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**COMMENT**

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# AN UNSAFE HARBOR: RECOUNTS, CONTESTS, AND THE ELECTORAL COLLEGE

Daniel P. Tokaji\* †

## INTRODUCTION

Although recent proposals for modifying the Electoral College process have focused mainly on how electoral votes are assigned, another problem with the current system has received less attention: the timetable for resolving post-election disputes over electors. Under 3 U.S.C. § 5, the so-called “safe harbor” provision of federal law, a state can be assured of having its chosen slate of electors recognized only if post-election disputes are resolved within thirty-five days of Election Day. As a practical matter, this provision doesn’t provide states enough time to complete recount and contest proceedings in the event of a close, contested election.

This problem surfaced in Florida’s 2000 presidential election and might well have resulted in Congress deciding the election, if not for the Supreme Court’s intervention in *Bush v. Gore*. The opinion in that case was issued on the safe harbor date, December 12, 2000. The Court’s disposition of *Bush v. Gore*, which effectively ended the recount process, was partly predicated on Florida’s intent to avail itself of the safe harbor date. Four years later, a replay of this crisis nearly occurred in Ohio. If the vote had been a bit closer and Senator Kerry had challenged the result, Ohio would have been hard pressed to complete its canvass, recount, and contest process in time.

This Commentary addresses the tension between the federally prescribed Electoral College dates and state procedures for resolving close elections. I first discuss the federal timetable for selecting electors and counting their votes. I then move to a discussion of the difficulties in fitting state post-election proceedings into the federal timetable. Finally, I propose changes to federal law designed to give states more time to resolve post-election disputes.

## I. THE FEDERAL FRAMEWORK

The Electoral College timetable is a creature of both constitutional and statutory rules. States have the power to determine the manner of appointing their electors, while Congress has the authority, under Article II, Section

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1 of the U.S. Constitution, to “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Acting on this authority, Congress enacted 3 U.S.C. § 1, setting the date for appointing presidential electors—Election Day—on the Tuesday following the first Monday in November. Under 3 U.S.C. § 7, electors are to meet and vote in their respective states forty-one days after Election Day, on the first Monday after the second Wednesday in December. Congress then meets in a joint session to count the votes on January 6, pursuant to 3 U.S.C. § 15.

Title 3 of the U.S. Code also sets forth the process to be followed in the event that there is a dispute over electoral vote counting. Section 15 provides that, if at least one senator and at least one member of the House join in a written objection to the counting of electoral votes, the two houses are to separate and to withdraw to their respective chambers for decisions.

In the event of a dispute over which electors’ votes should be counted, Congress is required to accept a final determination made under state law, if made at least six days before the date that electors meet in the states—that is, within thirty-five days of Election Day. This so-called “safe harbor,” enacted as part of the Electoral Count Act of 1887 and codified at 3 U.S.C. § 5, provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

The “safe harbor” provision would come into play in the event of a disagreement over which slate of electors should be recognized in Congress. Suppose, for example, that a state’s chief election official certified the result of an election three weeks after Election Day, but that certification was challenged in court pursuant to state law. To make the example more concrete, imagine that, in the decisive state of Ohio, Democratic Secretary of State Jennifer Brunner certifies the election for Democratic presidential candidate Hillary Clinton, ahead by a few hundred votes, with Republican candidate Rudy Giuliani arguing that thousands of votes in rural areas were mistakenly left out of the initial count. Suppose further that Giuliani’s case winds up before the all-Republican Ohio Supreme Court, which interprets state law as requiring that the outcome be reversed and the election certified in Giuliani’s favor. Assuming a final determination by the safe harbor date, Congress would (with one significant caveat, discussed below) be bound to count the Giuliani slate of electoral votes, as ordered by the Ohio Supreme Court.

If a state does not reach a final determination by the safe harbor date, Congress has considerably greater latitude in deciding which slate of electoral votes to count. To concretize this, imagine dueling slates of electors coming from a state such as Arizona, in which Governor Janet Napolitano is of one party (Democratic) and Secretary of State Jan Brewer is of another (Republican). If the Secretary of State certifies the election for her party's candidate while the Governor sends in a certification for her party's, and there is no conclusive resolution under state law by the safe harbor date, it would be up to Congress to decide which slate should be recognized. In a disputed election, party-line votes in Congress are likely. Should the two houses disagree, the "tie" is broken by the state's chief executive—a procedure that may violate the Constitution, as Professor Abner Greene observed in his book, *Understanding the 2000 Election*.

## II. STATE POST-ELECTION PROCEDURES

The federally prescribed Electoral College procedures put a premium on states resolving post-election disputes by the safe harbor date. Looking at both recent history and plausible scenarios for the 2008 election casts doubt on whether this can fairly be accomplished under the existing timetable in the event of a close and disputed election.

Key swing states would be hard-pressed to complete their post-election processes on the timetable contemplated by federal law. The most notorious example in recent history is Florida's 2000 election. On Friday, December 8, 2000—four days before the "safe harbor" date—the Florida Supreme Court issued an opinion holding that the lower court could order recounts in all counties that had not yet conducted them. The next day, December 9, the Supreme Court stayed this order and, on the safe harbor date of December 12, issued its *Bush v. Gore* opinion that effectively ended Florida's recounts. Even without the December 9 stay, it is hard to imagine that all the recounts would have been accurately completed by the safe harbor date.

One might protest that, if Gore had sought a statewide recount sooner, it would have been possible to reach a "final determination" by the safe harbor date. But Ohio's 2004 election calls into question how reasonable such an expectation is. Election Day fell on November 2, 2004, the safe harbor date on December 7, and the date for the electors meeting in the states on December 13. Section 3515.02 of the Ohio Revised Code prescribed that a recount application could be filed within five days after the Secretary of State declared the result. Furthermore, Ohio Revised Code § 3515.09 prescribed that a contest could be filed within fifteen days of the result being announced. Then-Secretary of State Ken Blackwell did not actually declare the result of the election until December 6, making it effectively impossible to reach a final determination of recount or contest proceedings by December 7. As I have explained on my blog, [Equal Vote](#), this would likely have created a crisis if Kerry had challenged the result.

Ohio is likely to be a swing state again in 2008. In preparation for this election, the Ohio state legislature adopted two amendments to state election

laws in 2006 that are germane to the federal timetable. Unfortunately, neither of these changes satisfactorily resolves the time crunch created by current federal law.

The first, § 3515.041 of the Ohio Revised Code, requires that “any recount of votes . . . for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors.” This provides only a nominal resolution of the problem, since it remains unclear how Ohio could possibly finish its canvass and recount by this time, as I previously discussed in a May 2005 comment on [Election Law @ Moritz](#).

Especially problematic is the state’s continuing reliance on a large number of provisional ballots. As detailed in a recent book that Steve Huefner, Ned Foley, and I wrote entitled *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*, 2.77% of Ohio voters cast provisional ballots in the 2004 election for a total of 158,641—a higher number than in any other state except California or New York. In the 2006 general election, an even higher percentage of Ohio voters cast provisional ballots than in 2004. One of the major steps before a final vote total can be ascertained is determining which provisional ballots should be counted, a process that would almost surely become heated in a tight election. It is difficult to see how the process of verification of ballots, let alone any judicial proceedings that might take place over the canvassing and recounting of ballots, could be completed by the safe harbor date.

The second significant change in Ohio law was to eliminate state contest proceedings in federal races, including presidential elections. Under the new § 3515.08 of the Ohio Revised Code, as amended in 2006, contests of elections to federal office are to be “conducted in accordance with the applicable provisions of federal law.”

The problem is that there are no federal laws allowing judicial contest proceedings over disputed federal elections. Nor is it clear that Congress would have the constitutional power to impose such a procedure for presidential elections, even if it so desired. Instead, federal law refers back to the “final determination” made under state law pursuant to 3 U.S.C. § 5. In other words, we have circular references—with federal law referring to state contest procedures and state law back to federal procedures. The effect of Ohio’s law thus appears to be the elimination of *any* judicial contest proceedings in any federal election taking place in that state.

Notwithstanding the Ohio legislature’s obvious *intent* to avail itself of federal law’s safe harbor, one could even argue that it has actually *failed* to provide for a “final determination of any controversy or contest” concerning its electors by this date. By eliminating contests in federal elections, the Ohio legislature has arguably deprived the state’s voters of the only procedure that could really provide a “final determination” of all controversies or contests. Accordingly, members of Congress could plausibly argue that they aren’t required to treat Ohio’s selection of electors as “conclusive,” even if all post-election proceedings are concluded by the safe harbor date.

While Ohio's elimination of contests may be anomalous, the unrealistic time pressures borne out in the above example are not unique to Ohio. Other states would also have problems resolving disputes on the timetable that federal law contemplates. Take Wisconsin, in which the margin of victory was actually much closer than in Ohio in 2004. Although Wisconsin has a relatively well-functioning election system on the whole, that state would also have trouble resolving a post-election dispute on the federal timetable, for reasons discussed at greater length in *From Registration to Recounts*. Compliance with the federal timetable isn't just a problem for Florida and Ohio, but for any state on which the outcome of the presidential election might turn.

### III. FIXING THE FEDERAL TIMETABLE

As it is doubtful that *any* state could fairly complete its procedures on this timetable, congressional attention to the timetable for resolving Electoral College disputes is badly needed. What can be done? Fortunately, it is possible to amend the calendar for resolving close presidential elections without amending the Constitution. It is also fortunate that there have been some changes since Congress enacted the Electoral Count Act that would allow compression of the back end of the process.

Under current law, the safe harbor date will fall some time between December 7 and December 13, the electors will meet some time between December 13 and December 19, and Congress will meet to count electoral votes on January 6. The length of time between these dates may have been necessary in days when communication and transportation were slow, but there is little good reason for them now. As Professor Huefner noted in a November 2004 comment on [Election Law @ Moritz](#), it is clearly desirable for disputes over the outcome of a presidential election to be settled promptly—so as to allow a smooth transition—but the necessity for public confidence in the result should trump the desire for speed.

Accordingly, as Professor Huefner suggests, Congress should amend the process to afford more time at the front end of the process for state post-election proceedings. This could be accomplished by compressing the time at the back end of the process. The minimum time that should be allowed for post-election proceedings is seven weeks: two weeks for canvassing returns, two weeks for recounts, and another three weeks for contests and related judicial proceedings. Allowing seven weeks after the election would push the safe harbor date back to late December (forty-nine days from Election Day would fall between December 21 and 27). There should, in my view, be a time cushion left between the date that Congress counts electoral votes and the date the President takes office, to allow for the resolution of disputes that might arise. For this reason, I do not propose changing the date when Congress meets to count votes.

The following table includes both the current dates and the new ones that I propose, as they would apply to the 2008 election. It also shows the source of these dates under current law.

Event—2008 Election Calendar	Current	Proposed
Election Day (3 U.S.C. § 1)—unchanged	Nov. 4	Nov. 4
Safe Harbor Date (3 U.S.C. § 5)—move from 35 days to 49 days after Election Day	Dec. 9	Dec. 23
Electors Meet in States (3 U.S.C. § 7)—move from 41 days after Election Day to Dec. 30	Dec. 15	Dec. 30
Congress Meets to Count Votes (3 U.S.C. § 15)—unchanged	Jan. 6	Jan. 6
President Takes Office (U.S. Const. amend. XX)—unchanged	Jan. 20	Jan. 20

This timetable should create sufficient time for states to complete their post-election processes, while allowing plenty of time for the events that must take place before the President takes office.

#### CONCLUSION

While some tinkering with this proposal might be appropriate, it is clear that Congress should address the timetable for resolving disputes over presidential electors. Providing more time to the states is necessary not only to promote a fair process but also to affirm the Constitution's respect for states in defining the procedure for resolving disputes over their presidential electors. Thus, a change is justified on both fairness and federalism grounds.

Cynics might argue that Congress has simply been protecting its own power to settle disputes over presidential electors that remain unresolved as of the current safe harbor date. But given that the Twentieth Amendment provides for new members of Congress to be sworn in on January 3—before the counting of electoral votes—we cannot be certain which party will control each house of Congress if such a dispute were to arise over the presidential election in 2008. Should the two houses disagree, the constitutionally dubious “tie-goes-to-the-Governor” rule would come into play, and it is anyone's guess who the Governor of the pivotal state in 2008 will be.

Accordingly, now is the perfect time for Congress to reform the Electoral College timetable. While we are all behind a “veil of ignorance” as to who will hold the various levers of power if a dispute emerges, those on both sides of the aisle have an incentive to create a more fair and orderly process, one that respects the constitutional role of the states' processes for resolving post-election disputes.

# 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,

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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.

## AWARDING PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICT: WRONG FOR CALIFORNIA, WRONG FOR THE NATION

*Sam Hirsch*\* †

The unfairness of the proposed California Presidential Election Reform Act is obvious: in a close election, the Act virtually assures that California's fifty-five electoral votes, which would be expected to go entirely to the Democratic presidential candidate under the traditional statewide-winner-take-all system, will instead be split, with more than a third of them going to the Republican candidate. Implementing this "reform" in the nation's largest Democratic state, but not in any of the large Republican states (like Texas), is roughly the equivalent of handing over to the Republicans the state of Illinois. What is less obvious is that the Act would be unfair and unwise even if it applied nationwide.

The Act embodies the "congressional-district system" for awarding electors to presidential candidates. That system gives the statewide popular-vote winner only two electors and allocates the remaining electors on a district-by-district basis, awarding each district's lone elector to whichever presidential candidate carries that particular district. This system sounds eminently fair to many casual observers, and it would likely have the benefit of encouraging presidential candidates to compete aggressively in a larger number of states. Indeed, even as sophisticated an observer of the political scene as Professor Bruce Cain of the University of California at Berkeley was recently quoted in the *San Diego Union-Tribune* as saying that, although the congressional-district system for awarding electors is "a horrible idea if it's applied only to California," the "idea itself is fine if it's applied to all states."

I believe the latter conclusion is wrong for two reasons. First, the congressional-district system not only would increase the chance that the Electoral College would generate the "wrong winner," that is, that the presidency would be awarded to the second-place finisher in popular votes, but it would do so in a way that is significantly biased to favor one political party. Second, the congressional-district system is founded on the erroneous assumption that congressional-district lines are politically "neutral" and thus

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well suited to functions other than electing members of the U.S. House of Representatives.

Contrary to popular belief, currently the Electoral College is *not* significantly biased to favor either political party. Some critics have noted that the four presidential candidates who have been denied the presidency despite winning a plurality of the popular vote nationwide—Al Gore in 2000, Grover Cleveland in 1888, Samuel Tilden in 1876, and Andrew Jackson in 1824—were all Democrats. But partisan voting patterns have changed enormously since the 19th century, rendering that point meaningless. And, even though it is true that in 2000 Gore lost the Electoral College after winning the popular tally by more than a half million votes, the 1996 and 2004 elections show that the system today is not consistently biased against Democrats. Had the nationwide popular vote been roughly tied in the 1996 and 2004 elections, Bill Clinton would have beaten Bob Dole by about twenty electors and John Kerry would have beaten George W. Bush by about thirty electors. So the same system that saved the Republican candidate in 2000 instead favored the Democratic candidates in 1996 and 2004, albeit by smaller and far less consequential amounts.

By contrast, under the nationwide application of the congressional-district system that Professor Cain and others have defended, all three Republican candidates (Dole in 1996 and Bush in 2000 and 2004) would have prevailed handily if the nationwide popular vote had been roughly tied. For example, assuming a nationwide tie vote under the congressional-district system, Bush would have won the Electoral College by about seventy-four and fifty-two electoral votes in 2000 and 2004, respectively. To see why this is so, it is useful to define partisan bias and then unpack its various components.

Partisan bias is generally defined as an electoral system's tendency to systematically favor one political party over another in translating popular votes into seats (whether in a legislature or in the Electoral College). An unbiased system treats the two major parties symmetrically. So if the two parties' presidential candidates have equal support in the national electorate, each should expect to win a roughly equal number of electors and to have a roughly equal chance to capture the presidency. Likewise, if a candidate succeeds in attracting support from well over half of the electorate, he should expect to be rewarded with more than half of the electors and thus with the presidency—regardless of the candidate's political party.

The congressional-district system would inject into the Electoral College a significant and consistent partisan slant because it combines "malapportionment bias" and "distributional bias." Under the traditional system, the presidential election effectively consists of fifty-one winner-take-all contests—one in each state, plus the District of Columbia. (For simplicity's sake, I'm ignoring the fact that two small states, Maine and Nebraska, have already adopted the congressional-district system.) Under a nationwide application of the congressional-district system, the contests would still be winner-take-all, but there would be 487 of them—fifty-one statewide contests for two electors apiece, plus 436 district-wide contests for one elector

apiece (one in each of the 435 House districts and one in the District of Columbia). For the District of Columbia or any of the seven states that currently has only one representative in Congress (and thus only three electors), it is possible to re-conceptualize the contest as a statewide race for three electors, but that would not significantly alter the analysis presented here.

Malapportionment bias is the main problem with having fifty-one statewide contests for two electors apiece. This form of partisan bias comes from apportioning the same number of seats to a lightly populated area as to a heavily populated one. The classic example of a malapportioned legislative body is the U.S. Senate, where California and Wyoming each get two Senators, even though the former now has more than fifty times as many residents (and voters) as the latter. If one major party's political strength is located disproportionately in relatively large states, and the other party's strength is located disproportionately in the smaller states, the former party will be harmed by (and the latter party will profit from) a malapportionment bias.

Empirically, such malapportionment bias would exist today under the congressional-district system. Republicans, who tend to run well in rural areas, are stronger in small states, while Democrats, who tend to run well in urban areas, are stronger in large states. This explains why Bush could carry thirty and thirty-one states in 2000 and 2004, respectively, without winning a nationwide landslide: he won most of the smaller states, while his Democratic opponents won most of the larger states. The congressional-district system would effectively award the first 102 electors to the winners of the fifty-one statewide contests, regardless of population. In an election where the nationwide popular vote is roughly tied, that system would have given the Republicans something like a sixty-two to forty lead in electoral votes—even before any of the congressional-district-based electors were awarded.

The congressional-district system would be even more heavily biased when awarding the 436 district-based electors. The problem here is not malapportionment bias, as each district has, very roughly, the same total population. Rather, the problem is distributional bias. A party's support is more efficiently distributed if there are many districts that favor the party by only relatively narrow margins. Having lots of support in districts that favor the party by landslide margins is an inefficient distribution, as such districts waste votes that otherwise might have determined the outcomes in more competitive districts.

Again, there is no doubt about the current empirical situation: by any reasonable measure, the twenty-seven or twenty-eight least competitive congressional districts today are all Democratic districts. Most of them are urban districts located in the New York, Los Angeles, and Chicago metropolitan areas. And almost all of these politically lopsided districts are heavily African-American or Latino. Because these urban, predominantly minority districts soak up huge numbers of Democratic votes and very few Republican votes, the remaining 400-plus districts tilt significantly Republican in a close presidential election.

For example, under the congressional maps currently in place, Bush would have won 238 district-based electors to Gore's 198, even though Gore won a half million more popular votes. Had Bush actually tied Gore nationwide, his advantage would have risen to about 241 to 195. When that distributional bias is added to the sixty-two-to-forty malapportionment-bias-infused edge in electors chosen statewide, the Republican advantage in the Electoral College—again, assuming a roughly tied popular vote nationwide—is a whopping 303 to 235. That is a very substantial bias, roughly akin to conceding New York and Vermont to the Republicans before the campaign even begins.

Although the precise size of the partisan bias may change significantly from election to election, the underlying reasons for the bias in the congressional-district system run deep and are unlikely to disappear as voting patterns evolve. As redrawn after every federal decennial census, congressional-district lines are “political” in both intent and effect, and therefore they can never provide a truly “neutral” basis for awarding presidential electors.

At bottom, the Electoral College is a mechanism for tying control of the presidency to the voters' preferences. By contrast, our system for electing representatives to Congress is not merely a mechanism for effectuating voters' preferences about which political party should control the U.S. House of Representatives. For a term of 730 days, each representative is supposed to exercise his or her judgment about what is in the best interests not only of the nation but also of the representative's particular congressional district. An elector's job is far narrower—to cast a single vote, on a single occasion, for a single slate of presidential and vice-presidential candidates. Today, each elector is actively discouraged, and in some states expressly forbidden, from exercising personal judgment in casting that vote.

Relatedly, representatives are expected to “represent” their constituents not only substantively, in terms of sharing similar public-policy preferences, but also descriptively, in terms of sharing similar demographic and socio-economic backgrounds. In a nation where non-Hispanic whites now constitute less than two-thirds of the population, having an all-white or nearly all-white “House of Representatives” would be worse than a misnomer; it would be an affront to our most cherished claims of democracy and equality. But while many engaged citizens know (and care about) who represents them in the House, almost no one is aware of who “represents” them in the Electoral College.

Congressional-district lines are drawn to address a variety of concerns, including ensuring fair representation of local communities and guaranteeing at least a minimally acceptable level of descriptive representation for minority citizens in the halls of our national legislature. Most of these concerns are utterly irrelevant to the Electoral College and its mission. Because congressional elections, and thus congressional-district lines, serve such a broad range of goals, they are unsuitable for choosing electors. Just to take one obvious example: viewed solely through the lens of Electoral College reform, the twenty-seven or twenty-eight most lopsided congressional districts in the nation are just a source of partisan bias, soaking up Democratic

votes and tilting the electoral playing field to favor Republican presidential candidates. But viewed through the lens of the congressional elections for which these districts were created, they are a source of great diversity in the House of Representatives—racially, ethnically, experientially, and ideologically.

As other contributors to this symposium surely will note, there are plenty of solid reasons to fault our current system of electing the President of the United States. But the current system is not so badly broken that *any* reform would be an improvement. If adopted only by the people of California, the congressional-district system for awarding presidential electors would be grossly unfair. But even if adopted uniformly in all states, the system would inject a new source of partisan bias into our political process and would be a major step backwards for our democracy.

# EQUAL VOICE BY HALF MEASURES

*John Mark Hansen*\* †

## INTRODUCTION

In democratic theory, the ballot is the most perfect expression of the democratic commitment to the moral equality of persons. Every citizen, whether old or young, rich or poor, sophisticated or simple, enjoys the same endowment in an election: a single vote. The ballot not only gives citizens their voice in government, it also makes their voices equal.

In practice, however, democracies have erected all sorts of impediments to the ideal of equal voice, such as restrictions on suffrage, legislative malapportionments, and discriminatory gerrymanders. Among the most egregious impediments, however, are surely the systems of indirect election purported to filter and to refine the voice of the people. The Electoral College is one such system. This Commentary examines the effects of that system and the proposed reforms to it on the prospect of equal voice in elections.

## I. THE ELECTORAL COLLEGE NOW

The Electoral College effectively divides the selection of the president into fifty-one separate elections in the fifty states and the District of Columbia. In every state except two, state electorates choose slates of electors pledged to support the winner of the statewide popular vote. Like all winner-take-all electoral systems, the Electoral College is exceedingly responsive: small changes in voter support magnify into large mandates in the Electoral College. Moreover, like all electoral systems divided into geographic districts, the Electoral College exhibits a representational bias, in that a candidate who falls well short of a majority of the popular vote can still win the presidency. Electoral College anomalies of this kind have occurred in four out of the fifty-five presidential elections held since 1789—and most recently in 2000.

Because the number of electoral votes for each state equals the size of its congressional delegation and the House of Representatives is apportioned roughly in proportion to population, the weighting of votes in presidential elections is not as grossly unequal as in U.S. Senate elections, where a sin-

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gle voter in the least-populous state, Wyoming, has sixty-eight times the power of a voter in the most-populous state, California. But the inequality in the value of each vote in the Electoral College is still considerable. In the five states with the largest electorates, the number of residents of voting age per electoral vote ranges from 445,500 in Pennsylvania to 486,400 in Florida. Meanwhile, in the five least-populous states, the ratio of voting age population to electoral votes ranges from 124,300 in Wyoming to 160,700 in Vermont. Thus, in the Electoral College, a vote cast in a less populated state is worth three to four times as much as a vote cast in a highly populated state. Although the Supreme Court has held that the Constitution does not allow such extreme deviations from the “one person, one vote” standard in legislative apportionment, they are perfectly tolerated in the apportionment of the Electoral College.

The Electoral College induces a second kind of inequality just as troublesome as the first: inequality of attention. The political arithmetic of the Electoral College encourages presidential campaigns to focus their efforts on states with a close partisan balance, whether large or small in population. In recent years, Florida (twenty-seven electoral votes), Ohio (twenty), New Hampshire (four), and New Mexico (five) have been the object of much solicitous attention. Meanwhile, except for fundraising visits, campaigns have slighted California (fifty-five) and Texas (thirty-four). And it has been decades since presidential nominees waged a vigorous contest for Kansas (six) or Rhode Island (four). From March to October 2004, George W. Bush and John Kerry combined to make forty-nine visits to Ohio, forty-six to Florida, forty-one to Pennsylvania, thirty-four to Wisconsin, and twenty-six to Iowa—but the candidates visited California only eight times. In the same election, voters in twenty-eight states, including California, Texas, New York, Illinois, New Jersey, and Georgia, saw fewer than 100 campaign advertisements per month over the entire course of the campaign, while voters in the swing states viewed an order of magnitude more. Judging by the two campaigns’ efforts, a majority of the 200 million citizens eligible to vote in 2004 were not seriously solicited for their votes.

The inequality of attention has two consequences for equality of voice. First, where campaigns concentrate their efforts influences who turns out to vote. Campaigns mobilize voters both as a direct strategy—through get-out-the-vote efforts—and as an indirect consequence of the excitement and commitment they generate. Indeed, the closely-fought 2004 campaign stimulated the largest increase in voter turnout in four decades, a gain of 5.8 percentage points over 2000. The increase, however, was concentrated in the battleground states. Every one of the ten states still “in play” in October—as judged by advertising buys—posted increases in voter participation that well exceeded the national average.

Second, where campaigns concentrate their efforts affects who sets the campaigns’ issue agendas. As a first-term president, George W. Bush departed from Republican free-trade principles to impose duties on imported steel and softwood timber, actions of keen interest in Pennsylvania, West Virginia, Ohio, Washington, and Oregon. As a candidate in 2004, John Kerry found it

necessary to establish his bona fides as a friend of gun owners by taking time off from the campaign trail to hunt pheasants in Iowa. The Republicans allegedly whipped up gay marriage referenda to mobilize religious conservatives in eleven states including Arkansas, Ohio, Michigan, and Oregon. To be sure, the parochial concerns of the swing states did not monopolize the two campaigns' agendas; the war in Iraq, health care, and terrorism each received thorough discussion. Still, the Electoral College pushed the special concerns of voters in a handful of highly competitive states ahead of the concerns of the vast majority of the citizens whose misfortune it was not to live in Ohio or Iowa.

In sum, the Electoral College violates the principle of equal voice that is fundamental to elections as an institution. It favors the preferences of some voters over others by as much as a factor of four, based only on the happenstance of the population of the state in which they reside. Even more dramatically, it distorts the process by which presidential candidates attend to the wishes of the voters. The Electoral College encourages—yea, demands—that candidates attach nearly exclusive importance to the preferences and involvement of voters living in closely divided states.

## II. PROPOSALS FOR ELECTORAL COLLEGE REFORM

The consideration of equal voice is essential to evaluating the different proposals for Electoral College reform. Reforms can hardly be justified apart from their effects on equality, a paramount value in a democracy. Equality is particularly important in discussing the most likely prospect for reform: awarding two “senatorial” electoral votes to the overall winner of the state as well as one electoral vote to the popular vote winner within each of the state’s congressional districts. By aligning the electoral vote more closely with the popular vote in each state, the proposal would appear to improve the prospects for equal voice. But the proposal contains less for political equality than meets the eye.

First, in a purely mechanical sense, the proposal to allocate electoral votes by congressional district does nothing to address the existing bias in favor of voters in less populated states. Every state still gets a minimum of three electoral votes, even tiny Wyoming, with a voting-eligible population about the size of Denver’s.

Worse, by making little difference in the states with the smallest populations, the proposal may in fact aggravate the bias against voters in the states with large populations. It would not alter the winner-take-all method of allocation for the eight states with a single statewide congressional district and three electoral votes. Moreover, the partisan balances in smaller states are so lopsided that only six of the thirteen states with four to six electoral votes might actually split them.

But in the states with the largest populations, the proposal would have a greater effect—probably for the negative. The reform might bring competition to areas that are not now contested at the state level, as I will discuss momentarily. But in the more populous states that are currently competitive in

presidential elections, the proposal would markedly reduce their value as a prize and diminish campaigns' willingness to invest their resources there. Were electoral votes allocated by congressional district, the one-sided partisan composition of most districts would cause Democrats and Republicans to compete for eight rather than twenty-seven electoral votes in Florida and for five rather than ten electoral votes in Wisconsin. The winner-take-all tradition of the Electoral College took hold precisely as a strategy to increase individual states' leverage in the presidential election process. Allocating electoral votes by congressional district would diminish the influence of highly populated states far more than less-populated states and in that way affect the more populous states—and equality of voice—for the worse.

On the other hand, one might assume that putting congressional districts into play would encourage presidential candidates to broaden the reach of their campaign efforts to include more people in more places, thus stimulating voter turnout and attending to more numerous and more diverse constituencies. Perhaps it would. But such an improvement in competitiveness—and in political equality—is hardly guaranteed.

Suppose, to make a back-of-the-envelope calculation, that we take as a measure of competitiveness a presidential election decided by a plurality of less than ten percent of votes cast. By this standard, twenty-one states with 264 total electoral votes were competitive in the 2004 election, and indeed, twenty-two states—mostly, but not entirely, the same ones—drew the attention of campaign advertisers at some point in the 2004 campaign.

Against this standard, what might have been the effect of a rule to award one electoral vote for each congressional district and two for each state in the 2004 election? George W. Bush and John Kerry ran within ten percentage points of each other in ninety-five of the 435 congressional districts. Sixty-three of the ninety-five competitive districts were in states that were already competitive according to the ten point standard, leaving just thirty-two districts in which campaigns might have invested resources they did not put into the state. Among the thirty-two, of course, were significant numbers of districts in states that drew absolutely no attention in the 2004 campaign, including nine (of twenty-nine) in New York, five (of nineteen) in Illinois, three (of five) in Connecticut, and three (of five) in Arizona. By this measure, the proposed reform would have increased the number of electoral votes in play by about twelve percent.

While the campaigns might step up their activities in the thirty-two newly competitive congressional districts under the proposed rule, they might equally reduce their efforts in the twenty-one states that had been competitive under the old rule. As already noted, the abolition of winner-take-all vastly diminishes the value of winning each state, from, for instance, 20 electoral votes to 2 for Ohio, or collectively, from 264 electoral votes in 21 competitive states to 42. Further, because the overwhelming majority of congressional districts are uncompetitive even in two-party competitive states, the proposed allocation also would drastically narrow the field in which campaigns need to make intense efforts to win votes. The

campaigns might take the resources formerly devoted to intense efforts to win 264 electoral votes in 21 competitive states and turn them instead to concerted efforts to win 95 competitive congressional districts with real but diminished efforts to win 42 senatorial electoral votes in the 21 competitive states. By this reckoning, the proposed reform would have reduced contestation by as much as forty-eight percent in 2004. Thus, it is by no means obvious that this step is in the right direction, either for competition or for equality.

#### CONCLUSION

This analysis suggests that the equality central to democratic theory and democratic practice cannot be achieved by half measures. If we want every vote to count equally, the only solution is to elect the president by direct popular vote. The chief executive is the only officer of the federal government who is responsible to the citizenry at large, and we cannot ensure equal responsiveness if one citizen's vote counts for three or four times as much as another's. Likewise, if we want every citizen to have an equal chance to enjoy the ministrations of at least one of the presidential candidates, the only solution is to elect the president by direct popular vote. Only a national popular vote gives campaigns the incentive to seek support in places and among demographics they will probably lose—or win decisively. Were presidents elected by the nation at large, Democratic candidates would have a reason to campaign intensively among poor Latinos in south Texas, while Republicans would be motivated to appeal nationwide to Latinos who might be attracted by the party's stand on social issues; similarly, Republicans would have a reason to mobilize white-collar commuters in Connecticut, while Democrats would be motivated to rally the prairie populists who still dot the Great Plains.

In short, citizens have equal voice only when every vote counts. And every vote counts only when candidates must seek support from all voters, no matter the partisan predispositions of their neighbors and no matter where they live.

# DEMOCRATIC PRINCIPLE AND ELECTORAL COLLEGE REFORM

*Ethan J. Leib & Eli J. Mark*\* †

## INTRODUCTION

The Electoral College is a relic from another time and is in tension with the modern constitutional command of “one person, one vote.” But the Electoral College is, nevertheless, ensconced in our Constitution—and, as a result, we would need to amend the document to alter or abolish it from our political fabric. Still, some states are toying with state-based Electoral College reforms. Thus, irrespective of whether voters in those states favor the abolition of the Electoral College through a federal constitutional amendment, they must critically examine the democratic merits of these state-based reform options. Categorically rejecting all state-based reform is unwise, owing to obvious and substantial barriers to direct federal or constitutional action.

Although states have the flexibility and authority under Article II of the Constitution to award their electoral votes in different ways, under the current system all but two states award their electoral votes in a “winner-take-all” fashion, with no votes allocated to the statewide popular vote loser. This scheme has dominated the electoral vote landscape since the rise of political parties, and it presently enables presidential candidates to focus their campaigns on a small percentage of voters from a tiny number of swing states while disregarding the needs of the rest of the nation.

## A CRITICAL ANALYSIS OF THREE STATE-BASED REFORM PROPOSALS

Recent reform proposals attempt to tap into states’ latent power to reapportion their electoral votes, with the stated hope of changing the local, state, or national dynamics of presidential elections and moving closer to the aspiration of “one person, one vote.” Although there are numerous methods a state could use to apportion its electoral votes, here we have space only to discuss very briefly three options.

The proposal that has gained the most notoriety—after a push in the fall of 2007 to get it on California’s ballot—consists of distributing most of a

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state's electoral votes according to the popular vote winners at the congressional district level while reserving some electoral votes for the statewide popular vote winner. Call this proposal, which has been adopted by Nebraska and Maine, *district-based reform*. Another proposal, similar to Colorado's failed 2004 voter initiative, would award a state's electoral votes in proportion to the popular vote at the state level. Call this *PR-based reform*. Finally, a third proposal would establish an interstate compact to implement a different kind of "winner-take-all" distribution (unlike the previous two options, which are likely to lead to "splitting" a state's electoral votes). Under this proposal, if a consortium of states representing a majority of the country's total electoral votes joins the agreement, the signatory states would assign all of their electoral votes to the *national* popular vote winner, irrespective of how the voters in the states expressed their electoral preferences. How should committed democrats (small 'd') think about these options?

Minority voters in large non-swing states—say Republicans today in California or New York, as well as Democrats in Texas—have the most reason to be upset with the current method of awarding electoral votes. It should therefore be no surprise that California, which holds a massive fifty-five electoral votes and which was largely neglected in the past three presidential races, attracted reform proposals in anticipation of the upcoming election. Of course, there is ample reason to be suspicious that the Republican sponsors of California's district-based reform initiative were not impartial to its strategic benefit in the 2008 election: district-based reform (as well as PR-based reform) would dilute California's electoral strength, advantaging the state's minority party by allowing it to capture votes that it simply couldn't (and wouldn't even try to) capture in the current winner-take-all environment.

Although the partisan arguments for or against state-based reform are easy to identify in any given context, there are also nonspecific appeals to "democratic principle," beyond the partisan hankering, that are much more difficult to analyze. To the extent that there is a democratic principle animating electoral vote reform, it must be this one: Our president should be elected by a direct popular vote, not by an Electoral College system.

Effectuating this principle without offending our written Constitution would be difficult to achieve through the interstate compact, which is essentially an end run around the one true and proper way to abolish the Electoral College once and for all: amending the Constitution. But the interstate compact has a more important deficiency from the perspective of democratic principle: it doesn't change the status quo at all. Both the constitutional status quo and the electoral status quo would remain unchanged for the foreseeable future. For instance, if California were to become the third state (after Maryland and New Jersey) to sign the compact, the state would not award its electoral votes any differently in the next presidential election—or many presidential elections thereafter. Indeed, getting a majority of electoral votes committed to the compact's method of distribution is only nominally less Herculean a task than getting the Constitution itself amended. More-

over, given the lack of congressional consent to the compact and the compact's potential unconstitutionality, the compact may not be enforceable by voters or other states. Consequently, California could plausibly pull out at any time if it later decided the compact were no longer in the state's best interest. From the perspective of the real world, California's action in signing the compact would be symbolic—and it would do next to nothing to bring the country any closer to meaningful Electoral College reform.

The best that can be said for the interstate compact is that, perhaps, it is consistent (or at least not inconsistent) with the democratic principle. Although a single state's ratification cannot directly bring about any alignment of electoral vote totals with national vote totals, neither would it cause a change that could threaten moving electoral vote totals *further away from* the ideal of the national popular vote. And there remains a glimmer of hope that enough states will sign on to the compact and that it will be held constitutional. But these are thin reeds upon which to hang a principled argument.

Maybe the Left (which generally embraces the compact and loudly rejects district-based reform in California) is onto something when it highlights just how much district-based reform violates the democratic principle. Indeed, it seems likely in the short term that any change in California to a district-based scheme of electoral vote allocation might increase the probability of an electoral vote winner who is also a popular vote loser. But there is no guarantee that this result will follow *over the long term*. Additionally, if one is entitled to have attenuated hope about the consequences of the compact, why shouldn't one also indulge in some hope about the potential long-term results of district-based reform?

The proponents of the district-based system argue that it will likely give presidential candidates more reason to go to California, to focus upon the state's citizens and to make them campaign promises, and, more generally, to attend to the needs of the most populous state in the Union. The naysayers on this point emphasize that this proposal is a naked power grab: because virtually all congressional districts are designed to give a single party dominance, no more effective competition will result from making the change.

But just because most districts are locked up for a particular party in congressional races doesn't mean that the same party's presidential candidate will win the district. After all, districts are gerrymandered to ensure the success of the congressional representatives, and different issues come into play when voters choose a national leader. Voters may judge a national leader on his or her vision for the country's domestic and foreign policy agendas while judging a local representative most centrally on his or her capacity to serve a local constituency and to "bring home the bacon." Indeed, the same Californians who gave all their electoral votes to a Democratic presidential candidate elected a Republican Governor. Thus, the context of an election matters even when the constituency remains constant. So do demographics, which change over time—California wasn't always a blue state, of course.

Nevertheless, we concede there may be something naïve about thinking that carefully gerrymandered districts can be unlocked from party dominance. Straight ticket voting under a district-based system could cause California to be ignored even more than it is now. In the right election, California could be transformed from a 55-electoral-vote behemoth that could swing for the right candidate into a state that only has one or two electoral votes up for grabs in a decreasing number of competitive districts. That would hardly create much incentive for a candidate to visit the state and make promises to its citizens.

Furthermore, while district-based reform might give constituents in a few competitive districts a greater voice in the presidential election, it would do little to get candidates to campaign for general state interests. Under district-based reform, specific local interests in the competitive districts might get increased attention, but the vast majority of voters in the remaining districts would be unlikely to garner any more attention from the candidates.

Still, opponents of district-based reform ignore some very plausible benefits. If California were to adopt district-based reform, Democrats might then actually try to do all they could to abandon the Electoral College in the one right and desirable way to achieve that change: through constitutional amendment. Destabilizing the purported “fairness” of the status quo may trigger real reform. Or consider that implementing district-based reform might stimulate meaningful reform of *districting* in California and result in more competitive districts; if the presidential election is suddenly at stake in district design, fair congressional districting reform might seem much more pressing. These are admirable goals—and they are ultimately consistent with the principle of “one person, one vote.”

Indeed, we think that there is some recent evidence to support the idea that district-based reform adopted by an important state like California could spur a real social movement to bring us closer to the “one person, one vote” ideal. To wit, as California got closer to adopting district-based reform, a very loud and public conversation resulted, forcing many to stare directly at the problems associated both with the Electoral College and with district design. As the threat ebbed, so did any meaningful public debate about the issues. As of this writing, the future of the proposal is uncertain. If the reform doesn’t make it to the ballot after all, an opportunity, of sorts, may be missed for true believers in the long-term triumph of the principle—even if the cost of such a reform would turn out to be a slightly-less-fair presidential election in 2008.

Even though district-based reform has some potential benefits, we think PR-based reform is much more likely to be true to the principles that the sponsors of district-based reform purport to advocate, all things considered. In contrast to the few potential electoral votes up for grabs and the local-interest pandering that would result under the district system, a PR system is more likely to put a greater number of electoral votes in play because individual votes would not be locked into a district that is subject to gerrymandering. In turn, PR-based reform could cause presidential candidates to appeal to statewide interests.

Still, PR-based reform is not without its own quite substantial problems from the standpoint of democratic principle. Given that third-party candidates could more easily capture electoral votes under a pure PR-based regime (not in itself a problem), electoral vote winners might have a tougher time getting a majority rather than a mere plurality of the electoral vote. The danger here is that the Constitution requires all elections that fail to produce electoral vote majority winners to be decided in the House of Representatives (where House delegations vote as state blocs). This type of voting could take us further away from the popular vote result that serves as the very basis for reform in the first place.

Nevertheless, although district- and PR-based reforms can both have suboptimal results when adopted one at a time by singular states, they do have the potential to encourage the representation of a larger number of voters' state or local interests. More importantly, they might stimulate a constitutional amendment to get rid of the Electoral College once and for all. Indeed, even signatories to the interstate compact could embrace district or PR-based reform in the interim, as they wait for the requisite number of states to sign on to the compact.

#### CONCLUSION

In the final analysis, we hope that we have shown that speaking in the high-minded and self-righteous discourse of democracy is somewhat inappropriate in the context of state-based Electoral College reform. One can weigh the costs and benefits of reform options; democratic principles, however, tell us only what to weigh and not what we must do at the level of state-based reform. Urging voters to reject state-based reform or merely to adopt the interstate compact only preserves the current state of affairs, which no truly democratically-principled individual should be able to advocate without feeling quite dirty. Admittedly, there is a conception of fairness that recommends against endorsing district- or PR-based reform—yet it is not a purely democratic one; rather it is one predicated on a particularized short-term vision about the upcoming 2008 election. Ultimately, the partisan nature of the discourse about electoral reform should not be surprising: we're talking about politics, after all.

Thus it is the Democrat in us speaking when we reject the current district-based reform proposal in California (if we get a chance to vote on it this November), because it is so obvious to us that we could not live with the consequences of such reform in the short term. But the democrat (small 'd') in us knows that our political preferences are not required by our democratic principles. That democrat in us thinks the decision to adopt or reject a state-based Electoral College reform proposal is guesswork when based "purely" on democratic principles, so we feel fully comfortable deferring to our partisan preferences when evaluating such proposals.

# THE GOOD, THE BAD, AND THE UGLY: THREE PROPOSALS TO INTRODUCE THE NATIONWIDE POPULAR VOTE IN U.S. PRESIDENTIAL ELECTIONS

Alexander S. Belenky\* †

## INTRODUCTION

The idea of reforming the Electoral College recurs each time a presidential election nears. Polls show that an overwhelming majority of respondents support abolishing the Electoral College in favor of direct popular election of the President. Yet, it is doubtful whether these polls really imply that such a move would be best for the country. Despite the seeming simplicity of direct popular presidential election, its introduction in the United States—a country in which the clear separation of powers between the states and the federal government has existed for more than two centuries—would have hidden drawbacks that the media and pollsters usually fail to communicate. Further, the existing Electoral College-based system of electing a President is complicated, and the simplistic media coverage of American social and political phenomena fails to educate voters about the nuances of that system. Thus, pollsters are asking people whether they favor replacing the Electoral College, a system that many respondents don't sufficiently understand, with direct popular election, a system that many respondents also don't necessarily understand.

Since the 2000 election, a dozen electoral reform proposals have been discussed both in the scientific community and in the media. Five proposals have received particular attention. I discussed two of them—one introducing a Maine-like district scheme and the other introducing a proportional scheme of awarding state electoral votes both in some states and nationwide—in my recent editorial in the *Baltimore Sun*, “District Vote Proposal Falls Short.” This Commentary explores the other three proposals, which are concerned with introducing the nationwide popular vote into presidential elections.

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Since space limitations prevent a detailed analysis of the proposals under consideration here, this Commentary offers only a kind of a snapshot of the basic ideas underlying each proposal, along with the inevitable negative consequences of adopting two of the proposals. I don't discuss how the technical problems associated with counting every vote under direct popular elections—for instance, voter registration fraud, long lines, and voting machine glitches—might compare to those under the existing election system. Whatever these problems may be, the quality of services in administering elections shouldn't be a factor in choosing a particular scheme for electing a President.

New election rules that I first proposed in *Extreme Outcomes of US Presidential Elections* and (in a particular form) in *How America Chooses Its Presidents* would encourage the country to elect a President with a mandate from both the nation and the individual states as equal members of the Union. Under these rules, the nationwide popular vote would be a decisive factor in choosing the President, while the existing Electoral College-based system would be preserved as a backup. Also under these rules, all the states would gain the attention of presidential candidates while retaining the benefits of the Electoral College.

Though I have my own preferences regarding the three proposals I discuss in this Commentary, readers should decide for themselves which proposal merits which of the three labels that the title of this Commentary borrows from Sergio Leone's famous movie.

## I. DIRECT POPULAR ELECTION OF A PRESIDENT

Implementing a direct popular election system—which has been proposed many times but always without sufficient support in Congress to initiate a constitutional amendment—would require revolutionary changes in the American political system.

First, American voters would acquire a constitutionally guaranteed right to vote for President. Currently, the participation of Americans in presidential elections—even voting for presidential electors—isn't constitutionally guaranteed. Appointing electors by state popular vote is no more than a particular manner of appointing state electors. Constitutionally, state legislatures can replace this particular manner with any other manner of appointing state electors, as the Supreme Court reaffirmed in *Bush v. Gore* in 2000.

Second, introducing this election system would likely invite multi-candidate presidential elections in the United States. Three factors—a potentially favorable electorate, an appeal to targeted voters, and financial resources—are crucial for non-major party candidates to emerge, and all of these factors look favorably upon the appearance of such candidates in direct popular presidential elections.

A sizable majority of eligible voters are, in fact, up for grabs in presidential elections, particularly, for non-major party candidates. Almost forty-five percent of all eligible voters usually do not vote in presidential

elections, at least ten percent of the electorate are swing voters, and more and more registered Republicans and Democrats call themselves independent. Also, under direct popular election, the constitutionally guaranteed right to vote for President would shift the burden of voter registration to the federal government and would eliminate many currently existing obstacles to voting in presidential elections. The winner-take-all rule would not waste votes cast for the losers in state presidential contests—as it does under the existing election rules. All this would contribute to encouraging people who are currently non-voters to vote.

In 1992, Ross Perot captured almost 19% of the 55% voter turnout, i.e. more than 10% of the whole electorate (more precisely, the voting-age population), even without any special appeal to non-voters and despite the manner in which his campaign was conducted. If only half of current non-voters voted in presidential elections, they would make the group of voters potentially favorable to non-major party candidates comparable in size to the group of voters favorable to either of the major party candidates. Since the major parties do not currently seem to represent non-voters in presidential elections, there is plenty of room for non-major party candidates to appeal to both non-voters and swing voters.

Financial problems for appealing non-major party candidates also look solvable. For example, the Internet has proven effective in fundraising for presidential hopefuls who appeal to particular factions of voters and in organizing concerned voters. Also, self-financed political figures interested in running as non-major party candidates are widely perceived by Americans as independent of any particular sponsors.

If multi-candidate elections with competitive non-major party candidates become a reality, a particular scheme for conducting multi-candidate direct presidential elections in the country should be chosen. The two most-employed schemes—which are based on the simple rule “choose one candidate only”—are (a) one-round elections with a popular vote plurality winner; and (b) two-round elections with a popular majority winner and, if no candidate receives a majority of votes in the first round, a runoff between the top two recipients of votes.

In such a politically divided country as the United States, under the first scheme multi-candidate elections with several candidates appealing to large factions of voters may eventually produce an election winner with less than 30% of all votes. Would the United States accept a President who more than 70% of the electorate had not chosen? In many countries employing the second scheme, it is common for no candidate to receive a majority of votes in the first round and for the turnout for runoff elections to be much less than 50% of the eligible voters. If, say, less than 40% of all eligible voters cast ballots in a U.S. runoff, would Americans accept a President finally elected by, say, only 20% of all eligible voters?

Though there exist schemes of choosing an election winner that overcome many deficiencies of the “choose one candidate only” rule in reflecting the wishes of voters, their introduction into possible multi-candidate direct popular presidential elections in the United States (at least

currently) could be problematic. This is especially true taking into account that Americans have never had either a right or a chance to choose a President directly, even under this simple rule.

Third, many Americans may feel that the introduction of direct popular presidential election would weaken the federal system of government, because an elected President may not have a mandate from the states, even in the form currently provided by the Electoral College. Moreover, movements supporting non-major party presidential candidates at times may result in the emergence of new strong political parties, and many Americans believe that a multi-party political system would destabilize the country.

In the United States today, the majority of the population resides in the largest eleven states. As a result, candidates in direct popular presidential elections would likely campaign mainly in large, urban areas. Sparsely populated rural states would likely be ignored by major party candidates. Admittedly, many of these states are ignored by candidates even under the existing election system; but sparsely populated states may eventually have a say in the current Electoral College, especially in close elections. Currently, if no candidate receives a majority of electoral votes, the election will be thrown into the House of Representatives, where each of the fifty states casts an equal, singular vote—regardless of the size of its population—due to the one state, one vote constitutional principle. Nothing even close to this would exist for small states in any direct popular presidential elections.

As a result, each of the seventeen states with five or fewer electoral votes is unlikely to surrender what it is currently entitled to under the existing election system by supporting a constitutional amendment introducing direct popular elections. Nor would this amendment likely garner support from current medium-sized battleground states—which draw a great deal of attention in election campaigns under the Electoral College. In any direct popular election, these medium-sized states would have to compete with large, densely populated states for even less attention of the candidates than they currently enjoy.

## II. THE NATIONAL POPULAR VOTE PLAN

In the aftermath of the 2000 election, Robert Bennett, a prominent constitutional lawyer, proposed an idea designed to effectuate the constitutionally guaranteed right of state legislatures to choose presidential electors in any manner they want, making it theoretically possible to circumvent the resistance of small states to direct popular presidential elections. This idea, described in Bennett's book *Taming the Electoral College*, was later reinvented by John Koza, a prominent computer scientist, and developed into the National Popular Vote plan described in the book *Every Vote Equal*. In its current form, the National Popular Vote plan involves assembling a compact of states that together control at least 270 electoral votes. The signatory states' legislatures would agree to award state electoral votes to the winner of the nationwide popular vote plurality, no matter how each of their own states voted.

If a sufficient number of states adopt the interstate compact, the plan is likely to face a constitutional challenge. The Supreme Court may conclude that while each state legislature is free to choose a manner of appointing state electors, a group of state legislatures cannot *de facto* introduce a new system of electing a President without an amendment to the Constitution—particularly over the objection of at least one-fourth of the members of the Union.

The plan strikes at the heart of the 1787 Great Compromise, which the Founding Fathers reached to keep the states together as a nation. The words of Delaware’s Gunning Bedford, Jr., to delegates from large states at the 1787 Constitutional Convention—“I do not, gentlemen, trust you”—in discussing principles of state representation in Congress serve as a reminder about tension between the small and large states in reaching the compromise. At the Convention, large states pledged to honor (a) the Electoral College, an “intermediate, independent Congress” with numbers of electoral votes for small states disproportionate to the size of their population, and (b) the one state, one vote principle both in electing a President in the House of Representatives and in amending the Constitution.

Today, however, the fifty states and the District of Columbia (D.C.)—rather than a college of presidential electors—choose the President. This happens due to the winner-take-all rule coupled with the widely implied (though not constitutionally required) obligation of presidential electors to follow the will of the appointing power (based on the state popular vote in forty-eight states and in D.C. and on the popular vote within each congressional district in Maine and Nebraska). This appears to violate the one state, one vote principle of electing a President by states, since a state’s quota of electoral votes is based on the size of its population. Moreover, constitutionally, the states are to elect a President through the House of Representatives *only* when the Electoral College fails to do so, i.e., when no candidate receives a majority of votes from all the appointed electors. In addition, adopting the winner-take-all rule of awarding state electoral votes, currently employed by forty-eight states and by D.C., has contributed to dividing the country into two parts during election campaigns. Candidates from the two major parties feel “safe” in a majority of states while the electoral battles take place in a remaining minority of states. As happened in 1992, 1996, and 2000, a third-party candidate may affect the election outcome by influencing electoral votes in key battleground states, and in close elections the existing election rules may produce an outcome contrary to the nationwide popular will.

But all this doesn’t mean that the circumvention of a substantial number of states—signaling that the value of the Great Compromise with respect to electing a President is no longer honored by the signatory states—can be justified.

Under the compact, one can easily imagine a multi-candidate race in which a candidate would win, say, a thirty-four percent plurality of the popular vote nationwide while losing in every state and D.C. If all of the states and D.C. were signatories to the compact, all the electoral votes in

such a hypothetical race would be awarded contrary to the will of voters choosing electors (still not voting directly for President under this plan). Would the United States accept a President who wasn't the choice of sixty-six percent of those voting, nor even the choice of a single state? Also, this proposal could create the appearance of "faithless" electors in the states forming the compact. These electors may decide not to follow the nationwide popular vote if it goes against the will of the voters of their states. Finally, implementing this plan would still not provide the electorate with any constitutionally guaranteed right to vote in presidential elections, even for presidential electors.

### III. ELECTION RULES MAKING THE NATIONWIDE POPULAR VOTE A DECISIVE FACTOR IN ELECTING A PRESIDENT BUT RETAINING THE ELECTORAL COLLEGE

The new election rules I have proposed would name as President the recipient of a majority of the nationwide popular vote *and* of the popular vote majorities in at least twenty-six states (or in twenty-five states and D.C.) as long as a majority of all eligible voters cast ballots in the election. This would be true even if another candidate won the Electoral College. Only if no candidate achieved the required majorities would the winner of at least 270 electoral votes—automatically awarded by the states and D.C. in the manners chosen by their legislatures—become the next President. If no candidate won at least 270 electoral votes either, then the proposed election rules would require the House of Representatives to choose a President, as the Twelfth Amendment directs.

When more than fifty percent of all eligible voters don't vote, choosing a President by the nationwide popular vote seems illogical. In such cases, either a majority of voters don't care, or they believe that the candidates do not deserve their votes. If this were the case, as described above, the Electoral College and, if necessary, the House of Representatives, should step in as protective mechanisms—backups guaranteeing that a President is elected (or selected) as a result of the election (though, currently, the existence of such a guarantee can be questioned, as *How America Chooses Its Presidents* argues). The Founding Fathers might have seen these two election mechanisms as protecting against a failure to elect a President, even if the popular will would not be expressed or a popular consensus could not be reached.

Of course, any state may decide that a plurality of the statewide popular vote is sufficient to carry the state. Also, if the number of voters casting ballots in a state is too small to award state electoral votes based on the statewide popular vote, the state legislature should retain the right to appoint electors to the Electoral College.

These new election rules, first proposed in my books *Extreme Outcomes of US Presidential Elections* and (in a particular form) *How America Chooses Its Presidents*, are easy to understand by using three conceptions of

the U.S. Presidency. First, a candidate who wins a nationwide popular vote majority is a “President of the people.” Second, a candidate who achieves a majority in each of at least 26 states (or in 25 states and D.C.) is a “President of the states.” Third, a candidate who achieves a majority of votes from all the appointed electors is a “President of an electoral majority in the Electoral College”—a compromise candidate in the sense of the Great Compromise.

A candidate who garners two kinds of the voter majorities—both the nationwide and the statewide majorities in 26 states or in 25 states and D.C.—is both a “President of the people” and a “President of the states.” This candidate would become the next President, even if another candidate became the “President of an electoral majority in the Electoral College.” If no candidate is both a “President of the people” and a “President of the states,” then the existing rules would apply, such that the Electoral College or, if necessary, the House of Representatives would have to choose the next President.

These rules would not destroy the existing system or any of its parts. Rather, they would build on the current system by potentially offering up a candidate whom society would perceive as better than the “compromise” candidate. These rules substantially differ from the Federal System Plan of 1970, and they address federalist concerns in the strongest form, since the one state, one vote principle matters in an attempt to directly elect a President by the nation as a whole.

Certainly, only a national dialogue may detect whether a compromise candidate—a “President of an electoral majority in the Electoral College”—is perceived by Americans as a better choice for the country than a candidate who is both a President of the people and a President of the states. If this were the case, there would be no need to implement the proposed new rules, despite all the well-known deficiencies of the existing election system.

The proposed rules would encourage major party candidates to actively campaign in all states, regardless of size. These candidates are likely to compete in all large states to win a nationwide popular majority and in small states to seek to win in at least twenty-six states. Both candidates are likely to compete in medium-sized states as well, especially in the “battleground” ones, since the Electoral College might eventually decide the election outcome.

These new rules would also encourage voter turnout by affording Americans the right to vote for President while leaving state legislatures with the right to appoint electors if their state’s voter turnout is too small.

#### CONCLUSION

The circumstances surrounding the creation of the Electoral College suggest that the Founding Fathers might have believed that new generations of Americans would propose a better election system or at least a better compromise in electing a President as the country developed. Such a compromise may be found in the proposed election rules under which nobody seems to lose while all voters and states gain.

# IDEOLOGICAL ENDOWMENT: THE STAYING POWER OF THE ELECTORAL COLLEGE AND THE WEAKNESSES OF THE NATIONAL POPULAR VOTE INTERSTATE COMPACT

Daniel P. Rathbun\* †

## INTRODUCTION

The National Popular Vote (“NPV”) movement is designed to eliminate the federalist impact of the Electoral College without amending the Constitution. By fashioning an interstate compact to grant participating states’ electoral votes to the winner of the national popular vote, NPV proponents suppose they can induce states to forfeit their electoral “weights” and replace the current, federalist election process with a fully majoritarian one. But by leaving the Electoral College in place, the NPV movement is setting itself up for a double pushback: first, in the form of immediate legal resistance, and second, through states’ long-term involvement in a meaningfully intact federalist system.

This Comment argues that the NPV will fail to institutionalize a majoritarian election process and that a constitutional amendment is necessary to eliminate the Electoral College’s federalist impact. Applying sociological theory, this Comment concludes that proponents of abolishing the Electoral College by constitutional amendment should aim to “dis-embed” pro-Electoral College federalist theory by implementing a compelling majoritarian alternative. It explains why the NPV has not accomplished this task and how future efforts should proceed differently.

## I. THE NATIONAL POPULAR VOTE MOVEMENT WILL FAIL TO INSTITUTIONALIZE A MAJORITARIAN ELECTION PROCESS

The Electoral College works, in conjunction with other constitutional institutions such as the enumeration of federal powers and the bicameral Congress, to maintain the Framers’ anticipated balance between state and federal authority. Together, these institutions form a coherent federalist system. And this system poses considerable—and likely fatal—legal and

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practical barriers to the NPV's efforts to institutionalize majoritarian elections.

The most significant constitutional challenges to the NPV will likely arise under the Compact Clause, which forbids states from entering into "any Agreement or Compact with another State" without the "Consent of Congress." NPV supporters highlight that this Clause is interpreted loosely, and that current jurisprudence, as represented by *U.S. Steel v. Multistate Tax Commission* (1978), forbids only those compacts that "enhance[] state power *quoad* the National Government." Accordingly, NPV supporters presume their anticipated compact effects a horizontal shift in power among states rather than affecting the vertical relationship between federal and state power. But this argument is patently thin. There are few subjects likely to upset *U.S. Steel's* vertical balance more than the means by which states select a federal executive. The NPV compact would take effect once the combined electoral votes of the participating states could determine the election's outcome. The ability of a few states to determine election outcomes would give "the states" a unified face and an important advantage in bargaining with the federal government. As Adam Schleifer points out in his article *Interstate Agreement for Electoral Reform*, the NPV compact would also prevent the House of Representatives from acting as an Electoral College tiebreaker in the way the Twelfth Amendment anticipates. Predictable state voting prevents ties and nullifies this potential federal presence, further disrupting the vertical balance.

The NPV also faces a number of other significant constitutional obstacles. In *New York v. United States* (1992), the Supreme Court instructed that "[a] departure from the Constitution's plan for the intergovernmental allocation of authority cannot be ratified by the 'consent' of state officials" because "the Constitution divides authority between federal and state governments for the protection of *individuals*" (emphasis added). While *New York* dealt with the specific issue of anti-commandeering, the Court conveyed a broader concern for the preservation of federalism. This discredits the NPV movement's claim that the constitutional freedom of states to allocate electoral votes allows them to allocate by reference to the national majority alone. And the NPV compact's form is independently objectionable. As the Supreme Court has objected to the Line Item Veto Act and other circum-constitutional shortcuts, the Court would presumably take issue with the NPV compact, which, as *The New York Times* has pointed out, blatantly advertises itself as an "end run."

Yet even if the NPV overcomes the challenges to its constitutionality, it will fail to eliminate states' federalist participation in presidential elections. The process it envisions is not *truly* majoritarian. Though the NPV hinges its arguments upon the supposed vestigiality of the Electoral College, it leaves the Electoral College in place, depending upon its state-centric system in a fundamental way to facilitate the NPV's goals. The states' uneven electoral weights make the NPV compact easier to effectuate than a constitutional amendment. Because of these weights, as few as eleven pro-NPV states could reconfigure the country's electoral process. And highlighting this fact

is more than a formalistic endeavor. Allowing the states to institutionalize majoritarianism ignores that citizens have made a substantive choice to temper their majority interests through the reigning constitutional order. It also denies that majoritarianism is an ideology, that a state's choice to vote in line with the national majority is still a choice, and that a state's agency in this choice is irremediably federalist. Also, as Schleifer highlights, the perceived unfairness of an NPV-initiated majoritarian system could generate a pro-federalist backlash among states not party to the agreement. Since states currently tally their own votes, non-participating states could purposefully obfuscate to prevent NPV states from discerning the national tally or from effectuating the compact more generally.

The uncertain duration and enforceability of the anticipated compact raise even greater long-term concerns. The NPV's current popularity likely stems from immediate concerns about the Electoral College's fairness and a perceived anti-Democratic bias. It seems telling, for example, that the "Amar Plan," the root of the NPV legislation, was proposed by Professors Akhil Reed Amar and Vikram Amar after the 2000 election, in which Republican George W. Bush defeated Democrat and national popular vote winner Al Gore. It is likewise revealing that Maryland and New Jersey, two of the country's most Democratic states, are the only ones to have enacted the NPV, and that Michigan, a battleground state that gains money and attention from the Electoral College system, has not introduced NPV for a vote. However, as time passes, states' incentives will change. Majoritarianism may not work well for all states, and some of them will desire less egalitarian alliances. As Stanley Chang observes in *Recent Development: Updating the Electoral College: the National Popular Vote Legislation*, states' ability to legislate *out* of the NPV compact, after initially agreeing to it, would enable them to do this. As Schleifer notes, the possible unenforceability of the compact might enable dissatisfied states to withdraw from the compact sooner rather than later. But in either case, the Electoral College's continued existence is what would facilitate states' post-NPV deal making. The NPV's design as an end run around the constitutional amendment process will seal the compact's undoing.

## II. ELECTORAL COLLEGE REFORM MUST CONFRONT THE THEORY OF FEDERALISM AND PRESENT A COMPELLING MAJORITARIAN ALTERNATIVE

Aside from highlighting the fact that a constitutional amendment is a necessary prerequisite to Electoral College reform, the NPV's likely failure also conveys a broader social message. While a majority of Americans support presidential elections by popular vote, the states' continued reliance on the Electoral College indicates that our society still believes in the Electoral College to some extent—if not at an individual level, then at an institutional one. This makes sense from a sociological perspective. As sociologists Margaret Somers and Fred Block explain in their article *From Poverty to Perversity*, popular theories become "embedded" in the public's consciousness and have independent influence on political outcomes. The NPV's

failure stems from its inability to dis-embed the federalist theory supporting the Electoral College. And the lessons for other would-be reformers are clear.

According to Somers and Block, it is fundamentally difficult for new theories to dis-embed old ones. In order to successfully dis-embed the prevailing theory, a new theory must contain “the means of making itself true” and assume a very specific form. First, a new theory must demonstrate why the prevailing theory aggravates society’s problems. Second, the new theory must explain how intelligent people could have believed the prevailing theory. And finally, the new theory must present a more compelling narrative than the one provided by the prevailing theory.

Using this framework, it is easy to understand how the prevailing federalist theory became embedded and why the NPV movement has failed to dis-embed it. The Framers conceived of our current system in response to a national crisis and incorporated that system into a coherent narrative about American identity. A federalist government was created to avoid the disarray of the Articles of Confederation and the tyranny of the Crown. Moreover, as *The Federalist*, the debates surrounding the Constitutional Convention, and other vehicles of national debate made clear, the new government reflected our identity as a people.

The NPV also conceives of itself in the context of a national crisis. As the compact’s proponents point out, the Electoral College’s recently highlighted potential to deviate from majority opinion threatens the perceived fairness and legitimacy of our electoral framework. Yet supporters of the NPV downplay the novelty of their proposal. The compact does not suggest that people are mistaken when they believe the prevailing theory of federalism behind the Electoral College. Nor does the compact present a new narrative. Instead, by leaving the Electoral College intact and proceeding on a state-by-state basis rather than adopting a national solution through a constitutional amendment, the NPV would *inhabit* the current system. It would bootstrap upon the existing federalist narrative rather than providing a new (and more compelling) majoritarian one.

In arguing that the interstate compact is constitutional, NPV supporters imply that it is consistent with federalism for states to allocate electoral votes based on national returns. But this argument is both disingenuous and counterproductive. It is disingenuous because the NPV begins with a not-so-secret presumption that federalist elections are unfair. It is counterproductive because, as Part I demonstrates, the NPV compact would only last as long as the participating states found it expedient. The NPV might provide a temporarily compelling version of the existing federalist narrative, but it cannot take root without reconceptualizing our electoral narrative along majoritarian lines. The states may reject the NPV model at any time, and the NPV never clearly says that they should refrain from doing so.

Despite the NPV’s inadequacies, however, there is reason to think that a properly constituted majoritarian narrative could meet Somers and Block’s criteria and dis-embed the prevailing federalist theory. Unlike the NPV, an amendment-oriented initiative would send a clear signal that fundamental

change is sought; it would also emphasize that majoritarian elections are not only “fair” and “who we are” but also “who we are *now*.” This is the appropriate tenor for reform, and there are plenty of notes to fill in the score.

When the Framers designed our current system, the states played a salient role in citizens’ lives. But that role has since diminished in relevant ways. The widespread use of elector pledges and winner-take-all voting indicates that citizens are now suspicious of state discretion in the context of presidential elections. Advancements in transportation and communications technology, meanwhile, signal that personal allegiances are increasingly based upon interstate ideological ties. This diminishing state affiliation suggests that the Electoral College works to promote arbitrary battlegrounds rather than to protect identity or to combat faction. Since the framing, states have also lost a great deal of power *vis-à-vis* the federal government. The Fourteenth and Seventeenth Amendments reflect contemporary understandings that states are potentially as tyrannical as the federal government and that majoritarianism is preferable to federalism in some electoral contexts. The trend toward majoritarianism is even more pronounced in areas pertaining to the scope and execution of federal law; the President’s increased involvement in administrative decision making and the expansion of Commerce Clause jurisprudence, for example, reflect the perceived impracticality of interest group representation and decentralized decision making in our increasingly complex society.

Placed in context, these developments toward greater federal power and majoritarianism fill in Somers and Block’s criteria. Federalism made sense at the time of the framing and still makes sense in deliberative (mostly legislative) contexts today. Yet, for ideological and practical reasons, our nation has since veered toward majoritarianism in areas under Executive purview—the areas with which Electoral College reform is most concerned. As time goes on, the prevailing federalist theory will aggravate society’s problems by increasing the probability of recounts and contentious electoral-popular splits, preventing candidates from focusing on national issues, and decreasing the legitimacy of government. And this is a message that individuals and institutions should both be able to understand.

#### CONCLUSION

As a creative, unorthodox attempt at Electoral College reform, the NPV deserves the attention it has garnered. But, as this Comment demonstrates, the NPV fails on both legal and sociological grounds. From a legal perspective, the NPV overlooks significant constitutional and practical-institutional obstacles. From a sociological perspective, the NPV is structurally incapable of dis-embedding the federalist theory underlying the Electoral College. This Comment suggests that a properly-constituted Electoral College reform effort could succeed where the NPV falls short. Yet, as Somers and Block point out, “all ideas are not created equal.” Reform is more complex than the game-theory dilemma the NPV portrays it as, and it must be framed by a compelling story with which the public can identify. Acknowledging how

deeply embedded the current federalist system is by returning to the amendment process would be a good way to start.