



California Initiative Review (CIR)

Volume 2008 February 2008 -- Presidential Primary
Election

Article 7

2-1-2008

Report on Electoral College Reform

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Recommended Citation

Pitner, James D. and Mocsny, Connor A. (2008) "Report on Electoral College Reform," *California Initiative Review (CIR)*: Vol. 2008 , Article 7.

Available at: <https://scholarlycommons.pacific.edu/california-initiative-review/vol2008/iss1/7>

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Electoral College Reform

Electoral College Reform.

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I. Introduction

Ever since its adoption, the Electoral College has been a subject riddled with controversy. Of the thousands of proposals for Constitutional amendments introduced in Congress, nearly ten percent of them have called for reform of the College. Matthew Vita, *Electoral College Up for Debate*, Chi. Sun-Times 2 (Nov. 17, 2000) (available at 2000 WLNR 4514005). The anomalous result in the 2000 presidential election thrust a spotlight on the issue and renewed calls for reform. This paper will discuss the history of the Electoral College and the reasons for its adoption. It will then discuss the dissatisfaction with the current "winner-take-all" method of awarding electoral votes. Next, it will describe four proposals for Electoral College reform and the attendant pros and cons of each proposal. Finally, it will address the possible Constitutional concerns regarding the use of voter initiatives to achieve Electoral College reform.

II. The History of the Electoral College

The method that the United States uses to elect its president was the result of an intense round of

negotiation and compromise at the 1787 Constitutional Convention between large and small states. Student Author, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 Harv. L. Rev. 2526, 2527-2528 (2001) (hereinafter *Rethinking the Electoral College*). Direct election of the president by popular vote was initially favored by some of the larger states. Neal R. Peirce & Lawrence D. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative* 21 (rev. ed., Yale University Press 1981) (hereinafter *The People's President*). Direct election would have given the large states greater influence in the election of the President because of their larger populations. *Id.* However, the smaller states feared that the more populous states would rally around a single candidate and carry the election. *Id.* Others feared that the people of the nascent democracy were "uninformed and would be misled by a few designing men." *Id.*

A compromise was reached whereby each state would have a number of electoral votes equal to number of Representatives and Senators that the state was entitled to in Congress. U.S. Const. art. II, § 1, cl. 2. The provision that awarded electoral votes for a state's House representation appeased the larger states. *Rethinking the Electoral College*, 114 Harv. L. Rev. at 2529. The smaller states were satisfied with the provision mandating that the selection of the President would be determined by the House of Representatives when no candidate received a majority of electoral votes. *Rethinking the Electoral College*, 114 Harv. L. Rev. at 2529. Once in the House, the delegations of each state would receive one vote, a process which put the smaller states on equal footing with their more populous brethren. *Rethinking the Electoral College*, 114 Harv. L. Rev. at 2529.

The critics of direct election who feared that the uninformed citizenry was incapable of making a wise presidential selection were mollified by the use of electors. See Peirce, *The People's President* at 24-25. Under the Electoral College system, citizens do not directly vote for a presidential candidate. Instead, they vote for electors who have pledged to vote for a particular candidate. Joy McAfee, *Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 Cumb. L. Rev. 643, 648 (2002). The Constitution provides that states may appoint their electors "in such a manner as the legislature thereof may direct." U.S. Const. Art. II § 1 cl. 2. This gives states complete discretion over the manner in which they appoint electors.

The early presidential elections prove the truth of this statement. States initially adopted a wide array of methods for awarding electoral votes. Matthew Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 Vand. L. Rev. 2099, 2123 (2001). Some states chose to have the legislature appoint electors. *Id.* Others states held a general election where the electors ran on a statewide basis, with the winning elector awarded all the state's electoral votes (i.e. the "winner-take-all method). Peirce, *The People's President*, at 46. Some states created several "super districts" that each elected a certain number of electors. *Id.* A small minority divided the state into two halves, with a certain number of electoral votes allocated to each half. Festa, 54 Vand. L. Rev. at 2123. Finally, some states allowed each congressional district in the state to appoint an elector. *Id.*

The move towards widespread adoption of the "winner take all" method began in 1796 when Thomas Jefferson lost the presidential election. Festa, 54 Vand. L. Rev. at 2124. Convinced that Virginia's method of awarding electoral votes by congressional district was the main cause of his defeat, he persuaded the state legislature to change to the "winner-take-all" method for the 1800 election and won the presidency. See *id.* This demonstrated that a state that awards all of its electoral votes to one candidate can gain political clout in presidential elections and sparked the trend towards widespread adoption of the "winner-take-all" method. Peirce, *The People's President* at 46-47. States gradually switched to this method and by 1836 it had been adopted by twenty-five of the twenty six states in the Union. *Id.* at 46. Currently, all states except Nebraska and Maine employ the "winner-take-all" method. Stanley Chang, Student Author, *Updating the Electoral College: The National Popular Vote Legislation*, 44 Harv. J. on Legis. 205, 206 (2007).

III. The "Winner-Take-All" Method: The Aftermath of the 2000 Election Spurs Calls for Reform.

The 2000 presidential election pitted Republican George W. Bush against Democrat Al Gore. As Election Day neared, Mr. Bush held a slim 3 point advantage according to most polls. Janet Elder, *The 2000 Campaign: The Polls; 4 New Polls Show Bush as a Factor, and Nader as a Factor*, NY Times A25 (Nov. 2, 2000) (available at 2000 WLNR 3219257). This prompted some to predict that the winner of the Electoral College might not win the popular vote. David Stout, *The 2000 Campaign: The Electoral College; How Winner of the Popular Vote Could Lose After All*, N.Y. Times A26 (Nov. 3, 2000) (available at 2000 WLNR 2996217). As it turned out, the worst fears of Electoral College critics came to fruition. Gore won the popular vote but lost the Electoral College to Bush by 5 electoral votes. Infoplease, *The Closest Presidential Races*, <http://www.infoplease.com/spot/closerace1.html> (accessed Oct. 20, 2007). Gore's margin of victory in the popular vote was 537,179, the fourth slimmest margin in presidential election history. *Id.* Bush's 5 electoral vote victory was the third smallest in history, *id.*, and marked just the fourth time that the winner of the popular vote lost a presidential election. George Skelton, *In Voting to End Electoral College, Maryland Dares to Go Where Schwarzenegger Wouldn't*, L.A. Times 3 (Apr. 12, 2007) (available at 2007 WLNR 6955085). The result sparked much debate over the "winner-take-all" method that virtually all states use to award their electoral votes.

A. Support

Defenders of the Electoral College, and the "winner-take-all" system of awarding electoral votes, often note that it still accomplishes its original purpose, preventing the large states from determining who the President will be. Editorial, *The Case for the Electoral College*, N.Y. Times A34 (Dec. 19, 2000) (available at 2000 WLNR 3000852) (hereinafter *The Case for the Electoral College*). They point to the fact that a candidate who wins several small states can offset the loss of one of the larger states. *Id.*

For example, in the 2000 election, Al Gore won California and its electoral haul of 54 votes. Fed. Election Commn., *2000 Presidential General Election Results*, <http://www.fec.gov/pubrec/2000presgeresults.htm> (accessed on Oct. 20, 2007). While this could have been a crippling blow to George W. Bush's chances, the damage was mitigated by the fact that Bush won 13 smaller states whose electoral votes totaled 55 votes. *Id.* (the states referred to are: Alaska, Idaho, Kansas, Mississippi, Montana, Nevada, New Hampshire, North Dakota, South Dakota, Utah, West Virginia and Wyoming). The structure of the Electoral College forces candidates to spend their time and resources in these smaller states, as the election could be lost by ignoring them. *The Case for the Electoral College*, N.Y. Times at A34.

Proponents of the "winner-take-all" method also point to the destabilizing effect on our current two party system of government should an alternate system of awarding electoral votes be adopted. Editorial, *Undoing the Electoral College is Dangerous*, Press Register A9 (Apr. 3, 2007) (available at 2007 WLNR 6748327). The requirement that a presidential candidate receive a majority of electoral votes practically mandates a two party system of government. *Id.* If there are more than two national parties, the chances that a candidate will receive a majority of electoral votes diminish. *Id.* Defenders of the current system point to presidential elections in other countries, like France, where the large number of candidates ensures that no one receives a large chunk of the popular vote. *Id.* The result is an election where there is no clear cut victor and the winner enters office without the backing of a majority of the country. *Id.* The two-party system provides stability and ensures that a presidential candidate will most likely be the consensus pick of the country. *Id.*

B. Opposition

Critics of the current "winner-take-all" system take issue with disproportionate influence the smaller states possess in relation to their minimal populations. Thomas M. Durbin, *The Anachronistic Electoral College*,

39 Fed. B. News & J. 510 (1992). The smaller states are guaranteed at least three electoral votes (every state has at least one Representative in the House and all states receive two electoral votes from their Senate representation) regardless of how small their population is. The net result is that the voters in the smaller states have a greater influence over the apportionment of their electoral votes than voters in larger states. *Id.* For example, according to the most recent census estimates, North Dakota has a population of 635,867 and California has a population of 36,457,549. U.S. Census Bureau, *2006 Population Estimates*, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1&-ds_name=PEP_2006_EST&-_lang=en&-format=US-9&-_sse=on (accessed on Oct. 20, 2007). Currently, North Dakota has three electoral votes and California has fifty-five. Fed. Election Commn., *Distribution of Electoral Votes*, <http://www.fec.gov/pages/elevote.htm> (accessed on Oct. 20, 2007) (hereinafter *Distribution of Electoral Votes*). Dividing the populations by the number of electoral votes for each state reveals that North Dakota has one electoral vote for every 211,956 citizens, while California has one electoral vote for every 675,140 citizens.

However, large states also enjoy an advantage in that the most populous states control the largest blocs of electoral votes. Durbin, 39 Fed. B. News & J. at 510. To illustrate, suppose Candidate A wins Colorado, Connecticut and Arizona. This would net him nine electoral votes from Colorado, seven from Connecticut and ten from Arizona for a total of twenty-six. *Distribution of Electoral Votes, supra*. Now suppose his opponent wins Florida. This gives the opponent twenty-seven electoral votes. *Id.* Thus, the win in Florida by Candidate B gives him more electoral votes than the victories in three states by Candidate A. Thus, candidates have an incentive to focus their efforts in the states that control large blocs of electoral votes. The "winner-take-all" system also makes a few "swing states" take on oversized importance in a given election. Editorial, *Making Votes Count: Abolish the Electoral College*, N.Y. Times 410 (Aug. 29, 2004) (available at 2004 WLNR 5513716) (hereinafter *Making Votes Count*). It makes little sense for a candidate to spend time and resources in a state where he has no chance of winning the popular vote. It is a much more efficient use of the candidate's resources to focus his efforts in states where the outcome is in doubt. The net result is that the needs and concerns of voters in the "swing states" take on added importance in an election year at the expense of the needs and concerns of voters in states where one candidate is assured of victory. See James Dao, *Swing-State Distortions; A Presidential Campaign Tinged with Rust*, N.Y. Times 43 (Sept. 5, 2004) (available at 2004 WLNR 5584192) (noting that the interests of states like California don't get as much discussion).

For example, in the 2004 election George W. Bush and John Kerry each took a position on how to store hazardous waste in Nevada, a state with 2.2 million people, *Making Votes Count*, N.Y. Times at 410, and just 5 electoral votes. *Distribution of Electoral Votes, supra*. Meanwhile, the candidates virtually ignored issues important to the voters of New York, with its 19.2 million people, see *Making Votes Count*, N.Y. Times at 410, and 31 electoral votes. *Distribution of Electoral Votes, supra*. This disparity can be explained by the fact that polls showed that New York was going to be easily won by Kerry. *Making Votes Count*, N.Y. Times at 410.

Another criticism of the "winner-take-all" approach is that it disenfranchises voters who vote for the losing candidate. See *Williams v. Virginia Bd. of Elections*, 288 F. Supp. 622, 627 (1968) (citing a Memorandum of the House Subcommittee on Constitutional Amendments). Critics who advance this argument note that these votes are meaningless since the result would have been the same had these voters simply stayed home. *Id.* Thus, the net effect of the "winner-take-all" system is the disenfranchisement of voters who select a losing candidate, in that their votes are rendered meaningless before the winner of the election is determined at the national level. *Id.*

IV. Abolishing the Electoral College: The Direct Election Plan

Perhaps the most straight-forward approach to reform is abolishing the Electoral College at the federal level. Such a plan would require a constitutional amendment. If Congress eliminates the Electoral College,

the nation can move to a direct voting system wherein the national popular vote elects the President.

Congress has made numerous attempts to abolish the Electoral College. See L. Paige Whitaker & Thomas H. Neale, *The Electoral College: An Overview and Analysis of Reform Proposals*, <http://www.ncseonline.org/NLE/CRSreports/government/gov-39.cfm?&CFID=6351860&CFTOKEN=54453595> (last updated Jan. 16, 2001) (hereinafter *The Electoral College*) ("Between 1889 and 2000, approximately 587 such amendments were proposed."). Most direct election plans require a candidate to receive at least forty percent of the national popular vote to win the presidency. *Id.* In the chance that no candidate receives the requisite forty percent, a runoff election is held between the two candidates receiving the highest number of votes. *Id.*

A. Support

The direct election plan has wide public support. See Roberta A. Yard, Student Author, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote,"* 42 Santa Clara L. Rev. 185, 208 (2001) (stating that, in 2001, poll reports showed that "approximately sixty percent of Americans said that the Constitution should be amended to abolish the Electoral College in favor of electing the President by a direct popular vote."). Proponents cite several reasons for changing the nation's electoral system to a direct election.

Foremost on the list of supporter arguments is the idea that direct elections give equal voting weight across the country. McAfee, 32 Cumb. L. Rev. at 668. In a direct election, every vote is counted equally. Supporters believe the "one person, one vote" concept would encourage the public to vote in greater numbers because each individual would feel that their vote held more weight than it did under the "winner-take-all" system currently used by most states. *Id.*

Supporters also note the simplicity of the plan. Whitaker & Neale, *The Electoral College*. Direct election eliminates the possibility of electing a President who has not received the popular vote. *Id.* It also reduces, and possibly eliminates, the need for the House Contingency Procedure. Yard, 42 Santa Clara L. Rev. at 210. Unless Congress decides to conduct a runoff election in this manner, the House Contingency Procedure will become a relic of the Electoral College system. Under a direct election plan, once the votes are tallied, the winner will be named President.

Direct elections will alter campaign strategies, broadening the focus from battleground states to individual voters. *Id.* Candidates may have to address the concerns of the majority of the country to ensure election instead of the needs of a few key states. With more votes available, direct elections may also increase the number of candidates, giving voters more options. *Id.*

B. Opposition

A major concern of those opposed to the direct election plan is the potential increase in the number of third party candidates. McAfee, 32 Cumb. L. Rev. at 668. The opposition is concerned that the election of minority candidates will lead to less government stability because the balance of power will be upset. Whitaker & Neale, *The Electoral College*. This splintering of power can lead to less stable coalitions like those found in some parliamentary democracies. *Id.*

While cited as an advantage by supporters of the direct election plan, the opposition sees a change in campaign strategies as a problem. Yard, 42 Santa Clara L. Rev. at 209. The opposition argues direct elections weaken the power of the smaller and larger states since state borders will no longer be relevant. Whitaker & Neale, *The Electoral College*. Instead, areas with dense populations would receive the most attention in an effort to maximize vote gathering using less time and money. The opposition fears that candidates would no longer address the needs of those in rural areas. Yard, 42 Santa Clara L. Rev. at 209. Supporters of the direct election plan note that many of these problems exist under the current system.

Battleground states hold most of the electoral power and the candidates focus on their needs at the expense of other states. *Id.* at 209-10.

C. Difficulty of Amending the Constitution

While held out by many as the obvious choice of reform, the direct election plan may prove more difficult to enact than it seems. A constitutional amendment is required to abolish the Electoral College. In order to amend the Constitution, two-thirds of Congress must agree on the amendment. U.S. Const. art. V. Three-fourths of the states must then ratify the amendment to abolish the Electoral College and replace it with a direct election system. *Id.* Up to this point, the House of Representatives has passed only one direct election plan which subsequently died in the Senate. John R. Koza et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*, 115-19 (1st ed., National Popular Vote Press 2006) <http://www.every-vote-equal.com/tableofcontents.htm> (accessed Nov. 7, 2007) (hereinafter *Every Vote Equal*). Even if such a plan were to make it to the ratification stage, it is likely that many states—such as battleground states and states that hold a disproportionate share of power under the Electoral College system—would not support the amendment since it would lead to a loss of influence over the outcome.

V. State Reform Plans

While Federal reform may prove impracticable, the Constitution gives states wide latitude in determining how to appoint their electors. Commentators have put forth three main plans for reform.

A. The District System

The district system is currently employed by Maine and Nebraska. In recent years bills to adopt the system have been introduced in Florida, Arizona, Georgia, Louisiana, North Carolina and Virginia. Larry Rohter, *Electoral College: Florida is Rethinking the Way Presidents are Elected*, N.Y. Times 125 (June 7, 1992) (available at 1992 WLNR 3299820). More recently, a ballot initiative in California proposing adoption of the system failed after its financial backing collapsed. Dan Morain, *GOP Electoral Effort Founders*, L.A. Times 1 (Sep. 28, 2007) (available at 2007 WLNR 18998175). The district system was also the method favored by many of the framers of the constitution. Peirce, *The People's President* at 45-46 (noting that the district system was favored by Thomas Jefferson, Alexander Hamilton, John Madison, Andrew Jackson, John Quincy Adams and Daniel Webster).

Under the method currently employed by Maine and Nebraska, each congressional district in the state elects a single elector. David S. Wagner, Student Author, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect That Change*, 25 Rev. Litig. 575, 582 (2006). The remaining two votes, symbolizing the state's Senate representation, go to the presidential candidate who captures a plurality of the statewide vote. *Id.* This leads to the possibility that a state could split its electoral votes. However, since the systems inception in both Maine and Nebraska, the congressional districts in the respective states voted for the same candidate, and the electoral votes of each state have yet to be split amongst candidates. Chang, 44 Harv. J. on Legis. at 206.

1. Support

Proponents of the district system argue that that it reflects the will of the people more accurately than the "winner-take-all" system. Wagner, 25 Rev Litig. at 584. When a candidate receives a slim majority of the popular vote, the "winner-take-all" system awards the candidate all of the states electoral votes. Under the district system, the will of each individual district would be recognized and the electoral votes distributed accordingly. Under a "winner-take-all" format, a district that favors a third party or independent candidate has little incentive to vote for that candidate, as their vote will be nullified by the remaining districts in the state that vote for the traditional two-party candidates. Under the district system, the

statewide vote has no impact on how an individual district awards its electoral vote. Thus, voters should be more inclined to vote for whomever they choose. *See id.*

The district plan could also spur an increase in voter participation, a crucial feature of a healthy democracy. Durbin, 39 Fed B. News & J. at 510. In the current political landscape, many states are completely dominated by one political party, with the minority party having no realistic chance of winning a statewide election. *See Timothy Egan, Red and Blue States: One Nation Indivisible, But Some of It Invisible*, N.Y. Times A18 (Sep. 29, 2004) (available at 2004 WLNR 5609914). The prospect of obtaining a portion of a state's electoral votes could be the incentive members of the minority parties in these states need to cast their ballots on Election Day. Durbin, 39 Fed B. News & J. at 510. Further, the same incentive may also spur increased participation by supporters of third party candidates. Finally, proponents also point to the district system as a way to realize Electoral College reform, while still retaining the elector system. *Id.* Smaller states would still have some of the advantages that they have under the current "winner-take-all" system. *Id.* A candidate could not simply focus his time and resources in the larger states, as the total electoral block that the smaller states would retain represents a significant deterrent to this type of strategy.

2. Opposition

The most compelling argument against the district system is the possibility of manipulation of congressional districts through gerrymandering. McAfee, 32 Cumb. L. Rev at 670. The power to draw up the boundaries of a state's congressional districts currently lies with the state legislature. *Id.* One can easily envision a scenario whereby congressional districts are redrawn to aid the political party who commands a majority of the state legislature. Even if this somewhat pessimistic scenario failed to occur, political battles would surely be waged in states where the power is evenly split between Republicans and Democrats. Critics contend that this could subject the gerrymandering process to the undue influences of lobbyists. Wagner, 25 Rev Litig. at 584. Both of these scenarios are not present in the "winner-take-all" scenario, as a state does not have the power to redraw its own boundaries. McAfee, 32 Cumb. L. Rev at 670. Detractors of the district system also point to the ease with which third party candidates can win electoral votes. Wagner, 25 Rev. Litig. at 584-85. The ability of a third party candidate to win electoral votes makes it much more likely that no candidate wins a majority of the total electoral votes, *id.* at 585, thus putting the decision of electing a president in the hands of Congress. U.S. Const. amend. XII. These detractors view this result as destabilizing, as it fails to produce a clear cut winner and public confidence in the electoral process would be undermined if Congress selected the president. *See Wagner*, 25 Rev. Litig. at 584.

3. The California Initiatives

The aforementioned failed California ballot initiative would have amended the California Constitution, providing for a district system of awarding electoral votes. Californians for Equal Representation, *Title and Summary for Proposed Initiative*, http://ag.ca.gov/cms_pdfs/initiatives/2007-07-17_07-0032_Initiative.pdf (July 17, 2007). Like the plans currently in place in Maine and Nebraska, each congressional district would award an electoral vote, with the remaining two votes awarded to the candidate receiving a plurality of the statewide popular vote. *Id.* at § 2.

In the initiatives "Findings and Declaration of Purposes," the drafters echoed many of the above criticisms leveled at the "winner-take-all" method of awarding electoral votes. *Id.* at § 1. They asserted that California had been ignored in past presidential elections despite having more electoral votes than any other state. *Id.* Employing the district system would give "presidential candidates an incentive to campaign in California and address the unique problems faced by Californians." *Id.* Secondly, they contend that the "winner-take-all" system does not reflect the diversity of the state's voters and largely ignores the needs of certain regions in the state. *Id.* Finally, the drafters asserted that the "winner-take-all" system was an impediment to the development of a legitimate third party or independent candidate for president. *Id.*

The drive to get this initiative on the ballot lost much of its inertia when many of the key donors and

proponents withdrew their support. Dan Morain, *GOP Electoral Effort Founders*, L.A. Times 1 (Sept. 28, 2007) (available at 2007 WLNR 18998175). Although proponents conceded the initiative would not be voted on by Californians prior to the 2008 Presidential election, they remained hopeful that the initiative could be revived if more funding could be procured. *Id.*

A second, more recent ballot initiative submitted to the Secretary of State would also change the California method of awarding electoral votes from a "winner-take-all" system to the district plan. Californians for Equal Representation, *Re: Request for Title and Summary for Proposed Initiative: The Proportional Representation in Presidential Elections Act*, http://ag.ca.gov/cms_pdfs/initiatives/2007-08-27_07-0052_Initiative.pdf (Aug. 26, 2007) (hereinafter *Proportional Representation Act*). However, this more recent initiative includes an added wrinkle. The district plan would not go into effect until a majority of states had implemented similar plans. *Id.* at § 2. The Secretary of State would be required to survey the 50 states and determine whether a majority of them had adopted the district plan, or some other proportional method of awarding electoral votes, by July 20 of a Presidential election year. If the requisite number of states had not yet adopted such a voting plan, California would continue to award their electoral votes via the "winner-take-all" method. *Id.*

In addition to the benefits of the district plan that the prior initiative highlighted, this newer initiative's declaration of purpose notes that the conditional implementation of the plan avoids any claims of partisanship, in that it would not go into effect until it was the method a majority of the country used. *Id.* at §1. The criticism most often leveled at the previous California initiative was that it was a partisan effort by the Republican Party to capture a portion of California's electoral votes. Morain, L.A. Times at 1. By waiting until a majority of states have adopted similar plans, the proponents argue that the proposal will not be viewed as a "purely partisan effort." *Proportional Representation Act*, at § 1. Further, they claim that California's reputation as a "trend-setter" would influence other states around the country to follow its lead and adopt district or proportional plans. *Id.*

B. The Proportional System

Under the proportional system, a state awards its electoral votes to a candidate in proportion to the percentage of the statewide popular vote that the candidate received. Wagner, 25 Rev. Litig. at 586. For example, in a state with ten electoral votes, suppose Candidate A receives seventy percent of the vote and Candidate B receives the remaining thirty percent. Under the proportional system, Candidate A would be awarded seven electoral votes (70% of ten) and Candidate B would receive the remaining three (30% of ten).

A more complicated problem arises when the percentages each candidate receives do not directly translate into equal shares of the total electoral vote. Wagner, 25 Rev. Litig. at 586. For example, in a state with 10 electoral votes, suppose Candidate A receives 67 percent of the popular vote and Candidate B receives 33 percent. A purely mathematical allocation of the electoral votes would yield 6.7 votes for Candidate A and 3.3 votes for Candidate B. Since electors cannot split their votes into fractions, early iterations of the proportional plan called for rounding a candidate's percentage up or down. *See Peirce, The People's President* at 144. So, in the above example, Candidate A would have his 6.7 electoral votes rounded up to seven, and Candidate B would have his 3.3 votes rounded down to three. However, later versions of the plan eliminate the elector from the process and compute each candidate's percentage of the vote to the nearest thousandth of a decimal. The electoral votes are then distributed on a purely mathematical basis. *Id.* So, if Candidate A receives 67.83 percent of the vote and Candidate B receives 32.17 percent, Candidate A would receive 6.783 electoral votes and Candidate B would be awarded the remaining 3.217.

1. Support

Proponents of the proportional plan point to its ability to better represent minority and third party candidates than the "winner-take-all" system. James A. Gardner, *Madison's Hope: Virtue, Self Interest and the Design of Electoral Systems*, 86 Iowa L. Rev. 87, 98 (2000). In particular, they point to the inequity of having a slim majority or plurality of a state's electorate control 100 percent of the electoral votes. *Id.* at 97 (noting that under the "winner-take-all" system fifty-one percent of the electorate can control one-hundred percent of the electoral votes). Under the proportional plan, majority, minority and third party candidates are awarded electoral votes that accurately reflect voter support in a given state.

Proponents of the proportional plan also note that states would retain the current electoral strength that they currently enjoy under the "winner-take-all" method. Durbin, Fed B. News & J. at 510. California's fifty-five electoral votes would still constitute a significant portion of the available electoral pool, thus ensuring that the state remained a powerful player in a presidential election.

Another advantage of the proportional plan is that it eliminates the possibility of the "faithless elector." Wagner, 24 Rev. Litig. at 586. A faithless elector is one who casts his presidential vote for a candidate who did not win the state's popular vote. *Id.* By using a purely mathematical formula for awarding electoral votes, the possibility of a faithless elector altering a presidential election is completely eliminated. *Id.*

2. Opposition

Critics of the plan mainly point to its potential to upset the delicate balance of our two-party system of government. Wagner, 25 Rev. Litig. at 587. Unlike the district or "winner-take-all" methods, a minority candidate who receives ten percent of a state's popular vote will be awarded electoral votes. This significantly increases the possibility that no presidential candidate will receive a majority of the electoral votes nationally, thus leaving the selection of the president to Congress. *Id.*

Opponents have also pointed to the increased threat of factionalism. *Id.* Because a candidate does not have to receive a plurality of votes to win electoral votes, the possibility that a party with extreme points of view could gain political power is greatly increased. Peirce, *The People's President* at 148 (noting that because minority parties could receive electoral votes, the plan could give a national political voice to groups like the Klu Klux Klan and the Communist party). Further, one could easily envision a scenario where a group with an extreme ideology could use their electoral power as leverage to gain political concessions from a Republican or Democratic candidate in exchange for withdrawing from the race.

Finally, opponents of the proportional plan claim that the plan would change the character of presidential elections from a statewide focus to a "more local focus." Wagner, 25 Rev. Litig. at 588. Absent a "winner-take-all" method of awarding electoral votes, states that have traditionally voted for one party will be back in play. For example in the 2004 presidential election, all fifty-five of California's electoral votes were won by Democratic candidate John Kerry. Infoplease, *Presidential Election of 2004, Electoral and Popular Vote Summary*, <http://www.infoplease.com/ipa/A0922901.html> (accessed on Oct. 20, 2007). However, Kerry only received fifty-four percent of the state's popular vote. *Id.* President George W. Bush received forty-four percent of the vote. *Id.* Under the proportional plan, Bush would have received 24.64 electoral votes.

A perusal of California's results by county illustrates the above concerns. President Bush's support in California was almost exclusively located in rural, eastern California, with Kerry's support exclusively based in the more populous coastal, metropolitan areas. CNN, *U.S. President/California*, <http://www.cnn.com/ELECTION/2004/pages/results/states/CA/P/00/index.html> (accessed on Oct. 21, 2007). Most tellingly, six counties accounted for a whopping 51.4 percent of Kerry's statewide vote total. Ca. Sec. of St., *2004 General Election: All Counties Returns*, <http://vote2004.sos.ca.gov>Returns/pres/59.htm> (last updated Dec. 7, 2004).

Viewed in this light, the proportional plan reduces the incentive for a candidate to campaign statewide, instead focusing on the areas where his support is strong and ignoring areas where his support is weak. This could cause candidates to focus on the concerns of local areas at the expense of the needs of the

state as a whole. For example, in the 2004 election, Bush would have likely focused his efforts in the counties where his support was strong, ignoring the coastal, metropolitan areas that overwhelmingly supported Kerry. Detractors view this result as a weakening of the power large states currently enjoy under the "winner-take-all" method. Wagner, 25 Rev. Litig at 588.

C. The Interstate Compact System

A third model of state-lead reform, the interstate compact (also known as the National Popular Vote Legislation), allows the national popular vote to decide the presidency without eliminating the Electoral College. States entering into an interstate compact will pledge their electoral votes to the winner of the national popular vote. Chang, 44 Harv. J. on Legis. at 211. To be a viable option, enough states need to enter into the compact to garner the electors necessary for electing the President. Adam Schleifer, *Interstate Agreement for Electoral College Reform*, 40 Akron L. Rev. 717, 725 (2007) (currently 270 electoral votes are needed to elect the President). This ensures that the national popular vote will be determinative of the electoral outcome. The compact will not bind a state unless one hundred of the required 270 electoral votes went to a candidate not chosen by that state's popular vote in the previous election. *Id.* The purpose of this requirement is to provide a balance between compacting states so that one party is not continually favored over another. *Id.* While several state legislatures, including California, have considered this model, only Maryland has signed it into law. Dianne Feinstein, *Senator Feinstein Calls for Abolishing the Electoral College*, http://votetrustusa.org/index.php?option=com_content&task=view&id=2571&Itemid=26 (Aug. 30 2007) (accessed Nov. 7, 2007).

1. Support

Supporters of the interstate compact plan point to several reasons why it should be the favored approach. The main reason is that the interstate compact will ensure that the national popular vote decides the presidency. Chang, 44 Harv. J. on Legis. at 212. With the national popular vote deciding the election, the interstate compact would prevent the voter disenfranchisement occurring in situations such as the 2000 election where the Electoral College favored George W. Bush even though he lost the national popular vote to Al Gore.

States are wary of the possibility of reducing their "Electoral College influence" without a guarantee that the popular vote winner will be elected president. *Id.* This partially explains why forty-eight states have yet to abandon the "winner-take-all" system. The interstate compact makes it easier for states to abandon the current system since a state is not bound to the compact "until the participating states cumulatively constitute a majority of the Electoral College." *Id.*

Currently, only a minority of states receive attention from presidential candidates. *See* Koza et al., *Every Vote Equal*, 9-10 (stating that five states received seventy-two percent of the campaign expenditures in the final month of the 2004 election, while twenty-three states did not receive any). Few battleground states remain where no candidate has overwhelming support; however, these states tend to get the most attention from the candidates in the form of advertising, visits, campaign promises and issue attention. Supporters argue that an interstate compact would ensure that non-battleground states would no longer serve as mere spectators in the election process. Chang, 44 Harv. J. on Legis. at 212. This would force candidates to focus on the needs of every state if they hoped to win the national popular vote, and consequently, the electoral votes that the interstate compact would offer. The natural side effect of this is an increase in the already high cost of running a presidential campaign. A major increase in funding needs could force candidates to further rely on large donors and ultimately feed the perception that large corporations and the wealthy "hold a disproportionate influence over the presidency." *Id.* at 227. It may also prevent less financially secure but qualified candidates from ever seeking office.

2. Opposition

Those opposed to the interstate compact offer several arguments against the plan. Supporters of the Electoral College note that the national popular vote and the electoral vote rarely conflict. *Id.* at 217. In fact, this has only happened four times in the history of the Electoral College. Whitaker & Neale, *The Electoral College*. Therefore, the interstate compact would have made little difference in the past and arguably will not make much difference in the future as to the overall outcome of a presidential election.

Another potential problem may lie in tallying the national popular vote itself. Currently, there is no official body to tally the national popular vote—each state must tally its own popular vote. Schleifer, 40 Akron L. Rev. at 727. While it may seem like a simple solution for the compacting states to designate such a body, that body would have no official vote counting power over non-compacting states and would still have to rely on their individual vote tallies. *Id.* at 728.

History has shown that state popular vote numbers may be suspect and recounts may be necessary. Unfortunately, interstate compacts are currently silent on how such a recount process would take place. Chang, 44 Harv. J. on Legis. at 226. Unless compacting states design some sort of recount machinery, each state will be responsible for its own recount. *Id.* In the end, this concern may hold little weight since a close outcome is less likely with a single large pool than with the fifty-one separate smaller opportunities that currently exist. Koza et al., *Every Vote Equal*, 361. "In fact, no presidential election since the 19th century has been won by fewer than 100,000 votes on a nationwide basis." *Id.* at 362.

Adding to the difficulties of tallying a national popular vote, each state has different ballot access requirements meaning that the same set of presidential and vice-presidential candidates may not appear on every state's ballot. David Lublin, *Electoral College Reform Has Problems of its Own*, *The Star-Ledger* 17 (Jul. 26, 2007). In order to get a true national popular vote, it would seem that every voter would require the same voting options.

Even if drafters deal with the national popular vote counting issues, other problems may prevent wide adoption of the interstate compact. The opposition points out that, because there is no duration requirement, a state may withdraw from the compact at any time and threaten the overall stability of the remaining states. *Id.*; see also Chang, 44 Harv. J. on Legis. at 228 (stating a compacting state cannot withdraw after July 20 of the election year ensuring election year stability). For the compact to remain viable, it would need more than 270 electoral votes to protect against withdrawals. Supporters of the interstate compact counter that the "popularity and self-propagating legitimacy of a true nationwide popular vote may make any switchback to a state-based system politically unfeasible." *Id.*

3. Constitutional Concerns

States may enter into interstate compacts under authorization of the U.S. Constitution. U.S. Const. art. I, § 10, cl. 3. The constitution states that "[n]o state shall, without the consent of Congress, ... enter into any agreement or compact with another state or with a foreign power." *Id.* The U.S. Supreme Court has interpreted this clause to mean that states only need congressional consent to enter into an interstate compact when the compact "enhances state power quoad the National Government." *U.S. Steel v. Multistate Tax Commn*, 434 U.S. 452, 473 (1978). Furthermore, the Constitution specifically gives states the power to select the manner in which it will assign its electoral votes. See U.S. Const. art. II, § 1, cl. 2 ("Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress."); see also *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) ("[T]he appointment and mode of appointment of electors belong exclusively to the states under the [C]onstitution of the United States."). Since states already have the power to choose the method of assigning electoral votes, it does not appear that an interstate agreement would take any power away from the federal government so as to require congressional consent. Of course, some argue otherwise.

Under the interstate compact system, the House Contingency Procedure will never come into play because one candidate will always receive a majority of the electoral votes. One could argue that the

interstate compact, therefore, is taking away a power granted specifically to the federal government. Schleifer, 40 Akron L. Rev. at 740-41. However, it is unclear "[w]hether the destruction of such a remote and highly contingent power" will be serious enough to hold that congressional consent would be required for the interstate compact. *Id.* at 741. It should be noted that the Supreme Court has not invalidated an interstate compact for want of congressional consent in well over a century. *Id.* at 739.

VI. Constitutional Concerns with Electoral College Reform by Voter Initiative

The U.S. Constitution states in part, "[e]ach state shall appoint, in such manner as the legislature thereof may direct, a number of electors...." U.S. Const. art II, § 1, cl. 2 (emphasis added). It is clear that the state legislature may select the method in which the state casts its electoral votes; however, the issue of whether the people also may seek reform through the initiative process still remains open. Controversy exists over the meaning of the word "legislature" as used in this clause and whether it includes acts by the people through the initiative process. Oddly enough, both sides point to the same case for support.

In *McPherson v. Blacker*, 146 U.S. 13, 25 (1892), the Supreme Court held that the Michigan Legislature had the power to change the state's "winner-take-all" system to a district system. While the holding may not seem to solve the issue at hand, *McPherson* is one of only two cases to discuss the meaning of "legislature" as found in Article II. Wagner, 25 Rev. Litig. at 593 (*Bush v. Gore* is the other case and is discussed below).

Those who believe electoral reform cannot be accomplished through the initiative process cite *McPherson* for the idea that the legislature has the exclusive power to decide the method for selecting electors. Doug Kendall, *The Legislature Thereof: California Voters Can't Change the 2008 Election Rules on Their Own*, Slate, <http://www.slate.com/id/2173740/> (Sept. 13, 2007) (accessed Nov. 7, 2007) (hereinafter *The Legislature Thereof*). In *McPherson*, the Court noted that "[the Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature *exclusively* to define the method of [appointing electors]." *McPherson*, 146 U.S. at 27 (emphasis added). Later in the opinion, the Court further noted that the state legislature has plenary power in appointing electors. *Id.* at 35.

While *McPherson* is over a century old, the Court reaffirmed the idea that a state legislature's power to appoint electors is plenary in *Bush v. Gore*. 531 U.S. 98, 104 (2000). In its per curiam opinion, the Court noted its "admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures." *Id.* at 111. The concurrence, written by Chief Justice Rehnquist, only serves to strengthen this idea. *See id.* at 113 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) ("In *McPherson v. Blacker*, we explained that Art. II, § 1, cl. 2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment.") (internal citations omitted). In light of this strict reading, some believe that the voter initiative is not a valid means of effecting Electoral College reform. Kendall, *The Legislature Thereof*.

As with every good debate, there are two sides to this story. Champions of the use of voter initiatives for Electoral College reform have found their own grounds for support. For instance, they point to language also found in *McPherson*:

The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, *except as limited by the constitution of the state*, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law power is elsewhere reposed*.

Koza et al., *Every Vote Equal* at 325 (citing *McPherson*, 146 U.S. at 27) (emphasis in original). They argue that the voter initiative process is a limitation on the legislative power because "[it] enable voters to displace the legislature by enacting laws of their own design" and that a state's fundamental law power-its Constitution-reposes this power by allowing for the initiative process. *Id.* Furthermore, they note that while *Bush v. Gore* does cite language in *McPherson* that would seem to grant the legislature exclusive authority

to determine the method of appointing electors, "*Bush v. Gore* was not about 'the process by which state legislation is enacted' but, instead, was about the extent to which the Florida Supreme [Court] should 'back off.'" *Id.* (citing Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*, 111 (Princeton University Press, 2001)).

This interpretation is not unique to supporters of the initiative process; both Justices Stevens and Breyer took a similar position in their dissents in *Bush v. Gore*. Justice Stevens noted that state legislatures, "while assigned the primary responsibility for determining the manner of selecting presidential electors," are "creatures born of, and constrained by, their state constitutions." *Bush*, 531 U.S. at 123 (Stevens, Ginsburg & Breyer, JJ., dissenting). Justice Breyer went a step further and argued that the use of the word "legislature" in Article II, Section 1 is most closely analogous to the use found in Article I, Section 4 which has never been subject to such a strict interpretation. *Bush*, 531 U.S. at 148 (Breyer, Ginsburg & Stevens, JJ., dissenting).

Supporters argue that "legislature" as used in Article II refers to the state's lawmaking process and that Article I, Section 4 shares similar usage of the term. Wagner, 25 Rev. Litig. at 596. Due to this similarity, supporters argue that Supreme Court decisions on Article I should apply in Article II cases.

The Supreme Court has upheld that the use of voter referenda "on any law passed by the state legislature could apply to a statute, passed under the authority of Article I, Section 4." *Id.* at 597 (citing *Davis v. Hildebrant*, 241 U.S. 565, 566 (1916)). The Court in *Davis* noted that the "referendum constituted a part of the state Constitution and laws, and was contained *within the legislative power.*" *Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (emphasis added). Of course, proponents of this reading of *Davis* would have to show that voter referenda and voter initiatives are similar enough for the same reasoning to apply. This may be a difficult task since voter initiatives bypass the legislature from the law making process while referenda may not. Wagner, 25 Rev. Litig. at 599.

Of course, the initiative process is not the same in every state. Most states follow the direct amendment model, whereby citizens submit initiatives to amend the state constitution to the Secretary of State who then places them on the ballot for voter approval or rejection. Initiative and Referendum Institute, *What is the Initiative and Referendum Process?*, <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm#Initiatives> (accessed Nov. 10, 2007). In contrast, two states, Mississippi and Massachusetts, have an indirect amendment model. *Id.* Under the indirect amendment model, constitutional amendments proposed by the people must be submitted to the state legislature for consideration before being placed on the ballot. *Id.* This would appear to be much more akin to the referendum process. It is arguable that this model would allow for voters to decide the method for choosing electors since the legislature is still involved in the process at some level. Unfortunately, this theory has not yet been tested in court.

In the end, there is no clear answer. Both sides present valid arguments for the Supreme Court to consider if it grants certiorari. While the make-up of the Supreme Court has changed since *Bush v. Gore*, the incoming justices are decidedly conservative and would likely favor the strict interpretation of "legislature" as put forth in the per curiam and concurring opinions in *Bush v. Gore*. It is an uphill battle, to say the least, for supporters of Electoral College reform by voter initiative.

VII. Conclusion

Americans seem ready for change. The 2000 election once again showed the weaknesses of the Electoral College and the "winner-take-all" method currently employed by most states. The problem lies in deciding on what form that change will take. Abolishing the Electoral College may seem like the most direct method of reform, but the difficulty of amending the Constitution makes this path appear to be an exercise in futility. Of course, the individual states have options; however, none of these are perfect and some may even be unconstitutional. Unless a few states take a chance with one of these systems, the discussion of

state reform of the Electoral College will remain just that: a discussion.