Large segments of our society and large parts of our state are simply irrelevant to the presidential campaigns—that is, the votes of these citizens do not count. If one accepts this premise, then the question becomes what California can do to better reflect its voters and to become relevant in presidential politics.

II. WINNER-TAKE-ALL

I have no particular quarrel with a system of awarding all of a state's electoral votes to the winner of the state's popular vote if that method best serves the interests of that state. Indeed, I firmly believe that each state should be free to choose any reasonable manner of awarding its electoral votes. Our national democracy is benefited by empowering its fifty state "laboratories of democracy." Winner-take-all is a valid method that serves the interests of many states, particularly smaller states or those where the voting population is more homogeneous. But such a system is no longer appropriate for California.

III. REFORM PROPOSALS

Over the last few years, two reform proposals have been discussed in California. In 2006, our Democratic-controlled legislature passed a bill that would make California a signatory to an Electoral College compact (AB 2948). The compact, entered into by each state, would require each state to award its electoral votes to the winner of the national popular vote. Under the California legislation, the requirement that California award its electoral votes to the winner of the national popular vote would not become effective until states possessing at least 270 electoral votes (the majority needed to win election) have also adopted the compact. Currently, only the states of Maryland and New Jersey have entered into the compact. Governor Schwarzenegger, a Republican, vetoed the California bill.

The other reform proposal is the one that I authored as an initiative last summer. The idea of awarding electoral votes by congressional district in California is not new. Legislation had been introduced more than once in the past, but it received little attention. Since the past bills were always proposed by a Republican, they quickly died in the legislature. My proposal, in contrast, takes the issue directly to the voters via the state's initiative process.

A. *The Electoral Compact*

The electoral compact is nothing more than an end run around amending the United States Constitution. Supporters of the compact simply prefer a national popular vote for President. Their problems are that our Constitution provides otherwise and that there is a perception (probably valid) that a constitutional amendment would not gain the necessary assent of three-fourths of the states. Indeed, it is ironic that the electoral compact proposal relies on an assertion of state's rights to enter into a compact with other states to achieve the goal of relinquishing each state's independent role in the selection of the President and Vice President as provided by our Founding Fathers.

Even supporters of a national popular vote have reason to oppose the electoral compact proposal. Setting aside the serious constitutional issues

presented by the current compact proposal, the compact would establish a dangerous precedent by allowing a small number of states to dictate the electoral outcome. If the compact is legal, why would states be limited to awarding electoral votes to the winner of the national popular vote? Could they also agree to award their electoral votes to the loser of the national popular vote? Or to the winner of the popular vote in just the compacting states? Or why not to a specific candidate preferred by the compacting states without regard to election results? For example, the eleven largest states by population could agree to award their 271 electoral votes to any candidate, thereby eliminating the overwhelming preference of voters in the other thirty-nine states. This is not reform.

The basic argument against a national popular vote also explains why a constitutional amendment proposing a national popular vote is likely to fail. The Electoral College was designed to protect the interests of the smaller states when electing a president. Indeed, it was one of the least-debated and least-controversial provisions of the Constitution. Federalist No. 68 starts by noting that “[t]he mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents.”

As Federalist No. 68 emphasizes, the Electoral College was designed specifically to ensure that a candidate for President would appeal to and have the confidence of the “whole Union, or of so considerable a portion of it” that it would make for a successful presidency. A national popular vote can not guarantee that result. The Electoral College, “be [it] not perfect, it is at least excellent.”

B. The Maine-Nebraska Model

For California, allocating electoral votes in the same manner as Maine and Nebraska would cause elections to better reflect voters’ preferences in our large and diverse state. Some have argued that our congressional districts are mostly noncompetitive (the result of gerrymandering) and that, as a consequence, the desired effect of making candidates compete for California’s votes would not occur. Clearly, some regions of our state could be reliably counted in one column or the other, but large, undecided parts—including California’s breadbasket (the Central Valley), San Diego, and the Inland Empire—would yield a prevailing candidate several electoral votes. Moreover, changing the Electoral College system might also prevent a future gerrymander in the next decade and increase the competitiveness of districts.

Opponents of this reform proposal also argue that it would not be fair unless the other large states (Texas, New York, Florida, etc.) adopted the methodology. Fair to whom? Our Constitution specifically empowers states to make their own choices in this regard. States should act in their own self-interest. Is it fair to Californians that they are all but ignored in the selection of our nation’s leader?

Lastly, opponents have suggested that changing California's system of awarding its fifty-five electoral votes will sway the election to the Republican Party nominee; they essentially argue that a Democratic Party nominee (no matter who it is) will not be able to win the presidency without a fifty-five electoral vote lock. There is no history to support this theory; in fact, if California would have awarded its electoral votes under this proposal in any of the presidential elections over the last 100 years, *not one* election result would have changed. What would have changed is that many Californians would have had a meaningful role in the presidential election and, presumably, the issues important to Californians would also have been important to the candidates seeking that office.

CONCLUSION

If our country desires to do away with the Electoral College, it should do so in the manner contemplated by our Constitution: the deliberate amendment process. The so-called electoral compact should be rejected as an end run around the Constitution. That does not mean, however, that each state should not consider and re-consider the manner in which it allocates its electoral votes in a way that best reflects the election preferences of its citizens. By doing so, reform is found within the basic structure of our Constitution as the framers intended.