

# Electoral College Reform: Contemporary Issues for Congress

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## Summary

The electoral college method of electing the President and Vice President was established in Article II, Section 1 of the Constitution, as revised by the Twelfth Amendment. It provides for election of the President and Vice President by electors who are themselves elected by the voters. A majority of 270 of 538 electoral votes is necessary to win. For further information on the electoral college system's operations, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by (name redacted).

The electoral college has been the subject of reform proposals since 1800. Constitutional and structural criticisms have centered on several of its features: it is not fully democratic, providing indirect election of the President; it can lead to the election of candidates who win the electoral college but fewer popular votes than their opponents or to contingent election in Congress if no candidate wins an electoral college majority; it results in electoral vote under- and over-representation between censuses; and that "faithless" electors can vote against the people's express choice. Legislative and political criticisms include the general ticket system, currently used in all states except Maine and Nebraska, which is said to disenfranchise voters who prefer the losing candidates in the states; various asserted "biases" that are alleged to favor different states and groups; and the electoral college "lock," which was once claimed to provide an advantage to Republican candidates, but is now said to favor Democrats.

Electoral college reform options include the following: end it, mend it, or leave it alone. Proposals to end the electoral college almost always propose direct popular election, with the candidates winning the most popular votes nationwide elected. Almost all reform proposals would eliminate electors and award electoral votes directly by one of several methods: the general ticket system; the district system that awards electoral votes on a congressional-district and statewide-vote basis; and the proportional system that awards state electoral votes in proportion to the percentage of popular votes gained by each candidate. Despite more than 30 years of legislative activity from the 1940s through the late 1970s, proposed amendments never managed to win the constitutionally required two-thirds vote in both houses of Congress.

Since 2004, some of the reforms identified above have been attempted in the states. District plan initiatives have been offered in California, Pennsylvania, Michigan, Virginia, and Wisconsin. Proportional plans have been proposed in Colorado and Pennsylvania. Nebraska has considered returning to the general ticket system. None of these, however, has been enacted to date.

A nongovernmental organization is currently promoting the National Popular Vote (NPV) initiative, an interstate compact that would effectively achieve direct popular election of the President and Vice President without a constitutional amendment. It relies on the Constitution's grant of authority to the states in Article II, Section 1, to appoint presidential electors "in such Manner as the Legislature thereof may direct...." States that join the compact pledge to award their electoral votes to the nationwide popular vote winners, regardless of who wins in their particular states. The compact would come into effect only after states controlling a majority of electoral votes (270 or more) were to join it. In April 2014, New York joined the compact, generating renewed interest in the NPV initiative. At the time of this writing, 10 states and the District of Columbia, which jointly control 165 electoral votes, have joined the NPV compact.

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## Introduction

The United States is unusual among contemporary presidential republics in that it provides for the indirect election of its President and Vice President.<sup>1</sup> Election of these two officers by a group of electors, known collectively as the electoral college, was established in Article II, Section 1 of the U.S. Constitution. The states were given blanket authority to appoint these electors “in such Manner as the Legislature[s] thereof” may direct. The original constitutional provisions, under which electors cast two votes for different candidates for President, but none for Vice President, proved unworkable<sup>2</sup> after only two contested elections,<sup>3</sup> leading to a constitutional crisis during the deadlocked election of 1800.<sup>4</sup> Following this event, Congress proposed the Twelfth Amendment, which provides for separate ballots for these two officials, and which was ratified by the states in time for the 1804 election. The presidential election provisions of Article II, Section 1 and the Twelfth Amendment have remained unchanged since that time.

As with other provisions of the Constitution, Article II, Section 1 and the Twelfth Amendment provided a basic framework for presidential elections, but left considerable leeway as to its implementation. In the years following ratification of the Twelfth Amendment, state laws and political party procedures added a range of now-familiar additional elements to the system. These include such practices as

- popular election of electors by the voters;
- joint tickets for presidential and vice presidential candidates—the voter casts a single ballot for both candidates;
- the predominance of the general ticket, or winner-take-all, method, which awards all of a state’s electoral votes to the ticket that wins the most popular votes statewide;
- a broad range of nomination procedures for elector candidates; and,
- an enduring tradition that electors are expected, but not constitutionally required, to vote for the candidates to whom they are pledged.

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<sup>1</sup> Direct election of the President is currently universal in presidential republics that provide for a strong chief executive, combining the roles of head of state and head of government, e.g., Mexico and Brazil. Presidents are generally indirectly elected in parliamentary republics, where the president typically has a ceremonial and non-political role as chief or head of state, while the prime minister, as head of government, exercises most of the executive authority associated with the presidency in the United States. Examples of parliamentary republics include Germany, Italy, and India. France combines aspects of both, providing for a powerful popularly elected president *and* a prime minister responsible to parliament.

<sup>2</sup> The unworkable formula required each elector to cast two votes for President, for different persons, at least one of whom could not be a resident of the same state as the elector. The candidate winning the most electoral votes, provided this constituted a majority of electors, was elected President, and the runner up was elected Vice President. This led in 1796 to the awkward result of “Federalist” John Adams being elected President as his political rival, “Jeffersonian Republican” Thomas Jefferson, was elected Vice President.

<sup>3</sup> Recall that George Washington was unopposed in the elections of 1788 and 1792.

<sup>4</sup> In 1800, Thomas Jefferson and his vice presidential candidate, Aaron Burr, reached a tie vote because the Jeffersonian Republicans failed to instruct one elector to cast a vote for someone other than Burr. The electoral college tie led to a bitterly contested contingent election in the House of Representatives.

The electoral college system has proved to be durable: 53 presidential elections have been held under this arrangement since the Twelfth Amendment was implemented in 1804. In 52 of these, it delivered a majority of electoral votes for President and Vice President,<sup>5</sup> and in 49 instances it delivered the presidency to “the people’s choice,” the candidates who won the most popular votes.<sup>6</sup> When measured by the first factor—delivery of a majority to one candidate or ticket—the electoral college has a success rate of 98.1%; when measured by whether it has delivered the presidency to “the people’s choice,” it enjoys a success rate of 92.4%. The electoral college has never been beyond criticism, however. Proposals to reform its alleged failings, or to replace it with something completely different, have been offered since the earliest days of the republic.

## The Electoral College in Brief: A Primer

### Origins of the Electoral College at the Constitutional Convention

Few questions so vexed the Constitutional Convention of 1787 as that of presidential election. During the convention, the delegates voted successively for election by Congress; direct popular election by the people; selection by the governors of the several states; election by electors chosen by the state legislatures; and even election by a group of Members of Congress chosen by lot.<sup>7</sup> At length, the matter was referred to a committee on “postponed matters,” which reported a compromise plan near the close of the convention. The committee considered a range of generally agreed-upon principles for choice of the chief executive. Proceeding from the lengthy convention debate on choosing the chief executive, they contrived a mode of election designed to

- be free of undue influence by Congress, thus insuring greater independence in the executive and separation of powers;
- provide a fundamental role for the states by establishing the election as a federal, as well as a national, process;
- allocate electors by a formula that provided a certain degree of advantage to less populous states, to avoid complete domination of the election process by the more populous ones;
- give the state legislatures broad authority over the choice of electors: at the legislatures’ discretion, electors could be picked by popular vote, by the legislature itself, or by another body altogether; and, ultimately
- temper popular enthusiasms and partisan and sectional attachments by giving the actual vote to the electors, who, it was hoped, would be prominent citizens of their states and communities, well-informed and educated persons who would make a balanced and measured selection.

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<sup>5</sup> In 1824, no presidential candidate received a majority of electoral votes, so the House of Representatives elected the President by contingent election. In the election of 1836, no candidate for Vice President won a majority of electoral votes, leading to election of that officer by the Senate.

<sup>6</sup> The four exceptions are the presidential elections of 1824, 1876, 1888, and 2000.

<sup>7</sup> Clinton L. Rossiter, *1787 – The Grand Convention* (New York: Macmillan, 1966), pp. 198-220.

Notwithstanding the Founders' intentions, from the very beginning, the electoral college began to change, evolving through constitutional amendment, state laws, and political party practices. The growth of political parties and the spread of voting rights and democratic principles overtook the Founders' vision that the President would be chosen by the nation's most distinguished citizens within two decades, as the electoral college evolved into the compound system that continues to govern U.S. presidential elections two centuries later.

## **The Contemporary Electoral College System by the Numbers**

As noted previously, the U.S. Constitution's minimal electoral college provisions have been complemented over the past two centuries by a range of federal and state laws, political party procedures, and enduring political traditions, leading to the system as it exists today. The salient features of the contemporary arrangement, a mixture of these elements, are detailed below.

- The electors are collectively known as the electoral college; although this phrase does not appear in the Constitution, it gained currency in the early days of the republic, and was recognized in federal law in 1845.<sup>8</sup>
- The electoral college has no continuing existence. Its sole purpose is to elect the President and Vice President; electors convene in the state capitals, vote, and adjourn.
- Each state is allocated a number of electors equal to the combined total of its U.S. Senate and House of Representatives delegations;<sup>9</sup> in addition, the District of Columbia is also allocated three electors.<sup>10</sup> At present, the total is 538, reflecting the combined membership of the Senate (100 Members), the House (435 Members), and the District of Columbia electors.
- Any person may serve as an elector, except Senators and Representatives, or any other person holding an office of "trust or profit" under the United States.<sup>11</sup>
- As noted previously, the state legislatures select the method by which electors are chosen.<sup>12</sup> In practice, all states currently provide for popular election of their electoral college delegations.<sup>13</sup> Candidates for the office of elector are nominated by political parties and other groups eligible to be on the ballot in each state. In most cases, the elector candidates are nominated by the state party committee or the party's state convention.<sup>14</sup>
- The winning presidential and vice presidential candidates must gain a majority of electoral votes (270 of 538) to be elected.

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<sup>8</sup> 3 U.S.C. §4.

<sup>9</sup> U.S. Constitution, Article II, Section 1.

<sup>10</sup> Ibid., 23<sup>rd</sup> Amendment.

<sup>11</sup> Ibid., Article II, Section 1.

<sup>12</sup> Ibid.

<sup>13</sup> Neal Peirce and Lawrence Longley, *The People's President, The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT: Yale University Press, 1981), pp. 44-47.

<sup>14</sup> See U.S. Congress, Senate, *Nomination and Election of the President and Vice President of the United States, 2008*, "Part IV. State Laws Relating to the Nomination and Election of Presidential Electors," S. Doc. 111-15 (Washington: GPO, 2010), pp. 346-444.

- If no ticket of candidates attains a majority, then the House of Representatives elects the President and the Senate elects the Vice President, in a procedure known as contingent election.<sup>15</sup>

## How the Electoral College Functions in Contemporary Elections

- Presidential election day is set by federal law for Tuesday after the first Monday in November every fourth year succeeding the election of President and Vice President; one-third of U.S. Senators, all Members of the House of Representatives, and many state and local officials are also chosen on election day, which falls on November 8 in 2016.<sup>16</sup>
- On election day, voters across the country cast *one* vote for the team of presidential and vice presidential candidates they support. When they do so, they are actually voting for the political party “ticket” of candidates for the office of elector who support, and pledge to vote for, that party’s presidential and vice presidential candidates.
- The popular vote is cast and certified, the electors are chosen, and they then vote in their respective states. While the nationwide popular vote count, the “horse race,” is generally accorded widespread publicity during the campaign, ultimately it is the electoral vote tally in the states that decides the election.
- The goal of presidential campaigns is to win by carrying states that collectively cast a majority of electoral votes. In particular, political parties and presidential campaign organizations focus on states that are closely contested, that have large delegations of electoral votes, or both. Winning a majority of the more populous of these “battleground states”<sup>17</sup> is considered crucial to obtaining the necessary electoral vote majority.
- In 48 states and the District of Columbia, the ticket that wins the most popular votes, a plurality or more, is awarded all the state’s electoral votes. That is, the winning party’s entire slate or ticket of candidates for the office of elector is elected. This is referred to as the “general ticket” or “winner-take-all” system.
- Maine and Nebraska use a different method, the “district” system, under which popular votes are counted twice, first, on a statewide basis, and second, on a congressional district basis. The presidential/vice presidential ticket receiving the most votes *statewide* receives two electors (or electoral votes) for this total. The ticket winning the most votes *in each congressional district* receives a single elector/electoral vote for that district. In this way, a state’s electoral vote may be

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<sup>15</sup> For more detailed information on the contingent election process, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by (name redacted).

<sup>16</sup> 3 U.S.C. §1, 62 Stat. 672.

<sup>17</sup> “Battleground” states are loosely defined as those 1) that possess large enough electoral vote delegations to have some influence on the election’s outcome; and/or 2) are closely enough divided in party strength that a relatively small number of swing votes could deliver the state and its electoral votes to either candidate.



divided to reflect geographical differences in support within the state for different candidates.<sup>18</sup>

- Presidential electors assemble on the first Monday after the second Wednesday in December following the election.<sup>19</sup> In 2016, the electors are to assemble on December 19. They meet in their respective states and cast separate votes by secret paper ballot for the President and Vice President.<sup>20</sup>
- As noted earlier, candidates for the office of elector are selected by their respective political party. They are expected to vote for the candidates to whom they are pledged, but occasionally, a “faithless elector” will vote against instructions.<sup>21</sup>
- After the electoral college votes, the results are forwarded by state officials to Congress and various other federal authorities designated by law. On January 6 of the year following a presidential election, Congress meets in a joint session to count the electoral votes and make a formal declaration of which candidates have been elected President and Vice President.<sup>22</sup>

## Electoral College Issues

As noted in the introduction to this report, the electoral college and the system built around it have delivered a President and Vice President in 52 of 53 elections since the Twelfth Amendment was ratified in 1804. It has elected the candidates who received the most popular votes in 49 of those elections. While the system’s defenders point to this as a considerable achievement, the electoral college has been criticized for a wide range of alleged failings since the earliest days of the republic. These criticisms fall generally in one of two categories. The first is essentially *philosophical*, and centers on the fact that the existing system is indirect, and provides a less-than-fully democratic indirect election of the President and Vice President. The second category addresses perceived constitutional, legislative, and political *structural* flaws in the system, focusing on its potential for various dubious procedures and outcomes, and the “biases” it is alleged to confer on certain groups and jurisdictions.

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<sup>18</sup> For individual state requirements, see *Nomination and Election of the President and Vice President*, p. 380 for Maine, and p. 394 for Nebraska.

<sup>19</sup> 3 U.S.C. §7.

<sup>20</sup> U.S. Constitution, Article II, Section 1; 12<sup>th</sup> Amendment. The words “by ballot” are interpreted to mean by paper ballot. With respect to the location of meetings of the electors, the Founders reasoned that if they met in their respective states, there would be less opportunity for political intrigue and chicanery than if they assembled in a single location. The difficulties inherent in long-distance travel at the time may also have influenced the Constitutional Convention’s decision.

<sup>21</sup> For further information, see Project Fairvote, “Faithless Electors,” available online at [http://archive.fairvote.org/e\\_college/faithless.htm](http://archive.fairvote.org/e_college/faithless.htm).

<sup>22</sup> 3 U.S.C. §15-18. The same sections of the U.S. Code provide for challenges to electoral votes, as occurred in 2001 and 2005.



## **Philosophical Criticism: The Electoral College Provides Indirect Election of the President**

Perhaps the fundamental contemporary criticism of the Founders' creation is philosophical. Proponents of change maintain that the electoral college system is intrinsically undemocratic—it provides for “indirect” election of the President and Vice President. They assert that this is an 18<sup>th</sup> century anachronism, dating from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive democratic political system it now enjoys. They maintain that only direct popular election of the President and Vice President is consistent with modern democratic values and practice. Survey research consistently shows broad popular support for direct election.<sup>23</sup> In its most recent question on the issue, asked in January 2013, the Gallup Poll reported that 63% of respondents favored an amendment providing for direct popular election, while 29% favored retention of the electoral college. This finding mirrors those recorded by Gallup as early as 1967.<sup>24</sup>

Defenders of the electoral college system reject this suggestion; they maintain that while it may be indirect, it is not undemocratic—electors are chosen by the voters in free elections. They argue that the system prescribes a federal election of the President with votes tallied in each state, noting that the United States is a federal republic, not a plebiscitary democracy. The states, they assert, are long-established entities: distinct political, social, and economic communities that exercise substantial authority in many areas of governance, including presidential elections. The Founders, they note, intended that choosing the President would be an action Americans take both as citizens of the United States and as members of their state communities.<sup>25</sup>

## **Structural Criticisms of the Electoral College System**

Beyond the fundamental claim that the electoral college is undemocratic, critics also cite what they identify as a wide range of structural flaws in the system; some of these are asserted to have origins in the constitutional provisions authorizing the electoral college system, while others are attributed variously to state legislation and political party practices.

### **Constitutional Issues**

Some of the electoral college system's asserted failings are attributed by its critics to its structure and provisions as established in Article II, Section 1 of the Constitution and the Twelfth Amendment.

### ***The Minority President: An Electoral College “Misfire”***

Perhaps the most widely cited structural criticism of the electoral college system is that it can lead to the election of Presidents and Vice Presidents who carry enough states to win a majority of the

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<sup>23</sup> See, for example, Peirce and Longley, *The People's President*, pp. 2-9.

<sup>24</sup> Lydia Saad, “Americans Call for Term Limits, End to Electoral College,” *The Gallup Poll*, January 18, 2013, at <http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx>.

<sup>25</sup> See, for example, Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington: American Enterprise Institute, 1977).

electoral vote, but who have gained fewer popular votes nationwide than their major opponents. This result has been variously referred to as “wrong winner”<sup>26</sup> or an electoral college “misfire,” and has occurred four times in the nation’s history, in 1824, 1876, 1888, and most recently in 2000.<sup>27</sup> Proponents of direct election claim this potential violates a fundamental democratic principle that the candidate winning the most popular votes should be elected. Electoral college supporters defend the system on the grounds that it is a federal election rather than a national plebiscite, and further note the system has delivered “the people’s choice” in 49 of 53 elections since ratification of the Twelfth Amendment, a success rate of 92.4%, as noted earlier in this report.

### ***Failure to Gain an Electoral College Majority: Contingent Election***

Contingent election, the electoral college “default” setting for cases in which no candidate receives the necessary majority of electoral votes, has also been cited as a structural failing of the system. If the presidential and/or vice presidential candidates fail to receive a simple majority of the electoral college votes, the Twelfth Amendment to the Constitution provides that the House of Representatives chooses the President and the Senate chooses the Vice President by contingent election.<sup>28</sup> In a contingent election, however, each state casts a single vote for President in the House, while each Senator casts a single vote for Vice President.<sup>29</sup>

Critics of the contingent election system generally argue that it further removes the choice of President and Vice President from the voters. That is, members of the House and Senate are free to exercise their choice without regard to the winners of the popular vote in their districts, states, or in the nation at large. Moreover, by effectively granting each state an equal vote, they claim that contingent election fails to account for great differences in population—and the number of votes cast—in the various states. Finally, it may be noted that the Twelfth Amendment does not provide for District of Columbia participation in a contingent election in the House and Senate. While the ratification of the Twenty-third Amendment in 1961 granted the District of Columbia three votes in the electoral college, the nation’s capital would be effectively disenfranchised in a

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<sup>26</sup> See, for instance, David W. Abbott and James P. Levine, *Wrong Winner, The Coming Debacle in the Electoral College* (New York, Praeger, 1991), Neal R. Peirce and Lawrence D. Longley, *The People’s President, The Electoral College in American History and the Direct Vote Alternative* rev. ed. (New Haven, CT: Yale University Press, 1980), “Chances of a Misfire,” pp. 116-119.

<sup>27</sup> In 1824, John Quincy Adams received fewer popular and electoral votes than Andrew Jackson, his major opponent, but was chosen President by contingent election, a process discussed in the next section of this report. In 1876, Republican Rutherford B. Hayes received fewer popular votes than his opponent, Democrat Samuel J. Tilden, but won a bitterly-contested election by one electoral vote. In the presidential election of 1888, Republican Benjamin Harrison received fewer popular votes than his major opponent, Democrat Grover Cleveland, but won the election with more electoral college votes. The incidence of a “minority President” occurred most recently in the closely contested presidential election of 2000, when Democratic candidates Al Gore, Jr. and Joseph Lieberman gained 50,992,335 popular votes to 50,455,156 for Republican candidates George W. Bush and Richard Cheney (*Congressional Quarterly’s Guide to U.S. Elections*, 4<sup>th</sup> ed. (Washington: CQ Press, 2001), vol. 1, p. 688.) After a bitter dispute over election results in Florida that was ultimately decided by the Supreme Court, the Republican nominees were elected, having won 30 states with 271 electoral votes, while their Democratic opponents took 20 states and the District of Columbia with 266 electoral votes (one District of Columbia elector cast a blank ballot in protest against the outcome).

<sup>28</sup> For further information, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by (name redacted).

<sup>29</sup> There is evidence the Founders assumed that contingent election would become the norm, once the protean figure of George Washington passed from the scene. The assumption was that no subsequent candidate would be able to command the same level of nationwide recognition and support. See Peirce and Longley, *The People’s President*, p. 26.

contingent election, as it is not a state and sends neither Senators nor Representatives to Congress.

Defenders might counter by noting that contingent election is a “break glass only in case of an emergency” procedure, and has been required only once, under arguably unique circumstances,<sup>30</sup> in the 53 presidential elections since ratification of the Twelfth Amendment.

### ***The Decennial Census Issue***

An additional structural issue is that the electoral college system bases allocation of electoral votes on the results of each decennial census. After each census, all 435 Members of the House of Representatives are reapportioned among the states: some states gain Representatives, others lose them, and some remain unchanged. Gains or losses in House seats lead to comparable adjustments to state electoral vote allocations following the census. For instance, the most notable adjustments following the 2010 census were Texas, which gained four House seats and whose electoral vote allocation rose from 34 to 38, and New York, which lost two House seats, and whose electoral vote allocation fell from 31 to 29. The decennial reallocation of electoral votes is reflected in the first presidential election following the census; for instance, electoral college reallocations resulting from the 2010 census were in place for the 2012 election, and will continue for the 2016 and 2020 elections. This decennial reapportionment of electors fails, however, to account for significant population shifts that often occur *during* the course of a decade. Thus, the allocation of electoral votes for the next two elections will reflect the 2010 population distribution among the states, but makes no provision for changes during the decade. States that enjoy greater population gains during the current decade will not see those increases translated into more presidential electors until 2024. Until then, they will arguably be under-represented in the electoral college, while by the same logic, those that will ultimately lose seats and electors will be over-represented.<sup>31</sup>

### ***The Faithless Elector***

The Twelfth Amendment to the Constitution directs presidential electors to “meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves....” It offers no further guidance beyond this instruction. There is ample evidence that the Founders intended electors to be representatives of their state political communities, free agents, able to vote for the persons they thought best fit for the presidency or vice presidency. Perhaps naively, they failed to anticipate the growth of partisanship and a nascent party system that emerged as early as President Washington’s second Administration. The job of the elector was therefore quickly transformed from that of dispassionate judge to loyal party agent, expected to vote for the candidates designated by the party. So they remain today, and although nearly all electors since the earliest presidential elections have voted for the candidates to whom they were pledged, from time to time one or more electors have voted against the instructions of the electorate. Since the 1948 presidential election, nine “faithless” or “unfaithful” electors have cast votes for candidates other than those to whom they were pledged, and one cast a blank ballot.<sup>32</sup>

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<sup>30</sup> Four closely matched major candidates contested the 1824 election, splitting the electoral vote.

<sup>31</sup> Abbott and Levine, *Wrong Winner*, pp. 82-83.

<sup>32</sup> In ascending chronological order they were: 1948: a Tennessee elector for Harry Truman (D), voted for Strom (continued...)

Twenty-six states and the District of Columbia attempt to bind their electors by one of several means, generally by requiring an oath or pledge or requiring electors to vote for the candidates of the political party the elector represents.<sup>33</sup> In 1952, the Supreme Court held in *Ray v. Blair* that political parties could exercise state-delegated authority to require elector-candidates for the office of elector to pledge to support the party's presidential and vice presidential nominees.<sup>34</sup> The Court did not, however, rule on the constitutionality of state laws that bind electors. Many commentators suggest that binding electors and the pledges that electors make are constitutionally unenforceable, and that electors remain free agents who may vote for any candidate they choose.<sup>35</sup>

From the standpoint of electoral college defenders, it may be noted that 9,137 electoral votes have been cast in the 17 presidential elections held since 1948. Of these, the eight that were indisputably cast against voters' instructions comprised less than one one-thousandth of one percent (0.00088%) of the total and had no effect on the outcome of any election.<sup>36</sup>

## Legislative and Political Issues

The second category of asserted distortions caused by the electoral college arrangement stems from procedures that have been added to its constitutional provisions by the states over a long period of time. The most important issue is the nearly universal adoption of the general ticket, or winner-take-all, system for awarding electoral votes.

### *The General Ticket System — "Winner Take All"*

The general ticket system of awarding electoral votes is cited by critics as a structural failing of the electoral college system, an issue that does not stem from the Constitution, but rather from state laws. At the present time, 48 states and the District of Columbia provide that the ticket of presidential and vice presidential candidates that wins the most popular votes wins all the electoral votes for that jurisdiction. By awarding all of a state's electoral votes to the winner, regardless of the closeness of the popular vote results, the general ticket system is said to disenfranchise or discount the votes of citizens who preferred the candidates receiving fewer votes. This asserted inequity is said to be particularly apparent in states where the popular vote is closely divided.<sup>37</sup> Conversely, electoral college defenders claim the general ticket system's

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Thurmond (States' Rights); 1956: an Alabama elector for Adlai Stevenson (D) voted for Walter Jones, a local judge; 1960: an Oklahoma elector for Richard Nixon (R) voted for Harry F. Byrd; 1968: a North Carolina elector for Richard Nixon voted for George Wallace (American Independent); 1972: a Virginia elector for Richard Nixon (R) voted for John Hospers (Libertarian); 1976: a Washington elector for Gerald Ford (R) voted for Ronald Reagan; 1988: a West Virginia elector for Michael Dukakis voted for Lloyd Bensten (D), Dukakis's vice presidential running mate, for President; 2000: a District of Columbia elector for Al Gore cast a blank ballot; and 2004: a Minnesota elector for John Kerry (D) voted for John Edwards (D), Kerry's vice presidential running mate, for President.

<sup>33</sup> For individual state requirements, see *Nomination and Election of the President and Vice President*, pp. 310-345.

<sup>34</sup> 343 U.S. 214, 228-231 (1952).

<sup>35</sup> See *U.S. Constitution, Analysis and Interpretation*, "The Constitution Annotated," Article II Analysis, Article II, Section 1, clauses 2-4, Election: Electors as Free Agents, available online to Members of Congress and staff at <http://crs.gov/conan/default.aspx?mode=topic&doc=Article02.xml&t=1|4&s=1&c=2>. See also Longley and Peirce, *The People's President*, pp. 96-101.

<sup>36</sup> Total and percentage computed by CRS. See also Peirce and Longley, *The People's President*, pp. 96-102.

<sup>37</sup> For example, in the 2012 presidential election, President Obama won Florida by a margin of 51.4% of the popular (continued...)

“multiplier” effect tends to reinforce the overall election results by magnifying the winning ticket’s margin and deter frivolous challenges to the state-by-state results.<sup>38</sup>

Maine and Nebraska provide the only exceptions to the general ticket system, having established what is referred to as the “district system” of awarding electoral votes. In these states, as noted earlier in this report, votes are counted both by congressional district and on the statewide level. The candidates winning the most popular votes statewide are awarded the two electoral votes reflecting the state’s “senatorial” electors, while the candidates winning in each congressional district are awarded one elector, reflecting the results in that district.<sup>39</sup> Proponents of direct election criticize the district system on the grounds that adding the “senatorial” electors to the statewide winners’ total has much the same effect of disadvantaging the losing candidates and their supporters. District system supporters claim that it better reflects geographical differences in candidate support throughout a state, thus delivering an electoral vote that more accurately represents local preferences.

### *Alleged Biases of the Electoral College System*

Opponents of the electoral college identify another category of alleged distortion built into the system. These are said to provide an advantage derived from state population or voter characteristics or behavior.

As the composition of the electoral college is partially based on state representation in Congress, some maintain it is inconsistent with the “one person, one vote” principle.<sup>40</sup> The Constitutional Convention agreed on a compromise plan whereby less populous states were assured of a minimum of three electoral votes, based on two Senators and one Representative, regardless of state population. Since electoral college delegations are equal to the combined total of each state’s Senate and House delegation, its composition is arguably weighted in favor of the “small,” or less populous, states. The two “senatorial” electors to which each state is entitled are said to confer on them an advantage over more populous states, because voters in the less populous ones cast more electoral votes per voter. For instance, in 2012, voters in Wyoming, the least populous state, cast 249,061 popular votes and three electoral votes for President, or one electoral vote for every 83,020 voters. By comparison, Californians cast 13,038,547 popular votes and 55 electoral votes, or one electoral vote for every 237,064 voters.<sup>41</sup> As a result of this distribution of electoral votes

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vote to Governor Romney’s 49.1%. Under the general ticket system, however, the President also won all 29 of the state’s electoral votes. Source: U.S. Federal Election Commission, *Official 2012 General Election Results*, at <http://www.fec.gov/pubrec/fe2012/2012presgeresults.pdf>.

<sup>38</sup> See also Peirce and Longley, *The People’s President*, pp. 110-112.

<sup>39</sup> It should be recalled here and elsewhere in this report that despite the nearly universal reference to electoral votes as being awarded to the winning candidates, in fact, it is the tickets or slates of electors pledged to the candidates who win the most popular votes who are elected.

<sup>40</sup> The one person, one vote principle was established by the U.S. Supreme Court in congressional and state legislative reapportionment and redistricting, respectively in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), for state legislative districts, and *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964), for U.S. House of Representatives districts, in order to insure equal representation for equal numbers of people.

<sup>41</sup> U.S. Federal Election Commission, *Official 2012 General Election Results*.

among the states, it is argued that “small” states have an advantage over large states because their electoral vote totals are larger in proportion to their population.<sup>42</sup>

While it is generally recognized that small states possess an *arithmetical* advantage in the electoral college, as noted above, some observers hold that, conversely, the most populous (large) states enjoy a *voting power* advantage, because they control the largest blocs of electoral votes. In combination with the general ticket system, this is said to confer an advantage on voters in these states because the large blocks of electoral votes controlled by the states have greater ability to influence the outcome of presidential elections. To use the previously cited example, a voter in Wyoming in 2012 could influence only three electoral votes, whereas a voter in California could influence 55 electoral votes in the same presidential election. According to this argument, known as the “voting power” theory, the electoral college system actually provides an *advantage* to the most populous states, and disadvantages all other states and the District of Columbia.<sup>43</sup>

Another theory centers on the asserted advantage enjoyed by ethnic minority voters. According to this argument, minority voters, principally African Americans, Latinos, and Jews, tend to be concentrated in populous states with large electoral college delegations. By virtue of this concentration, they are said to exert greater influence over the outcomes in such states because their voting patterns tend to favor candidates whose policies they perceive to be in their interest, thus helping win the states and their electoral votes for these candidates.<sup>44</sup>

A further alleged bias in the electoral college system is said to stem from the constitutional mandate that

Representatives shall be apportioned among the several States according to their respective numbers, *counting the whole number of persons in each state* (emphasis added), excluding Indians not taxed.<sup>45</sup>

Except for the two “senatorial electors,”<sup>46</sup> a state’s electoral vote allocation depends on the number of Representatives in Congress apportioned to it. A state’s electoral vote is based to this extent on residents, not on citizens, and therefore, it is asserted that states that have high numbers of noncitizen residents counted in the Census are said to enjoy a bias in the allocation of both Representatives and electoral votes.<sup>47</sup> For instance, the United States Election Project at George

<sup>42</sup> Abbott and Levine, *Wrong Winner*, pp. 76-77; Gordon J. Hylton, “How Much Difference Does the Small State Advantage in the Electoral College Really Make?” *Marquette University Faculty Law School Blog*, March 8, 2010, available online at <http://law.marquette.edu/facultyblog/2010/03/08/how-much-difference-does-the-small-state-advantage-in-the-electoral-college-really-make/>. See also Peirce and Longley, *The People’s President*, pp. 112-113.

<sup>43</sup> Peirce and Longley, *The People’s President*, p. 125.

<sup>44</sup> See U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Direct Election of the President and Vice President of the United States, hearings on S.J.Res. 28, 96<sup>th</sup> Cong., 1<sup>st</sup> sess.*, March 27, 30 April 3, 9, 1979 (Washington: GPO, 1979), pp. 163-219. The validity of these assertions was, however, questioned by Peirce and Longley in *The People’s President*, pp. 127-130. Writing of conditions in the 1970s, they maintained that the electoral college system actually disadvantaged African American voters. For an opposing view, see Ronald D. Rotunda, “How the Electoral College Works, and Why It Works So Well,” Cato Institute, Commentary, November 13, 2000, at <http://www.cato.org/publications/commentary/how-electoral-college-works-why-it-works-well>.

<sup>45</sup> U.S. Constitution, 14<sup>th</sup> Amendment, Section 2, clause 1.

<sup>46</sup> The two electors allocated to each state in addition to electors equal in number to its House of Representatives delegation are often referred to as “senatorial” or “constant two” because each state is assigned two, the same number as its Senate delegation.

<sup>47</sup> Leonard Steinhorn, “Without Voting, Non-Citizens Could Swing the Election for Obama,” *Washington Post*, (continued...)



Mason University found that in 2012, 17.6% of California's population were noncitizens, the highest proportion of any state, followed by Nevada at 13.7% and Texas at 13.5%.<sup>48</sup> A recent article discussing this asserted bias concluded that, due to large concentrations of noncitizens, California gained five electors from the most recent reapportionment, Texas gained two, and New York, Florida, and Washington each gained one elector that they would not have received if Representatives and electoral votes were allocated according to *citizen* population in the states, rather than their resident populations. Conversely, the author calculated that Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, Ohio, Oklahoma, and Pennsylvania each lost one elector due to the noncitizen population advantage.<sup>49</sup>

Another alleged advantage or bias of the electoral college centers on voter participation in the states. Neal Peirce and Lawrence Longley, writing in *The People's President*, suggested that voters in states that have lower rates of participation may enjoy an advantage because it takes fewer popular votes per elector to win the state and all its electoral votes.<sup>50</sup> For instance, in the 2012 election, Hawaii, with four electoral votes, had the lowest rate of voter participation: 44.5% of eligible voters participated, casting 434,697 votes for President, a figure that equals 108,674 votes for each elector. By comparison, Minnesota, with 10 electoral votes, had the highest rate of participation, 75.7% of eligible voters, who cast 2,936,561 votes for president, a figure that equals 293,656 votes per elector.<sup>51</sup>

These various biases have been debated over the years. For instance, the alleged minority vote advantage was advanced by the Presidents of the American Jewish Congress and the National Urban League<sup>52</sup> as a reason for their support of the electoral college system during hearings before the Senate Judiciary Committee's Subcommittee on the Constitution as it considered a direct election amendment in 1979,<sup>53</sup> while Alexander Bickel also supported the electoral college in this context.<sup>54</sup> Conversely, other commentators have sought to refute many of the "biases" of the electoral college system.<sup>55</sup>

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October 5, 2012, at [http://www.washingtonpost.com/opinions/without-voting-noncitizens-could-swing-the-election-for-obama/2012/10/05/b9d99be8-0be9-11e2-bd1a-b868e65d57eb\\_story.html](http://www.washingtonpost.com/opinions/without-voting-noncitizens-could-swing-the-election-for-obama/2012/10/05/b9d99be8-0be9-11e2-bd1a-b868e65d57eb_story.html).

<sup>48</sup> George Mason University, United States Election Project, 2012 General Election Turnout Rates, at [http://elections.gmu.edu/Turnout\\_2012G.html](http://elections.gmu.edu/Turnout_2012G.html).

<sup>49</sup> Steinhorn, "Without Voting, Non-Citizens Could Swing the Election for Obama."

<sup>50</sup> Peirce and Longley, *The People's President*, pp. 113, 114.

<sup>51</sup> George Mason University, United States Election Project, 2012 General Election Turnout Rates.

<sup>52</sup> U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Direct Election of the President and Vice President of the United States*, hearings on S.J.Res. 28, 96<sup>th</sup> Cong., pp. 163-219.

<sup>53</sup> For further information on the alleged technical biases of the electoral college, see Lawrence D. Longley and James D. Dana, Jr., "The Biases of the Electoral College in the 1990s," *Polity*, vol. 25, no. 1, autumn, 1992, pp. 123-45 (the author of this report has been unable to identify any studies updating Professor Longley's work since his death in 2002); and U.S. Federal Election Commission, National Clearinghouse on Election Administration, *The Electoral College*, by William C. Kimberling, Washington, 1992, p. 12.

<sup>54</sup> Alexander M. Bickel, *Reform and Continuity: The Electoral College, the Convention, and the Party System* (New York: Harper and Row, 1971), pp. 4-9.

<sup>55</sup> See, for instance, Harvey Zeidenstein, *Direct Election of the President* (Lexington, MA: D.C. Heath, Lexington Books, 1973).



## The “Electoral College Lock”

A final asserted bias considered in this report is the so-called “electoral college lock” that has been claimed to provide a lasting presidential election advantage to a particular party’s candidates, originally Republicans, but more recently, Democrats. The lock is loosely defined as a tendency of the system to favor presidential candidates of one party over another. It is said to operate because a bloc of states possessing a large, sometimes decisive, number of electoral votes can be reliably expected to vote in successive elections for the candidates of the political party that tends to dominate those states. The lock is asserted to be dependent, as with other electoral college issues, on the general ticket system, which is examined earlier in this report.

In the late 1960s, political analyst and historian Kevin Phillips developed a thesis that political and social developments were responsible for a political realignment that was arguably the most important factor in creating the lock. In *The Emerging Republican Majority*, he predicted that growing Republican Party conservatism and the Democratic Party’s embrace of the civil rights movement and a socially and politically progressive or liberal agenda would combine with demographic developments favorable to the “Sunbelt” states to produce a restructuring of the nation’s political balance in favor of the Republican Party.<sup>56</sup> Political commentators generally credit Horace Busby, a political advisor to President Lyndon B. Johnson, with naming rights for the lock.<sup>57</sup> During the 1980 presidential election campaign, Busby reviewed electoral college trends since the 1968 election and concluded that “... Democratic candidacies for the White House may no longer be viable. *The Republican lock* (emphasis added) is about to close; it will be hard for anyone to open ... between now and the year 2000.”<sup>58</sup>

At the time Busby coined the term electoral college lock, the phenomenon was largely presumed to benefit the Republican Party. For a period of at least 20 years, beginning in 1968, observers pointed to a nearly uninterrupted string of GOP presidential election victories as proof of the lock.<sup>59</sup> Republican candidates won five of six elections during this period, taking an average of 417 of 538 electoral votes per election.<sup>60</sup>

In recent years, however, particularly since the 2008 and 2012 presidential elections, some observers have discerned a shift in the electoral college lock in favor of Democratic Party presidential candidates. They note that Democratic candidates have won four of the past six presidential elections by convincing electoral college margins, and that 18 states disposing of 242 electoral votes, sometimes referred to as “the blue wall,”<sup>61</sup> have voted Democratic in all six. This tendency is said to provide both a solid base for Democratic candidates, and a serious obstacle to Republicans in these contests.<sup>62</sup> It is attributed in part to the fact that social attitudes in the general

<sup>56</sup> See Kevin P. Phillips, *The Emerging Republican Majority* (New Rochelle, NY: Arlington House, 1969).

<sup>57</sup> Charlie Cook, “Color Them Competitive,” *Cook Political Report*, January 30, 2007, at, <http://cookpolitical.com/story/1359>.

<sup>58</sup> Godfrey Hodgson, *More Equal Than Others, America from Nixon to the New Century* (Princeton, NJ: The Century Foundation, 2004), p. 47.

<sup>59</sup> “Electoral College’s Cold Calculus,” *New York Times*, July 8, 1988, at, <http://www.nytimes.com/1988/07/08/opinion/the-electoral-college-s-cold-calculus.html>.

<sup>60</sup> Statistics compiled by CRS from National Archives and Records Administration, U.S. Electoral College, “Historical Election Results,” at <http://www.archives.gov/federal-register/electoral-college/historical.html>.

<sup>61</sup> David Gergen, “For GOP, a Scary ‘Blue Wall’ Awaits,” *CNN Opinion*, November 4, 2014, at <http://www.cnn.com/2014/11/03/opinion/gergen-blue-wall-republicans-2016/>.

<sup>62</sup> Richard Baehr, “Electoral College: Advantage Democrats, American Thinker,” March 1, 2013, at (continued...)

public are said to have grown more favorable to Democratic candidates, and that, as one observer noted, “the demographic pendulum is swinging toward the Democrats. Young voters, Hispanics and a more active African-American electorate added states like Nevada, New Mexico, Colorado and Virginia to President Obama’s winning coalition in the past two elections.”<sup>63</sup> Since 1992, as noted above, Democratic candidates have won four of six presidential elections, taking an average of 327 electoral votes per election.<sup>64</sup>

Other observers, however, caution against accepting the electoral college lock as a deterministic given. They note that the purported locks of the 1960s through 80s, and that of the 1990s through the present can also be attributed to a wide range of factors, including such influences as domestic social and economic conditions, international issues of war and peace, U.S. involvement in conflict abroad, scandals of various sorts, candidate popularity, and even the competence, or lack thereof, of a presidential nominee’s campaign.<sup>65</sup>

## **Electoral College Reform Options: End It? Mend It? Leave It Alone?**

Congress may consider three basic options if it addresses the question of electoral college reform. The first choice, widely advocated for at least 50 years, would repeal the sections of the Constitution dealing with the electoral college—clause 2 of Article II, Section 1 and the Twelfth Amendment—and substitute direct popular election. The second, largely dormant for several decades, would reform the electoral college system by eliminating some of the alleged problem areas cited in the previous section of this report. A third option would be to leave arrangements as they are at present.

### **End It—Direct Popular Election Replaces the Electoral College**

The direct election alternative would abolish the electoral college, substituting a single nationwide count of popular votes. The candidates winning a plurality of votes would be elected President and Vice President. Most direct election proposals would constitutionally mandate today’s familiar joint tickets of presidential/vice presidential candidates, a feature that is already incorporated in state law.<sup>66</sup> Some would require simply that the candidates that gain the most

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[http://www.americanthinker.com/blog/2012/11/electoral\\_college\\_advantage\\_democrats.html](http://www.americanthinker.com/blog/2012/11/electoral_college_advantage_democrats.html).

<sup>63</sup> Ron Brownstein, “The American Electorate Has Changed and There’s No Turning Back,” *Nationaljournal.com*, November 8, 2012 at <http://www.nationaljournal.com/magazine/the-american-electorate-has-changed-and-there-s-no-turning-back-20121108>; “The Tarnish of the Electoral College,” *New York Times*, November 15, 2012, at <http://www.nytimes.com/2012/11/16/opinion/the-tarnish-of-the-electoral-college.html>.

<sup>64</sup> “Historical Election Results,” at <http://www.archives.gov/federal-register/electoral-college/historical.html>.

<sup>65</sup> Jonathan Bernstein, “The Electoral College: Not That Crucial,” *Washingtonmonthly.com*, June 9, 2011, at [http://www.washingtonmonthly.com/ten-miles-square/2011/06/the\\_electoral\\_college\\_not\\_that030154.php](http://www.washingtonmonthly.com/ten-miles-square/2011/06/the_electoral_college_not_that030154.php); Mark Rhoads, “Democratic Electoral Lock is Nonsense,” *Illinois Review*, February 26, 2011, at <http://illinoisreview.typepad.com/illinoisreview/2013/02/dem-electoral-lock-is-nonsense.html>.

<sup>66</sup> This provision, currently used in all states and the District of Columbia, requires each voter to cast a single vote for a joint ticket of two candidates, one for President and one for Vice President. This insures that the President and Vice President will always be of the same political party.

popular votes be elected, while others would set a minimum threshold of votes necessary to win election—generally 40% of votes cast. Some proposals would require a majority to elect, and if no presidential ticket were to win either a majority or 40% of the popular vote, then the two tickets with the highest popular vote total would compete in a subsequent runoff election. Alternatively, some versions of the direct popular election plan would provide for Congress, meeting in joint session, to elect the President and Vice President if no ticket reached the 40% or majority threshold.

## **Direct Election—Discussion**

Proponents of direct popular election cite a number of factors in support of the concept, many of which address the issues cited in the previous sections of this report. As their core argument, they assert that the process would be simple, national, and democratic. They maintain that direct popular election would provide for a single, democratic choice, allowing all the nation's voters to choose the President and Vice President directly, with no intermediaries. The "people's choice" would always be elected. According to supporters of direct election, every vote would carry the same weight in the election, no matter where in the nation it was cast. No state or group of voters would be advantaged, nor would any be disadvantaged. Direct election would eliminate the potential complications that could arise under the current system in the event of a presidential candidate's death between election day and the date on which electoral vote results are declared, since the winning candidates would become President-elect and Vice President-elect as soon as the popular returns were certified.<sup>67</sup> All mechanisms of the existing system, such as provisions in law for certifying the electoral vote in the states and the contingent election process, would be replaced by these comparatively simple requirements.

Critics of direct election and electoral college defenders seek to refute these arguments. Direct election proponents claim their plan is more democratic and provides for "majority rule," yet most direct election proposals require only a plurality—as little as 40% of the vote—in order to elect the President. Other versions include no minimum vote threshold at all, or provide for election by Congress in these circumstances. How, they might ask, are plurality Presidents or those elected by Congress, a practice they might note that was rejected by the Founders, to be reconciled with the ideal of strict majoritarianism? Opponents might further maintain that direct election would result in political fragmentation, as various elements of the political spectrum form competing parties, and regionalism, as numerous splinter candidates claiming to champion the particular interests of various parts of the country, entered presidential election contests. Further, they assert that direct election would foster acrimonious and protracted post-election struggles, rather than eliminate them. Under direct election, they suggest, every close election might resemble the bitter post-election contests in 2000, not just in one state, but nationwide, as both parties seek to gain every possible vote. They contend that such rancorous disputes could have profound negative effects on political comity in the nation, and might ultimately undermine public confidence in the legitimacy of the federal government.

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<sup>67</sup> For further information on the succession question, please consult CRS Report RS22992, *The President-Elect: Succession and Disability Issues During the Transition Period*, by (name redacted).

## Mend It—Reform the Electoral College

Reform measures that would retain the electoral college in some form have included several variants. Most versions of these plans share certain common elements. They would eliminate the office of presidential elector while retaining electoral votes; award electoral votes automatically, that is, directly to the candidates, without the action of electors; and retain the requirement that a majority of electoral votes is necessary to win the presidency. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates, a practice currently provided by state law. The three most popular reform proposals include (1) the automatic plan, which would award electoral votes automatically on the current general ticket/winner-take-all basis in each state; (2) the district plan, as currently adopted in Maine and Nebraska, which would automatically award one electoral vote to the winning ticket in each congressional district in each state, but would also assign each state's two additional "senatorial" electoral votes to the statewide popular vote winners; and (3) the proportional plan, which would automatically award each state's electoral votes in proportion to the percentage of the popular vote gained by each ticket.<sup>68</sup>

## Electoral College Reform—Discussion

Friends of the electoral college, as presently structured, or reformed, offer various arguments in its defense.<sup>69</sup> They reject the suggestion that it is undemocratic: electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19<sup>th</sup> century. They cite the electoral college as a major element in federalism, noting that the Constitution prescribes a federal election of the President by which votes are tallied in each state. As a federal republic, they assert the states have a legitimate role in many areas of governance, and that the Founders intended that in choosing the President voters act both as citizens of the United States, and as members of their state communities. Proponents of the electoral college maintain that the assignment of two electors to each state regardless of population is an additional "federal" component of the presidential election system, comparable to the two Senators assigned by the Constitution to each state. Further, they maintain the electoral college system promotes political stability. Parties and candidates must conduct ideologically broad-based campaigns throughout the nation in order to assemble a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system. They find the "faithless elector" argument to be specious: as noted previously in this report, only nine electoral votes have been cast against instructions since 1820, and none has ever influenced the outcome of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector. On a practical level, they note that the general ticket system generally magnifies the winning ticket's electoral vote margin, an action they claim tends to bring closure to the election process and promote the legitimacy of the winning candidates.<sup>70</sup>

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<sup>68</sup> For detailed information on the automatic, district, and proportional electoral college reform plans, please see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by (name redacted).

<sup>69</sup> See Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington: American Enterprise Institute, 1977); Tara Ross, *Enlightened Democracy, The Case for the Electoral College* (Dallas, TX: Colonial Press, 2004).

<sup>70</sup> Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996) pp. 10-16.

Supporters of direct election and critics of the electoral college counter that the existing system is cumbersome, potentially anti-democratic, and beyond saving. As noted earlier they maintain that the existing arrangement is the antithesis of their simple and democratic proposal. Its worst flaw has thwarted the public will on three occasions, by electing as President a candidate who received fewer popular votes than his primary opponent, and by throwing election into the House of Representatives in a fourth. They find the Twelfth Amendment's contingent election provisions to be even less democratic than the primary provisions of Article II, Section 1 of the Constitution.<sup>71</sup> They cite the decennial Census issue, the provision of "senatorial" electors regardless of state population, the prospect of the faithless elector, and the general ticket system as providing opportunities for political mischief and deliberate distortion of the voters' choice. They warn that although all states currently provide for choice of electors by popular vote, state legislatures still retain the constitutional option of taking this decision out of the voters' hands, and selecting electors by some other, less democratic means.<sup>72</sup> This option was discussed in Florida in 2000 during the post-election recounts,<sup>73</sup> and its survival demonstrates that even one of the more "democratic" features of the electoral college system is not guaranteed, and could be changed arbitrarily by politically motivated state legislators.

## Leave It Alone

For nearly 30 years, the issue of electoral college reform held a prominent place on the agenda of successive Congresses. Between the late 1940s through 1979, hundreds of electoral college reform proposals were introduced in both chambers. They embraced a wide range of approaches to the question, but generally followed the outlines set out in the previous section: "ending it" by eliminating the entire electoral college system and establishing direct popular election, or "mending it" by reforming its more controversial provisions. The question of electoral college reform or replacement was actively considered throughout these years. Proposed amendments were the subject of hearings in the Senate and House Judiciary Committees on 17 different occasions between 1948 and 1979, and, most notably, electoral college reform proposals were debated in the full Senate on five occasions, and twice in the House during this period. Proposals were approved by the necessary two-thirds majority twice in the Senate and once in the House, but never in the same Congress.<sup>74</sup>

Following the 1979 defeat of a direct popular election amendment on the Senate floor, and the subsequent retirement or defeat of prominent congressional advocates, the question of electoral college reform largely disappeared from public attention and Congress's legislative agenda. The Senate's failed vote on a direct popular amendment marked the last occasion on which either chamber took floor action on an electoral college reform measure of any kind. With few exceptions, Congress has largely "left it alone" since that time. Although Senators and

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<sup>71</sup> For more detailed information on the contingent election process, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by (name redacted).

<sup>72</sup> U.S. Constitution, Article II, Section 1, clause 2: "Each State shall appoint in such Manner as the Legislature thereof may direct [emphasis added], a number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...."

<sup>73</sup> Michael White, "The Electoral College, A Message From the Dean," *Prologue* (National Archives), fall 2008, vol. 40, no. 3, at <http://www.archives.gov/publications/prologue/2008/fall/electoral.html>.

<sup>74</sup> For a detailed examination and analysis of these efforts, see Peirce and Longley, *The People's President*, rev. ed. pp. 131-206.

Representatives continue to introduce reform proposals in almost every Congress, few have received anything more than routine committee referral, and in time, the number of measures introduced per Congress has dropped almost to nil. Even after the presidential election of 2000, which featured a so-called “misfire,” there was little evidence of support in Congress for constitutional reform of the electoral college system.<sup>75</sup> Since that closely contested election, the general ticket system’s magnifier effect has generally conformed to contemporary expectations. In the presidential election of 2012, President Barack Obama and Vice President Joseph Biden, the Democratic nominees, were able to translate a popular vote margin of 3.85% (51.06% to 47.21%<sup>76</sup> and 65,899,660 popular votes to 60,932,152 popular votes) over Republican contenders Governor Mitt Romney and Representative Paul Ryan into an overwhelming electoral vote margin of 62.0% to 38.0% (332 electoral votes to 206).<sup>77</sup>

The most recently introduced constitutional reform measure was H.J.Res. 36, a proposed amendment that would have provided for direct popular election. Introduced in the 112<sup>th</sup> Congress by Representative Jesse L. Jackson, Jr., and 29 co-sponsors, the resolution provided that “the President and Vice President shall be elected jointly by the direct vote of the citizens of the United States, without regard to whether the citizens are residents of a State.” This measure was referred to the House Judiciary Committee’s Subcommittee on the Constitution, but received no further consideration.

No amendment proposing direct popular election or reform of the electoral college has been introduced to date in the 113<sup>th</sup> Congress, although H.J.Res. 7 would extend the right to vote for President and Vice President to residents of dependent territories and commonwealths of the United States.<sup>78</sup>

## Trends in Congressional Electoral College Reform Proposals

Within the context of declining congressional activity with respect to the electoral college, two trends emerge. First, the few proposed amendments introduced in the past decade all embraced the “end it” option, substituting direct popular election for the electoral college; no proposal to reform the electoral college has been introduced since the 107<sup>th</sup> Congress. Second, the scope of proposed direct popular election amendments arguably evolved in complexity and detail.

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<sup>75</sup> Congress responded with the Help America Vote Act, enacted in 2002. For additional information, please consult CRS Report RS20898, *The Help America Vote Act and Election Administration: Overview and Issues*, by (name redacted) and (name redacted).

<sup>76</sup> The remaining 1.73% of the popular vote was cast for minor party candidates.

<sup>77</sup> U.S. Federal Election Commission, *Official 2012 Presidential General Election Results*, at <http://www.fec.gov/pubrec/fe2012/2012presgeresults.pdf>.

<sup>78</sup> H.J.Res. 7, 113<sup>th</sup> Congress, introduced on January 3, 2103, by Delegates Donna M. Christensen, U.S. Virgin Islands, and Madeleine Bordallo, Guam. This proposal would authorize voting for President and Vice President by residents of “a territory or commonwealth of the United States.” The resolution’s relationship to the electoral college system is problematic, however, in that it does not seek to provide electoral votes for U.S. territories or the nation’s other associated jurisdictions, e.g., American Samoa, Guam, the U.S. Virgin Islands, Puerto Rico and the Commonwealth of the Northern Marianas. If direct popular election supplanted the electoral college, this measure would arguably extend the right to vote for President to voters in these jurisdictions. The resolution was referred to the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice. No further action has been taken to date.



Given the contemporary context, it may be that the first development reflected a decline in electoral college support, lack of interest in reform proposals, or simply the absence of a sense of urgency. It is highly likely that supporters of the current system would coalesce to defend the electoral college if its existence or integrity were endangered. Recent actions by the Heritage Foundation and the State Government Leadership Foundation identified later in this report arguably confirm this thesis.

The second trend is that recent proposed amendments not only provided for direct popular election, but also included provisions to enhance and extend federal authority in such areas as residence standards, definition of citizenship, national voter registration, inclusion of U.S. territories and other associated jurisdictions in the presidential election process, establishment of an election day holiday, and ballot access standards for parties and candidates. If approved and ratified, provisions such as these would provide Congress with enhanced authority to establish broad national election standards, potentially superseding current state and political party practices and requirements, at least with respect to federal elections.<sup>79</sup>

The prospect of increased federal involvement in the administration of presidential elections raises two potential issues. The first is whether such federal involvement in traditionally state and local practices would impose additional responsibilities and uncompensated costs on state and local governments. If so, such requirements might be considered to be unfunded mandates, as they could impose additional costs on sub-federal governments, and as such would be subject to points of order on the floor of both the House and Senate.<sup>80</sup> One response by the affected state and local governments might be to call for federal funding to meet the increased expenses imposed by federal requirements. Precedent for this exists in the grant program incorporated in the Help American Vote Act of 2002 (HAVA).<sup>81</sup> An additional issue centers on perceptions that such an amendment and resultant legislation might be regarded as federal intrusion in state and local responsibilities. For instance, a far-reaching scenario could include the gradual assumption of the election administration structure by the federal government. In this hypothetical case, questions could be raised as to (1) the costs involved; (2) whether a national election administration system could efficiently manage all the varying nuances of state and local conditions; and (3) what would be the long-term implications for federalism. Conversely, it could be asserted that (1) a national or federal election administration structure is appropriate for national elections; (2) state or local concerns are counterbalanced by the urgent requirement that every citizen be enabled and encouraged to vote; and (3) every vote should be accurately counted.

## State-Based Initiatives Since 2004

While Congress has not acted on the question of electoral college reform in recent years, there has been considerable activity in the states. Only an amendment can alter constitutional structure of the electoral college, but the states retain considerable authority concerning various aspects of

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<sup>79</sup> Congressional authority over federal elections stems from Article I Section 4, clause 1 of the Constitution for Congress, and Article II, Section 1, clause 4 for presidential electors. For further information and a detailed analysis of this authority, consult CRS Report RL30747, *Congressional Authority to Standardize National Election Procedures*, by (name redacted).

<sup>80</sup> For additional information, please consult CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by (name redacted) and (name redacted).

<sup>81</sup> Help America Vote Act (HAVA): P.L. 107-252; 116 Stat. 1666.



the system. For instance, as noted elsewhere in this report, Article II, Section 1, clause 2 gives the state legislature broad authority to “appoint” electors in any way they choose. In practice, this has been by popular election for 150 years. States also have authority over the formula by which electors are elected; as noted, 48 states and the District of Columbia use the general ticket system, but Maine and Nebraska adopted the district system or plan decades ago, an example of the states acting in their classic role as “laboratories of democracy.” In other words, the states are free to experiment with systems of elector selection and electoral vote allocation, up to a point. Over the past decade, both proportional and congressional district plan proposals have been advanced in the states, as identified in the following section, but none has been successful to date.

## **California: District and Proportional System Proposals, 2008, 2012, and 2014**

Since 2008, reform advocates in California have sought unsuccessfully to place legislative initiatives on the ballot that would have established the district plan on two separate occasions. In 2008 (the California Presidential Reform Act) and 2012 (the California Electoral College Reform Act), California district plan advocates proposed versions similar to those used in Maine and Nebraska as a legislative initiative to be decided by the voters. The 2008 initiative, in particular, was the subject of contentious political discussion and criticism on grounds that it violated the state constitution.<sup>82</sup> Supporters cited familiar arguments for the district plan, asserting that Republican votes in the Golden State were discounted by Democratic statewide majorities that took all 55 electoral votes in both elections. By comparison, if a district plan had been in place in California in 2012, the Democratic ticket, having won 41 congressional districts and the statewide vote, would have gained 43 electoral votes, whereas the Republican ticket, having taken 12 congressional districts, would have won 12 votes.<sup>83</sup>

In 2014, reform advocates proposed the California Split Electoral College Vote Distribution Initiative, which would have provided a rounded proportional allocation of electoral votes.<sup>84</sup> If the proportional plan as proposed had been in place in 2012, the Democratic ticket, with 60.2% of the popular vote, would have won 34 electoral votes; the Republican ticket, with 37.1% of the popular vote, would have won 20; and the Libertarian Party ticket, with 1.1% of the popular vote, would have gained 1 electoral vote.<sup>85</sup> Under the general ticket system, the Democratic candidates won all 55 electoral votes.

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<sup>82</sup> Vikram David Amar, “The So-Called Presidential Reform Act: A Clear Abuse of California’s Initiative Process,” *FindLaw Legal News and Commentary*, August 17, 2007, available at <http://writ.news.findlaw.com/amar/20070817.html>.

<sup>83</sup> “Daily Kos Statewide Election Results by Congressional and Legislative Districts,” *Daily Kos*, July 9, 2013, at <http://www.dailykos.com/story/2013/07/09/1220127/-Daily-Kos-Elections-2012-election-results-by-congressional-and-legislative-districts>.

<sup>84</sup> Under a rounded proportional plan, percentages of the popular vote are rounded to whole numbers in determining the number of electoral votes awarded to competing candidates.

<sup>85</sup> Computed by CRS from California Secretary of State, *Statement of Vote, November 6, 2012 General Election*, at <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

Ultimately, however, none of these proposed legislative initiatives reached the voters: supporters have been unable to gain enough petition signatures for any of the three to be placed on the ballot.<sup>86</sup>

## Colorado: Proportional System Proposal, 2004

On November 2, 2004, Colorado voters rejected a state constitutional amendment, Amendment 36, that would have provided a rounded proportional allocation of electoral votes.<sup>87</sup> After a well-publicized campaign that gained a degree of national interest, the proposal was ultimately defeated by the voters.<sup>88</sup> Had the proportional plan proposed by Amendment 36 been in effect in Colorado for the 2012 presidential election, the Democratic Party ticket would have taken five Colorado electors with 51.5% of the popular vote, while the Republican ticket would have gained four electors from their 46.2% of the vote.<sup>89</sup> Under the winner-take-all system, the Democratic ticket received all nine Colorado electoral votes.

## Michigan: District System Proposal, 2011

On November 29, 2011, a Michigan state representative introduced House Bill 5184, which proposed a standard district system for the election of presidential electors—one for winning the popular vote in each congressional district, and two for the ticket winning the statewide popular vote.<sup>90</sup> Advocates claimed the advantage for the district system that it makes every vote count, unlike the general ticket system, and better reflects geographical differences in candidate support within the state. Opponents claimed it was an effort to deprive the winning ticket of a majority of electoral votes in Michigan, citing in particular the 2012 presidential election results.<sup>91</sup> Under the proposed district system, in 2012, the Democratic ticket gained 54.21% of the statewide popular vote and all 17 Michigan electors. It won, however, only five congressional districts, so, under the District System, it would have gained seven electoral votes, one for each district and the two

<sup>86</sup> 2008: see Shane Goldmacher, “Electoral College Measure Falls Short,” *Sacramento Bee Capitol Alert*, February 5, 2008, available at <http://blogs.sacbee.com/capitolalert/latest/2008/02/electoral-colle.html>. 2012: “California Electoral College Reform Act,” *Ballotpedia, an Interactive Almanac of U.S. Politics*, at [http://ballotpedia.org/California\\_Electoral\\_College\\_Reform\\_Act\\_\(2012\)](http://ballotpedia.org/California_Electoral_College_Reform_Act_(2012)). 2014: “California Split Electoral College Vote Distribution Initiative (2014),” *Ballotpedia, an Interactive Almanac of U.S. Politics*, at [http://ballotpedia.org/California\\_Split\\_Electoral\\_College\\_Vote\\_Distribution\\_Initiative\\_\(2014\)](http://ballotpedia.org/California_Split_Electoral_College_Vote_Distribution_Initiative_(2014)).

<sup>87</sup> Amendment 36, available at <http://www.lawanddemocracy.org/pdffiles/COamend36.pdf>. Under the rounded proportional plan, percentages of the popular vote are rounded to whole numbers in determining the number of electoral votes awarded to competing candidates.

<sup>88</sup> Colorado, Secretary of State, *Official Publication of the Abstract of Votes Cast for the 2003 Coordinated[,] 2005 Primary[,] 2004 General [Elections]* (n.p., n.d.), pp. 138-139.

<sup>89</sup> The remaining 2.3% of popular votes were cast for candidates of other parties. Results computed by CRS from U.S. Congress, House, Clerk of the House of Representatives, *Statistics of the Presidential and Congressional Election of, November 6, 2012*, at [http://clerk.house.gov/member\\_info/electionInfo/2012election.pdf](http://clerk.house.gov/member_info/electionInfo/2012election.pdf).

<sup>90</sup> Michigan Legislative Web-site, 2011 session, House Bill 5184, at [http://www.legislature.mi.gov/\(S\(sknehimedm0y3k55mlybtbnbu\)\)/mileg.aspx?page=getobject&objectname=2011-HB-5184&query=on](http://www.legislature.mi.gov/(S(sknehimedm0y3k55mlybtbnbu))/mileg.aspx?page=getobject&objectname=2011-HB-5184&query=on).

<sup>91</sup> Bryan Dickerson, “Don’t Count on Snyder to Stop GOP’s Electoral College Mischief,” *Detroit Free Press*, January 12, 2014, at <http://www.freep.com/article/20140112/COL04/301120077/electoral-college-Michigan-Rick-Snyder-Barack-Obama-Mitt-Romney-popular-vote>.

senatorial electors, while the Republican ticket, which won 44.71% of the statewide vote and nine congressional districts, would have gained a majority of nine electoral votes.<sup>92</sup>

## **Nebraska: Proposed Return to General Ticket System, 2013-2014**

Nebraska established a district system for presidential elections in 1992, but only once, in 2008, has the state's five-electoral delegation been split by party. Bills to return Nebraska to the general ticket or winner-take-all system have been introduced in the state's unicameral legislature several times in recent years. Proponents asserted that the district plan had weakened the state's influence in national politics, while opponents claimed that it actually promoted grassroots involvement in elections and public affairs, and that the split electoral vote in 2008 proved the validity of the district plan.<sup>93</sup> Some commentators, however, suggested that the proposed change reflected Republican concerns that the district system had energized Democratic voters in the 2008 election, leading to closer results than anticipated in the statewide presidential vote and other election contests that year.<sup>94</sup> One proposal, LB382, introduced on January 18, 2013, was the subject of hearings, but it was ultimately "bracketed" (indefinitely postponed) on April 5, 2014.<sup>95</sup>

## **Pennsylvania: District and Proportional System Proposals, 2011, 2013-2014**

A district plan proposal introduced in the Pennsylvania legislature in 2011, and reintroduced in 2013, generated considerable publicity and political controversy. Senate Bill 1282 proposed to substitute the district system for the general ticket system used in the Keystone State since the earliest presidential elections. The bill proposed a standard district system, with one elector apportioned to each congressional district, and two at-large, representing the "senatorial" electors.<sup>96</sup> Supporters asserted that "[t]his proposal will more fairly align Pennsylvania's electoral college votes with the results of the popular vote. It will also make individual votes across the state more important, giving voters a more significant say in presidential elections."<sup>97</sup> Opponents, however, suggested the proposal was designed to break a 20-year Democratic hold on Pennsylvania's electoral college delegation.<sup>98</sup> In awarding electoral votes by congressional district, it was argued, Republicans might gain as many as 12 or 13 electoral votes from Republican-leaning districts under the district plan, even though the Democratic candidates won a statewide majority.<sup>99</sup> Opponents claimed the proposal was "a blatant power grab meant to rig

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<sup>92</sup> FEC, "Official General Election Results for United States President, November 6, 2012," at <http://www.fec.gov/pubrec/fe2012/2012pres.pdf>.

<sup>93</sup> "Electoral Vote Debate Begins," *Unicameral Update, the Nebraska Legislature's Official News Source*, January 29, 2014, at <http://update.legislature.ne.gov/?p=14322>.

<sup>94</sup> Don Walton, "Electoral Vote Change Stuck in Committee," *JournalStar.com, Lincoln Journal-Star*, March 10, 2011, available at [http://journalstar.com/news/unicameral/article\\_6b78c3da-95fc-54c0-8f12-486e5e8a9fff.html](http://journalstar.com/news/unicameral/article_6b78c3da-95fc-54c0-8f12-486e5e8a9fff.html).

<sup>95</sup> "Open States," at <http://openstates.org/ne/bills/103/LB382/>.

<sup>96</sup> SB 1282, Amending the Act of June 3, 1937, Regular Session 2011, Pennsylvania General Assembly web-site, available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=S&type=B&BN=1282>.

<sup>97</sup> "Senator Pileggi Unveils Proposal to More Fairly Allocate Electoral College Votes," statement, September 13, 2011, available at <http://www.senatorpileggi.com/press/2011/0911/091311.htm>.

<sup>98</sup> Pennsylvania voted for Democratic presidential candidates for every election since 1992.

<sup>99</sup> Aaron Blake, "Could Pennsylvania Republicans End the Electoral College as We Know It?" *Washington Post*, (continued...)

presidential elections and diminish the voice of voters in Democratic strongholds.”<sup>100</sup> Some Republicans also criticized the bill, on the grounds that the state Democratic Party organization might “move campaigns out of safe Democratic districts in urban population centers and into the more moderate suburbs.”<sup>101</sup> SB 1282 was referred to the Committee on State Government on September 30, 2012, but no further action was taken during the 2012 legislative session.<sup>102</sup> An identical bill, HB 94, was introduced in the 2013-2014 session, but no action beyond committee referral had been taken by October 2014.<sup>103</sup> In the 2012 presidential election, the Democratic ticket won 51.97% of the Pennsylvania popular vote to the Republican ticket’s 46.59% and all 20 electoral votes.<sup>104</sup> Had a district system allocation of electoral votes been in place in Pennsylvania in 2012, the Democratic ticket would have won 7 electoral votes, having taken 5 congressional districts and the 2 senatorial electors awarded to the statewide popular vote winner, while the Republican ticket would have won 13 electoral votes, having taken 13 congressional districts.<sup>105</sup>

During the ensuing 2013-2014 legislative session, on February 21, 2013, 12 state Senators introduced Senate Bill SB 538, legislation that would establish a proportional system plan to award electoral votes in Pennsylvania.<sup>106</sup> This proposal differs from the classic proportional plan: it incorporates one of the district system’s elements by awarding the two “senatorial” electors to the candidates who won the most popular votes statewide, but would award the balance on a rounded proportional basis. As with the earlier proposals, SB 538 aroused considerable media and press coverage and complaints by critics.<sup>107</sup> No action beyond committee referral has been taken on the bill at the time of this writing. Had this version of a proportional system been operative in Pennsylvania for the 2012 presidential election, the Democratic ticket, with 51.97% of the

(...continued)

September 14, 2011, available at [http://www.washingtonpost.com/blogs/the-fix/post/could-pennsylvania-republicans-end-the-electoral-college-as-we-know-it/2011/09/14/gIQAQUzUSK\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/could-pennsylvania-republicans-end-the-electoral-college-as-we-know-it/2011/09/14/gIQAQUzUSK_blog.html).

<sup>100</sup> Dan Hirschhorn, “House GOP Fret Over Pa. Electorals [sic],” *Politico*, September 14, 2011, available at <http://www.politico.com/news/stories/0911/63522.html>. Here again, Professor Lawrence Longley’s “voting power” theory comes into play. Substantial concentrations of Democratic voters, particularly minority voters, in the Philadelphia and Pittsburgh metropolitan areas have long been regarded as a key element in gaining a Democratic plurality or majority in the popular vote in Pennsylvania. A district plan system for awarding electoral votes would arguably lessen the voting power of minority votes in the state.

<sup>101</sup> “Pete Sessions: Pa. Electoral College Change Would Put House Races at Risk,” *Wall Street Journal*, *Washington Wire*, September 15, 2011, available at <http://blogs.wsj.com/washwire/2011/09/15/pete-sessions-pa-electoral-college-change-would-put-house-races-at-risk/>.

<sup>102</sup> SB 1282, Regular Session, 2011-2012, Pennsylvania General Assembly web-site, at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&sind=0&body=S&type=B&BN=1282>.

<sup>103</sup> HB 94, Regular Session, 2013-2014, Pennsylvania General Assembly web-site, at [http://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2013&sind=0&body=H&type=B&bn=94](http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2013&sind=0&body=H&type=B&bn=94).

<sup>104</sup> U.S. Federal Election Commission, “Official General Election Results for United States President, November 6, 2012,” at <http://www.fec.gov/pubrec/fe2012/2012pres.pdf>.

<sup>105</sup> Daily Kos Elections’ presidential results by congressional district for the 2012 and 2008 elections,” *Daily Kos*, at <http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections?detail=hide>.

<sup>106</sup> Senate Bill 538, Regular Session, 2013, Pennsylvania General Assembly web-site, at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2013&sessInd=0&billBody=S&billTyp=B&billNbr=0538&pn=0502>

<sup>107</sup> “Bill to Change Electoral College System in PA Introduced,” *Philadelphia Inquirer*, “*Philly.com*,” February 26, 2013, at [http://www.philly.com/philly/blogs/harrisburg\\_politics/193294801.html](http://www.philly.com/philly/blogs/harrisburg_politics/193294801.html).

popular vote, would have won 12 electoral votes, while the Republican ticket, with 46.59%, would have won 8 electoral votes.<sup>108</sup>

## Virginia: District System Proposal, 2012-2013

On December 3, 2012, a different version of the district system was introduced in the Virginia General Assembly as SB 723. In contrast to conventional district systems, which award each state's two senatorial electors to the presidential ticket *winning the most popular votes statewide*, this legislation would have awarded the senatorial electors to the presidential ticket that won the popular vote *in the greatest number of congressional districts statewide*.<sup>109</sup> As with similar recent state proposals, this bill proved to be controversial; supporters claimed it would more accurately reflect differing voter preferences by geographical regions, while opponents saw it "as an attempt to counter recent successes by Democrats."<sup>110</sup> The bill was "bypassed indefinitely" on January 29, 2013, by the Senate Committee on Privileges and Elections.<sup>111</sup> In the 2012 presidential election, the Democratic ticket gained 51.16% of the statewide popular vote to the Republican ticket's 47.28%, and won all 13 Virginia electors under the general ticket system.<sup>112</sup> If the district system variant as envisioned by SB 723 had been in effect for the 2012 election, the Democratic ticket, having won the popular vote in four congressional districts, would have gained four electoral votes, while the Republican ticket, having gained seven districts, would have gained one electoral vote for each district, and Virginia's two senatorial electors, for a total of nine electoral votes.

## Wisconsin: District System Proposal, 2011

Shortly after Pennsylvania's SB 182 was introduced in 2011, the *Milwaukee Journal Sentinel* reported that district system legislation would soon be introduced in the Wisconsin state legislature. Arguments in favor of and opposed to the projected bill were similar to those raised in Pennsylvania.<sup>113</sup> Opponents, however, also claimed that the district plan would eliminate Wisconsin from the roster of "battleground" states. This, they asserted, would lead presidential campaign organizations and political parties to shift their resources to states where the winner-take-all system promised bigger electoral vote rewards for their campaign spending. Under this scenario, they claimed that the district system would ultimately cost the state economy millions of dollars in broadcast TV revenue, and even more from lost radio, cable, travel, staff, and other

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<sup>108</sup> Computed by CRS from FEC, "Official 2012 Presidential General Election Results," at <http://www.fec.gov/pubrec/fe2012/2012presgeresults.pdf>.

<sup>109</sup> Senate Bill SB 723, 2013 session, Virginia General Assembly, at <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB723>.

<sup>110</sup> Nia-Malika Henderson and Errin Haines, "Republicans in Virginia, Other States, Seeking Electoral College Changes," *Washington Post*, January 24, 2013, at [http://www.washingtonpost.com/politics/2013/01/24/430096e6-6654-11e2-85f5-a8a9228e55e7\\_story.html](http://www.washingtonpost.com/politics/2013/01/24/430096e6-6654-11e2-85f5-a8a9228e55e7_story.html).

<sup>111</sup> Senate Bill SB 723, 2013 session, Virginia General Assembly, at <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB723>.

<sup>112</sup> U.S. Federal Election Commission, "Official General Election Results for United States President, November 6, 2012," at <http://www.fec.gov/pubrec/fe2012/2012pres.pdf>.

<sup>113</sup> Craig Gilbert, "Changing the Way the Electoral College Works in Wisconsin: A Recipe for Irrelevance?" *Milwaukee Journal Sentinel*, *Journal Interactive*, October 23, 2011. Available at <http://www.jsonline.com/blogs/news/132415248.html>.



campaign-related spending.<sup>114</sup> At the time of this writing, however, no such bill had been introduced in the legislature.<sup>115</sup>

In addition to these specific plans, other states have been reported as considering changes to their current allocation of electoral votes in recent years, particularly Ohio and Florida. At the time of this writing, however, no measure has been introduced in the legislature of either state to this effect, and press accounts indicate that such actions are unlikely in the immediate future.<sup>116</sup>

## Nongovernmental Proposal—National Popular Vote Initiative (NPV)

National Popular Vote (NPV) is a nongovernmental initiative which seeks to establish direct popular election of the President and Vice President through an interstate compact, rather than by constitutional amendment.<sup>117</sup> Under the compact's provisions, legislatures of signatory states (including the District of Columbia) would appoint presidential electors committed to the presidential ticket *that gained the most votes nationwide*. Assuming all 50 states joined the NPV compact, this would deliver a unanimous electoral college decision for the candidates winning the most popular votes.

Northwestern University law professor Robert W. Bennett and constitutional law professors Akhil and Vikram Amar are generally credited as originators of the NPV concept.<sup>118</sup> NPV relies on the Constitution's broad grant (in Article II, Section 1, clause 1) of power to each state to "appoint, *in such Manner as the Legislature thereof may direct* [emphasis added], a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>119</sup>

Specifically, the plan calls for an interstate compact in which the legislatures in each of the participating states agree to appoint electors pledged to the candidates who won the *nationwide popular vote*. State election authorities would count and certify the popular vote in each state, which would be aggregated and certified nationwide as the "nationwide popular vote." The

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<sup>114</sup> Ibid.

<sup>115</sup> Wisconsin Legislative Documents website, available at [https://docs.legis.wisconsin.gov/2011/related/author\\_index/assembly/A\\_LeMahieu\\_Daniel?view=section](https://docs.legis.wisconsin.gov/2011/related/author_index/assembly/A_LeMahieu_Daniel?view=section).

<sup>116</sup> Florida: Marc Caputo and Steve Bosquet, "Florida House Speaker Weatherford: Changing the Electoral College is for Sore Losers," *Miami Post Blog*, January 24, 2013, at <http://miamiherald.typepad.com/nakedpolitics/2013/01/florida-house-speaker-weatherford-rigging-the-electoral-college-is-for-sore-losers.html>. Ohio: Kevin Robillard, "Ohio Skips Electoral Shift," *Politico*, January 29, 2013, at <http://www.politico.com/story/2013/01/ohio-gop-skip-electoral-college-shift-86882.html>.

<sup>117</sup> For more detailed information and analysis of the National Popular Vote Initiative, please consult CRS Report R43823, *The National Popular Vote Initiative: Direct Election of the President by Interstate Compact*, by (name redacted) and (name redacted).

<sup>118</sup> Robert W. Bennett, "Popular Election of the President Without a Constitutional Amendment," *The Green Bag, An Entertaining Journal of Law*, 4 Green Bag 2d 241, available from the Social Science Research Network by subscription, see [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=261057](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=261057); Akhil Reed Amar and Vikram David Amar, "How to Achieve Direct National Election of the President Without Amending the Constitution," *Findlaw's Writ*, December 28, 2001, available at <http://writ.news.findlaw.com/amar/20011228.html>.

<sup>119</sup> U.S. Constitution, Article II, Section 1, clause 2.

participating state legislatures would then choose the slate of electors pledged to the “nationwide popular vote winner,” *notwithstanding the results within their particular state*.<sup>120</sup> Barring unforeseen circumstances, if all 50 states and the District of Columbia were to join the NPV, it would yield a unanimous electoral college vote of 538 electors for the winning candidates.

The compact, however, would take effect only if states controlling a majority of the electoral college, 270 or more votes, were to approve the plan. This would guarantee the plan’s success by ensuring that at least 270 electoral votes would be cast for the candidates winning the most popular votes.

If the national popular vote were tied, the states would be released from their commitment under the compact, and would choose electors who represented the presidential ticket that gained the most votes in each particular state.

One novel NPV provision would enable the presidential candidate who won the national popular vote to fill any vacancies in the electoral college with electors of his or her own choice.

States would retain the right to withdraw from the compact, but if a state chose to withdraw within six months of the end of a presidential term, the withdrawal would not be effective until after the succeeding President and Vice President had been elected.

## **National Popular Vote, Inc.**

The NPV advocacy effort is managed by National Popular Vote, Inc., a “501(c)(4)”<sup>121</sup> nonprofit corporation, established in California in 2006 by Barry Fadem, an attorney specializing in initiative and referendum law, and Stanford University professor John R. Koza.<sup>122</sup> As a 501(c)(4) entity, it may engage in unlimited lobbying and similar advocacy and educational activity so long as it furthers the organization’s tax-exempt purpose and is not its primary activity. The primary activity restriction applies only to campaign activities.

NPV’s board members include former Senators and Representatives of both major political parties, suggesting bipartisan support on the national level. As of September 2014, NPV claimed the support of 2,110 state legislators, over one-sixth of the 7,382 total, and endorsements by the *New York Times*, *Los Angeles Times*, *Chicago Sun-Times*, *Minneapolis Star Tribune*, *Boston Globe*, *Miami Herald*, and other newspapers.<sup>123</sup>

According to NPV, the compact has been introduced in the legislatures of all 50 states, and the Council of the District of Columbia. After initial momentum in 2008, when four states joined the

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<sup>120</sup> Under NPV, assume that presidential ticket “A” won 55% of the popular vote in State “X,” and ticket “B” won 45%. Under the current general ticket system, the state legislature would typically choose electors pledged to ticket A. Under NPV, assume the same in-state results, but assume that ticket “B” won the national popular vote. The state legislature, in compliance with the National Popular Vote compact, would vote to choose electors committed to ticket “B,” because that ticket won the national popular vote, notwithstanding the in-state returns.

<sup>121</sup> 26 U.S.C. 501 (c)(4). Non-profit tax-exempt organizations described in this provision of the Internal Revenue Code (IRC) may lobby for legislation and, so long as it is not their primary activity, participate in political campaigns and elections.

<sup>122</sup> Rick Lyman, “Innovator Devises Way Around Electoral College,” *New York Times*, September 22, 2006, <http://www.nytimes.com/2006/09/22/us/politics/22electoral.html>.

<sup>123</sup> National Popular Vote website, available at <http://www.nationalpopularvote.com/>.



compact in one year, NPV has made more gradual progress toward its goal of states disposing of 270 electoral votes. Previous highlights have been California's approval in 2011, which added 55 electoral votes to the tally, and most recently, New York's accession to the compact, finalized by Governor Andrew Cuomo on April 15, 2014. This action added the Empire State's 29 electoral votes to the total in states that have approved NPV, and brought it to 61% of its 270-vote operational threshold.<sup>124</sup> States that have adopted the NPV Compact, including their electoral vote allotments, are listed below, in chronological order.

- **Hawaii** (4 electoral votes), 2008;
- **Illinois** (20 electoral votes), 2008;
- **Maryland** (10 electoral votes), 2008;
- **New Jersey** (14 electoral votes), 2008;
- **Washington** (12 electoral votes), 2009;
- **Massachusetts** (11 electoral votes), 2010;
- **District of Columbia** (3 electoral votes), 2010;
- **Vermont** (3 electoral votes), 2011;
- **California** (55 electoral votes), 2011;
- **Rhode Island** (four electoral votes), 2013; and
- **New York** (29 electoral votes), 2014.

In addition to New York, the NPV compact was actively considered in six state legislatures in their 2014 sessions: Arizona,<sup>125</sup> Connecticut,<sup>126</sup> Minnesota,<sup>127</sup> Oklahoma, where it was approved in the Senate;<sup>128</sup> Michigan,<sup>129</sup> and Pennsylvania.<sup>130</sup> It remains to be seen whether New York's action will provide the impetus for further accessions in the near future; however, the legislatures in the first four cited states adjourned for the year without taking action, leaving only Michigan and Pennsylvania in session through the balance of 2014.

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<sup>124</sup> Ibid., "Home," at <https://www.governor.ny.gov/press/04152014-national-popular-vote-compact>.

<sup>125</sup> Arizona: in committee when the special legislative session adjourned May 29, 2014. National Conference of State Legislatures web-site, "2014 Legislative Session Calendar," at <http://www.ncsl.org/research/about-state-legislatures/session-calendar-2014.aspx>.

<sup>126</sup> Connecticut: passed in committee and pending when the legislative session adjourned May 9, 2014. Connecticut General Assembly web-site, at [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB05126&which\\_year=2014](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05126&which_year=2014).

<sup>127</sup> Minnesota: tabled in the House, Minnesota State Legislature web-site, at <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF0799&ssn=0&y=2013&ls=88>; in committee in the Senate; legislature adjourned May 16, 2014 at <https://www.revisor.mn.gov/bills/bill.php?f=SF585&y=2013&ssn=0&b=senate>.

<sup>128</sup> Oklahoma: passed Senate, referred to House committee. Legislature adjourned May 30, 2014. Oklahoma State Legislature web-site, at <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB906&Session=1400>.

<sup>129</sup> Michigan: active, in Senate committee; legislature normally remains in session through the end of the year. Michigan Legislature web-site, at [http://www.legislature.mi.gov/\(S\(kyesuf45i1k13rvtjsr1iuyb\)\)/mileg.aspx?page=getObject&objectName=2013-SB-0291](http://www.legislature.mi.gov/(S(kyesuf45i1k13rvtjsr1iuyb))/mileg.aspx?page=getObject&objectName=2013-SB-0291).

<sup>130</sup> Pennsylvania: referred to committee in House; legislature normally remains in session through the end of the year. Pennsylvania General Assembly web-site, at <http://www.legis.state.pa.us/cfdocs/legis/home/session.cfm>.

Conversely, proposals to rescind approval of the NPV Interstate Compact have been introduced in the legislatures of Hawaii, Maryland, Massachusetts, New Jersey, and Washington, to date, but none has been approved.<sup>131</sup>

NPV, Inc., claims bipartisan support, and includes a number of Republicans on its governing council; it may be noted, however, that all the jurisdictions that have joined the compact to date have been classified by a recent Gallup survey as “leaning” or “solid” in their support of the Democratic Party. For instance, 9 of the 11, including California, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Rhode Island, and Vermont were found by Gallup to be among the “most solidly Democratic states in 2013.”<sup>132</sup>

Following California’s accession to the NPV compact in 2011, various conservative or libertarian groups announced measures to defend the electoral college system. On December 7, 2011, the Heritage Foundation, a conservative public policy institute, hosted a forum at which guest speakers, including five state secretaries of state, expressed their concern over the National Popular Vote campaign.<sup>133</sup> On December 8 of the same year, *Roll Call* reported that the State Government Leadership Foundation, a project of the Republican State Leadership Committee, would begin a campaign to defend the electoral college and counter recent NPV gains.<sup>134</sup>

## **The National Popular Vote Initiative: Pro and Con**

Arguments in support of and opposed to the National Popular Vote proposal resemble those for and against direct popular election; here again, the central issue turns on the question of the asserted simplicity, logic, and democratic attractiveness of the direct election idea as compared to a more complex array of factors cited by supporters of the electoral college system.

### **NPV—Pro**

The National Popular Vote initiative is novel to the extent that it preserves the structure of the electoral college system, while guaranteeing that the ticket gaining more popular votes nationwide than any of its opponents would always be elected President and Vice President. At the core of their arguments, NPV supporters assert that the process would be simple, national, and democratic. Their core argument is that the compact “would guarantee the Presidency to the candidate who receives the most popular votes [or at least a plurality] in all 50 states (and the District of Columbia).”<sup>135</sup> It is also claimed to eliminate (1) the possibility of Presidents who won fewer votes than their opponent—there would never again be a presidential election “misfire” or another “wrong winner”; (2) faithless electors; (3) “disfranchisement” under the general

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<sup>131</sup> National Conference of State Legislatures web-site, at <http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx>.

<sup>132</sup> Lydia Saad, “Not As Many U.S. States Lean Democratic in 2013,” Gallup Politics, January 29, 2014, at <http://www.gallup.com/poll/167030/not-states-lean-democratic-2013.aspx>.

<sup>133</sup> Heritage Foundation, “The Electoral College and the National Popular Vote Plan,” available at <http://www.heritage.org/events/2011/12/electoral-college>.

<sup>134</sup> Eliza Newlin Carney, “GOP Nonprofit Backs Electoral College,” *Roll Call.com*, December 8, 2011, available at [http://www.rollcall.com/issues/57\\_71/GOP-Nonprofit-Backs-Electoral-College-210872-1.html](http://www.rollcall.com/issues/57_71/GOP-Nonprofit-Backs-Electoral-College-210872-1.html). For further information on the State Government Leadership Foundation and its election-law-related activities, see the foundation’s web-site at <http://www.sglf.org/election-law>.

<sup>135</sup> National Popular Vote website, available at <http://www.nationalpopularvote.com/pages/explanation.php>.

ticket/winner-take-all system; (4) the various “voting power” advantages noted earlier in this report; and (5) the potential for contingent election under the Twelfth Amendment.<sup>136</sup>

Moreover, NPV advocates also assert the compact would provide a practical benefit to non-battleground “flyover” states. With “every vote equal,” NPV maintains that presidential and vice presidential nominees and their organizations would need to spread their presence and resources more evenly as they campaigned for every vote nationwide, rather than concentrate on winning key “battleground” states.<sup>137</sup> For instance, according to *Every Vote Equal’s* analysis of campaign appearances, the 2012 major party candidates for President and Vice President appeared at a total of 253 campaign events during the general election campaign, but they only visited 12 battleground states; 38 states and the District of Columbia were bypassed during the campaign.<sup>138</sup> NPV advocates also maintain that the concentration of campaign resources, advertising, and candidate appearances in battleground states depresses turnout in “flyover” states. NPV further suggests that this phenomenon may ultimately damage the ability to govern on the state and local levels and could have a negative impact on the legitimacy of public institutions.<sup>139</sup>

## NPV—Con

Opponents may assert that NPV would undermine the Constitution and overturn the Founders’ original intent. As noted earlier in this report, they could argue that presidential elections are not only national, but federal contests, in which the states have an important and legitimate role as envisioned by the Founders. The electoral college, they may assert, is an integral and important component of federalism, against which national popular election would be a serious blow. They might also argue that the National Popular Vote compact, despite its advocacy of majoritarian democracy, does not require that winning candidates gain a *majority* of the popular vote, but delivers the presidency to the ticket that gains *more* popular votes than any other.

Another criticism centers on what could be accurately defined as a fundamental change in the presidential election process and a *de facto* amendment to the Constitution. In fact, they could note, the NPV, as described by its founders, is an admitted “end run” around the Constitution,<sup>140</sup> circumventing the amendment process established by the Founders in Article V. One study opposing the plan asserted that because the use of an interstate compact “does not conform to the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation.”<sup>141</sup>

<sup>136</sup> Contingent election takes place under the existing system if no candidates receive a majority of electoral votes. For further information, please consult CRS Report RL32695, *Election of the President and Vice President by Congress: Contingent Election*, by (name redacted).

<sup>137</sup> National Popular Vote web-site, available at <http://www.nationalpopularvote.com/pages/explanation.php>.

<sup>138</sup> Ibid.

<sup>139</sup> Koza, et al., *Every Vote Equal*, p. 38.

<sup>140</sup> This is the term applied by NPV founder, John Koza, in a 2006 interview: “When people complain that it’s an end run,” Dr. Koza said, “I just tell them, ‘Hey, an end run is a legal play in football.’” Rick Lyman, “Innovator Devises Way Around Electoral College,” *New York Times*, September 22, 2006, available at <http://www.nytimes.com/2006/09/22/us/politics/22electoral.html>.

<sup>141</sup> John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, Cato Institute, Policy Analysis No. 622, October 13, 2008, p. 9.

Opponents might also assert that the NPV would eliminate the multiplier effect by which the electoral college tends to magnify the winning ticket's margin of victory, and confers a degree of added legitimacy to winners. NPV opponents could also argue that eliminating the multiplier effect would actually result in an increase in contested election results and legal challenges in the states, as the political parties maneuver to claim every possible vote.

Critics may also note that the National Popular Vote plan, launched in 2006, contains no "statute of limitations," unlike constitutional amendments, which must be approved by three-fourths of the states, typically within a seven-year period.<sup>142</sup> It may be noted that if NPV were a constitutional amendment proposed in 2006, it would have expired in 2013.

Finally, opponents might question the assertion that spreading campaign spending resources and candidate events in non-battleground states is a goal that justifies a profound change in the presidential election process. Candidate campaign appearances and spending, they might assert, should not be considered to be a local economic stimulus package; moreover, they might continue, it is equally dubious to assert that nominees will slight the concerns of citizens of the states from which they draw their greatest support, or that concentrated campaigning in the "battleground" states somehow "disenfranchises" voters in others.

## **National Popular Vote: Constitutional and Legal Issues**

In addition to policy issues as discussed previously, some observers have also raised questions related to the National Popular Vote initiative based on the fact that it is an interstate compact as defined in the Constitution. Others have questioned whether NPV might interfere with some provisions of the Voting Rights Act. These issues are briefly identified below; for more detailed information and analysis, see CRS Report R43823, *The National Popular Vote Initiative: Direct Election of the President by Interstate Compact*, by (name redacted) and (name redacted).

One issue turns on the status of the NPV initiative. NPV has been described by its supporters variously as a bill,<sup>143</sup> a state-level statute,<sup>144</sup> and an interstate compact,<sup>145</sup> and is generally considered to be the latter. An interstate compact is a contract agreement between two or more consenting states to establish an agency or authorize programs or functions that are carried out on an interstate basis.<sup>146</sup> Article I, Section 10, clause 3, requires that "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State...."

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<sup>142</sup> Congress has set the seven-year period as a reasonable time limit for the ratification process for the 18<sup>th</sup>, 20<sup>th</sup>, and all succeeding amendments.

<sup>143</sup> "Explanation of the National Popular Vote Bill," National Popular Vote web-site, at [http://www.nationalpopularvote.com/pages/explanation.php#exp\\_1page](http://www.nationalpopularvote.com/pages/explanation.php#exp_1page).

<sup>144</sup> "What Is the National Popular Vote Plan,?: Facts and FAQs," FairVote.org web-site, at <http://www.fairvote.org/reforms/national-popular-vote/what-is-the-national-popular-vote-plan/>.

<sup>145</sup> "Explanation of the National Popular Vote Bill," National Popular Vote web-site, at [http://www.nationalpopularvote.com/pages/explanation.php#exp\\_1page](http://www.nationalpopularvote.com/pages/explanation.php#exp_1page).

<sup>146</sup> Although compacts were originally used largely to settle boundary disputes among the states, in the 20<sup>th</sup> century they began to be used to address more complex, regional issues. At present, there are approximately 200 interstate compacts in effect, including such wide-ranging concerns as mental health treatment, law enforcement and crime control, education, driver licensing and enforcement, environmental conservation, energy, nuclear waste control, facilities operations, transportation, economic development, insurance regulation, placement of children and juveniles, disaster assistance, and pollution control.

A related issue concerns the question of whether the National Popular Vote Initiative is an interstate compact that requires congressional consent. The National Popular Vote movement agrees that NPV is an interstate compact, but it maintains that the Constitution implicitly permits valid interstate agreements without the need for congressional approval on any subject that falls within the states' constitutional authority, as they assert the NPV compact would.<sup>147</sup>

Another issue is related to the Constitution's grant of authority in Article II, Section 1, clause 1, to the states to "appoint, in such manner as the Legislature thereof may direct," their electors for President and Vice President. The question has been raised as to whether NPV would violate the principles of federalism and deprive individual states of their influence under the electoral college.

One critic asserts the National Popular Vote compact might violate Section 2 of the Voting Rights Act (VRA) because moving from "a state-based [vote] to a national popular vote dilutes the voting strength of a given state's minority population by reducing its [voting power] ability to influence the outcome of presidential elections."<sup>148</sup> The same author asserts that the NPV compact may also violate Section 5 of the act.<sup>149</sup> In 2013, however, the U.S. Supreme Court invalidated Section 4(b) of the VRA;<sup>150</sup> as a result, Section 5 has been rendered currently inoperable.

## Concluding Observations

Barring unforeseen circumstances, the likelihood of major changes to the electoral college system by any of the three processes cited in this report—constitutional amendment, state legislation changing electoral vote formulae, or through the interstate compact proposed by the National Popular Vote campaign—appears to be low in the short term.

From the standpoint of a constitutional amendment, there has been little indication of congressional interest in this question during recent Congresses. The one relevant legislative proposal to date in the 113<sup>th</sup> Congress consists of an amendment to guarantee the right to vote in presidential elections by citizens who reside in U.S. territories.<sup>151</sup> Barring such unforeseen circumstances as an egregious electoral college "misfire," or some other highly contentious contest following the 2016 presidential election, there appears to be little impetus for congressional action in the immediate future.

The states may continue to consider legislative action providing for changes in their procedures for allocating electoral votes by either the district or proportional systems. To date, however, such proposals have generated intense controversy and opposition in the states where they have been introduced, being regularly characterized by opponents as efforts to rig presidential elections and deprive minorities of their voting rights. To date, none has been successful. Again, barring unforeseen circumstances, such experiments do not appear to enjoy widespread support, and even

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<sup>147</sup> John R. Koza, Barry Fadem, et al. *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (Los Altos, CA: National Popular Vote Press, 2006), pp. 284-285.

<sup>148</sup> David Gringer, "Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College, *Columbia Law Review*, vol. 108, 2008, p. 208.

<sup>149</sup> 42 U.S.C. §1973c.

<sup>150</sup> 42 U.S.C. §1973b.

<sup>151</sup> H.J.Res. 7, introduced on January 3, 2013 by Delegates Christensen and Bordallo.

if enacted, they might be subject to legal challenges on various grounds, including dilution of minority voter influence.

Despite its successful adoption by California in 2011 and New York in 2014, the National Popular Vote interstate compact has yet to develop sustained momentum. While it has generated interest in various direct popular vote advocacy communities, it does not appear to have gained widespread awareness or support among the public at large. This could change, however, if NPV were to develop sustained momentum, or if more states were to join the compact, particularly populous ones like Pennsylvania (20 electoral votes) and Michigan (16 electoral votes), where the NPV compact was under active legislative consideration in 2014. Under these circumstances, proponents could be energized and encouraged by the apparent progress, while at the same time, opponents and supporters of the electoral college system might be expected to coalesce and mobilize around the issues identified in this report.

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