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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 and revised by the Twelfth Amendment. It provides for election of the President and Vice President by electors, commonly referred to as the electoral college. A majority of 270 of the 538 electoral votes is necessary to win. For further information on the modern-day operation of the college system, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

The electoral college has been the subject of criticism and proposals for reform since before 1800. Constitutional and structural criticisms have centered on several of its features: (1) although today all electors are chosen by the voters in the presidential election, it is claimed to be not fully democratic, since it provides indirect election of the President; (2) 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; (3) it results in electoral vote under- and over-representation for some states between censuses; and (4) "faithless" electors can vote for candidates other than those they were elected to support. Legislative and political criticisms include (1) the general ticket system, currently used in all states except Maine and Nebraska, which is alleged to disenfranchise voters who prefer the losing candidates in the states; (2) various asserted "biases" that are alleged to favor different states and groups; and (3) the electoral college "lock," which has been claimed to provide an electoral college advantage to both major parties at different times.

In its defense, electoral college supporters claim that it is a fundamental component of federalism, that it has elected "the people's choice" in over 90% of presidential elections, and that it has promoted political stability and a broad-based, enduring, and generally moderate political party system.

Changing the electoral college system presents several options, sometimes characterized as "end it," "mend it," or "leave it alone." Proposals to end the electoral college almost always recommend direct popular election, under which the candidates winning the most popular votes nationwide would be elected. In support of direct popular election, its advocates refer to the elections of 2000 and 2016, so-called electoral college "misfires," in which candidates were elected with an electoral college majority, but fewer popular votes than their principal opponents.

Almost all reform proposals—"mend it"—would keep electoral votes, but eliminate electors, thus ending the faithless elector phenomenon. They would then award the electoral votes directly by one of several methods: the general ticket system on a nationwide basis; the district system that awards electoral votes on a congressional district- and statewide-vote basis; or 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 constitutional amendments did not win the approval of two-thirds of Members of both houses of Congress required by the Constitution for referral to the states.

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 without a constitutional amendment. It relies on the Constitution's broad 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. At the time of this writing, 10 states and the District of Columbia, which jointly control 165 electoral votes, have joined the NPV compact.

Since the 2016 presidential election, several amendments to eliminate the electoral college system and establish direct popular election have been introduced in the 114th and 115th Congress. For additional information on contemporary reform efforts, see CRS Report R44928, *The Electoral College: Reform Proposals in the 114th and 115th Congress*.

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Introduction

The United States is unusual among contemporary presidential republics by providing for the indirect election of its President and Vice President.[1] 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[2] after only two contested elections,[3] resulting in a constitutional crisis during the deadlocked election of 1800.[4] Following this significant event, Congress proposed the Twelfth Amendment, which provides for separate electoral vote ballots in Congress for the President and Vice President, and which was ratified by the states in time for the 1804 election. The constitutional 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 established a basic framework for presidential elections, but they extended considerable latitude to the states concerning its implementation. Arguably the most important related power reserved to the states was their right to appoint electors "in such Manner as the Legislature thereof may direct.... " In the years following ratification of the Twelfth Amendment, this right was exercised in various ways as 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, system or method, which awards all of a state's electoral votes to the ticket that wins the most popular votes statewide;
- a range of differing nomination procedures for elector candidates in the states; and,

[1] 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. In parliamentary republics, the president typically has a ceremonial and nonpolitical role as chief or head of state and is elected indirectly in most cases. In these republics, 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.

[2] 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, and a majority of the total number of electors, was elected President; the runner up was elected Vice President. This led in 1796 to the awkward result of "Federalist" candidate John Adams being elected President as his political rival, "Jeffersonian Republican" Thomas Jefferson, was elected Vice President.

[3] Recall that George Washington was unopposed in the elections of 1788 and 1792.

[4] 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.

- an enduring tradition that electors are expected, but not constitutionally required, to vote for the candidates to whom they are pledged.

The electoral college system has proved to be durable: 54 presidential elections have been held under this arrangement since the Twelfth Amendment was implemented in 1804. In 53 of these, it delivered a majority of electoral votes for President and Vice President,[5] and in 49 instances it delivered the presidency to "the people's choice," the candidates who won the most popular votes.[6] When measured by the first factor, it delivered an electoral vote majority to one candidate or ticket 98.2% of the times; when measured by whether it has delivered the presidency to "the people's choice," the candidate who won the most popular votes,[7] it did so 90.7% of the times. The electoral college has almost always been the subject of some 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

The Electoral College in Principle: The Founders' "Original Intent"

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.[8] 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 ensuring 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.

[5] 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.

[6] The five exceptions are the presidential elections of 1824, 1876, 1888, 2000, and 2016.

[7] Either a majority of plurality of the popular vote.

[8] 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, the electoral college evolved into the compound system that continues to govern U.S. presidential elections two centuries later.

The Electoral College in Form: The System's Components as They Exist Today

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, resulting in 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.[9]
- 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;[10] in addition, the District of Columbia is also allocated three electors.[11] 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.[12]
- As noted previously, the state legislatures select the method by which electors are chosen.[13] In practice, all states currently provide for popular election of their electoral college delegations.[14] 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.[15]
- The winning presidential and vice presidential candidates must gain a majority of electoral votes (270 of 538) to be elected.

[9] 3 U.S.C. §4.

[10] U.S. Constitution, Article II, Section 1.

[11] Ibid., 23rd Amendment.

[12] Ibid., Article II, Section 1.

[13] Ibid.

[14] 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.

[15] 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. This is the most recent edition available.

- 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.[16]

The Electoral College in Function: How It Works in Contemporary Presidential Elections

The assorted components of the electoral college system come into operation before, during, and after presidential election day, once every four years. Aside from the period of several months when electors are nominated, elected, and cast their votes, the college has no permanent or continuing existence.

- 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 3 in 2020.[17]
- 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 assemble and 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" or "swing" states[18] 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 or method.
- 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

[16] 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 Thomas H. Neale.

[17] 3 U.S.C. §1, 62 Stat. 672.

[18] "Battleground" and "swing" 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.

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 divided to reflect geographical differences in support within the state for different candidates.[19]

- Presidential electors assemble on the first Monday after the second Wednesday in December following the election.[20] In 2020, the electors are to assemble on December 14. They meet in their respective states and cast separate votes by paper ballot for the President and Vice President.[21]
- 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.[22]
- 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.[23]

The Electoral College in Survey Research Findings: Trends in Public Opinion

Historically, public opinion, as measured by survey research, consistently supported reform (i.e., direct popular election), until recently.[24] The Gallup Poll reported as early as 1967 that 58% of

[19] For instance, in the 2016 presidential election in Maine, Democratic nominee Hillary Clinton won the statewide popular vote and the popular vote of one congressional district, thus gaining three of the state's four electoral votes. Republican nominee Donald Trump won the popular vote in one congressional district, thus gaining one electoral vote. See Edward D. Murphy, "Trump Takes 1 of 4 Maine's Electoral Votes in a First for the State," *Portland Press Herald*, November 8, 2016, revised, November 9, 2016, at http://www.pressherald.com/2016/11/08/mainers-take-matters-into-their-own-hands-after-bitter-presidential-campaign/. For individual state requirements, see *Nomination and Election of the President and Vice President*, p. 380 for Maine, and p. 394 for Nebraska.

[20] 3 U.S.C. §7.

[21] U.S. Constitution, Article II, Section 1; 12th 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.

[22] In the 2016 presidential election, seven electors cast votes for candidates other than those to whom they were pledged. An additional three would-be faithless electors were replaced by alternates and their votes not recorded. This was the largest number of electors who cast votes for candidates other than those to whom they were pledged since 1912. For further information, see Project Fairvote, "Faithless Electors," available online at http://www.fairvote.org/faithless_electors.

[23] 3 U.S.C. §15-18. The same sections of the U.S. Code provide for challenges to electoral votes, as occurred most recently in 2005. Attempted challenges to electoral votes in 2017 were not entertained by the Vice President, because they were not made in writing and endorsed by at least one Member of each house of Congress, as required by the Code. See *Congressional Record*, 115th Congress, 1st session, vol. 163, no.4, daily edition, January 6, 2017, "Counting Electoral Votes—Joint Session of the House and Senate Held Pursuant to the Provisions of Senate Concurrent Resolution 2", at https://www.congress.gov/congressional-record/2017/01/06/house-section/article/H185-8.

[24] See, for example, Peirce and Longley, *The People's President*, pp. 2-9.

respondents supported direct election, compared with 22% who favored retaining the electoral college; Gallup's 2013 survey recorded that 63% of respondents favored an amendment providing for direct election, while 29% favored retention of the electoral college.[25] Following the 2016 election, however, Gallup reported a shift to greater support for the electoral college system by respondents who identified themselves as "Republican" or "Lean Republican." Conversely, already high levels of support for direct popular election among respondents who identified themselves as "Democratic" or "Lean Democratic" rose to new heights in the post-2016 election Gallup Poll.[26]

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 53 of 54 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 asserted by its critics, focusing on the potential for various dubious procedures and outcomes, and the "biases" it is alleged to confer on certain groups and jurisdictions.

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 18th 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.

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

[25] 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.

[26] Republican support for direct popular election fell from 54% in 2012 to 19% in December 2016, while Democratic support rose from 69% to 81%. Influenced by the change in opinion among Republican respondents, overall support for direct election fell from 62% in favor to 35% opposed in 2012 to 49% in favor to 47% opposed in 2016. Art Swift, "Americans' Support for Electoral College Rises Sharply," *The Gallup Poll*, December 2, 2016, at http://www.gallup.com/poll/198917/americans-support-electoral-college-rises-sharply.aspx.

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.[27]

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 win a majority of the electoral vote, but who have gained fewer popular votes nationwide than their major opponents. This result has been variously referred to as "wrong winner" or an electoral college "misfire,"[28] particularly among reform advocates, and has occurred four times in the nation's history: 1876, 1888, 2000, and most recently in 2016.[29] In one other election, that of 1824, no candidate received a majority of electoral votes, leading to contingent election in Congress.[30] Proponents of direct election claim this potentially 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 54 elections since ratification of the Twelfth Amendment, a rate of 90.7%, as noted earlier in this report.

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[27] See, for example, Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington: American Enterprise Institute, 1977).

[28] See, for instance, David W. Abbott and James P. Levine, *Wrong Winner, The Coming Debacle in the Electoral College* (New York, Praeger, 1991), and Peirce and Longley, *The People's President, The Electoral College in American History and the Direct Vote Alternative*, pp. 116-119.

[29] 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 presidential election of 2016.

According to official state returns for the 2016 presidential election reported by the Federal Election Commission, Republican Party nominees Donald Trump and Mike Pence won 304 electoral votes, a majority of 56.5%, while Democratic Party nominees Hillary Clinton and Tim Kaine won 227 electoral votes, 42.2% of the total. Seven "faithless" electors cast votes for candidates other than those to whom they were pledged: five Clinton/Kaine electors and two Trump/Pence electors. They comprised 1.3% of the electoral vote total. In the popular vote, Clinton and Kaine won 65,853,516 popular votes, a plurality of 48.18% of the popular vote total, while Trump and Pence won 62,984,825 popular votes, 46.09% of the total. Other candidates gained 7,830,896 popular votes, 5.73% of the total. Source: U.S. Federal Election Commission, *Official 2016 Presidential Election Results*, January 30, 2017, at http://www.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

[30] 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.

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 by some 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.[31] 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.[32]

Critics of contingent election generally argue that it removes the choice of President and Vice President one step further 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 popular 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 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,[33] in the 54 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 each census; for instance, electoral college reallocations resulting from the 2010 census were in place for the 2012 and 2016 elections, and will continue for the 2020 election.[34] Supporters of direct election note that decennial

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[31] For further information, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

[32] 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.

[33] Four closely matched major candidates contested the 1824 election, splitting the electoral vote.

[34] The Census Bureau generally delivers its official population figures and reapportionment counts late in the year in which each census is conducted. See U.S. Census Bureau, "U.S. Census Bureau Announces 2010 Census Population Counts—Apportionment Counts Delivered to President," December 21, 2010, at https://www.census.gov/newsroom/releases/archives/2010_census/cb10-cn93.html. As a result, when the census is conducted during a presidential election year, the reallocation of electoral votes among the states takes place for the next presidential election. Barring unforeseen circumstances, the 2020 census reallocation will be in effect for the 2024 presidential election.

reapportionment of electors fails to account for significant population shifts that often occur *during* the course of a decade. Thus, the allocation of electoral votes for the elections of 2012, 2016, and 2020 reflects the 2010 population distribution among the states, but it 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.[35]

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, 16 "faithless" or "unfaithful" electors have cast votes for candidates other than those to whom they were pledged, and one cast a blank ballot.[36]

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.[37] 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.[38] 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

[35] Abbott and Levine, *Wrong Winner*, pp. 82-83.

[36] In 1948 a Tennessee elector for Harry Truman (D), voted for Strom Thurmond (States' Rights). In 1956 an Alabama elector for Adlai Stevenson (D) voted for Walter Jones. In 1960 an Oklahoma elector for Richard Nixon (R) voted for Harry F. Byrd. In 1968 a North Carolina elector for Richard Nixon voted for George Wallace (American Independent). In 1972. a Virginia elector for Richard Nixon (R) voted for John Hospers (Libertarian). In 1976 a Washington elector for Gerald Ford (R) voted for Ronald Reagan. In 1988 a West Virginia elector for Michael Dukakis voted for Lloyd Bensten (D), Dukakis's vice presidential running mate, for President. In 2000 a District of Columbia elector for Al Gore (D) cast a blank ballot. In 2004 a Minnesota elector for John Kerry (D) voted for John Edwards (D), Kerry's vice presidential running mate, for President. In 2016, one Hawaii elector for Hillary Clinton (D) voted for Bernie Sanders; one Texas elector for Donald Trump (R) voted for John Kasich and one voted for Ron Paul. Three Washington electors for Hillary Clinton (D) voted for Colin Powell and one voted for Faith Spotted Eagle. For further information, see Project Fairvote, "Faithless Electors," available online at http://www.fairvote.org/faithless_electors.

[37] For individual state requirements, see *Nomination and Election of the President and Vice President*, pp. 310-345.

[38] 343 U.S. 214, 228-231 (1952).

choose.[39] In the presidential election of 2016, however, three would-be faithless electors were prevented from voting for candidates other than those to whom they were pledged.[40]

From the standpoint of electoral college defenders, it may be noted that 9,675 electoral votes have been cast in the 18 presidential elections held since 1948. Of these, the 16 that were indisputably cast against voters' instructions comprised less than two thousandths of one percent (0.001654%) of the total and had no effect on the outcome of any election.[41]

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 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.[42] Conversely, electoral college defenders claim the general ticket system's "multiplier" effect tends to reinforce the overall election results by magnifying the winning ticket's margin and to deter frivolous challenges to the state-by-state results.[43]

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.

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[39] 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 Peirce and Longley, *The People's President*, pp. 96-101.

[40] One Colorado Clinton elector voted for John Kasich, but his vote was invalidated, and an alternate cast it for Clinton. See "Colorado's Electoral Votes Go to Hillary Clinton after One Is Replaced," *Denver Post*, December 21, 2016, at http://www.denverpost.com/2016/12/19/colorado-electors-new-motion-federal-appeal-denied/. One Maine elector for Clinton was ruled out of order when he attempted to vote for Bernie Sanders, and re-cast his vote for Hillary Clinton. See "Maine Electors Cast Votes for Clinton, Trump—After Protests Inside and Outside Statehouse," *Portland Press-Herald-Maine Sunday Telegram*, December 20, 2016, at http://www.pressherald.com/2016/12/19/maine-electoral-college-elector-says-he-will-cast-his-ballot-for-sanders/. One Clinton elector in Minnesota attempted to vote for Bernie Sanders, but was replaced by an alternate. See Bill Salisbury, "Minnesota electors Vote for Hillary Clinton, after One Goes Rogue," *Twin Cities Pioneer Press*, December 19, 2014, at http://www.twincities.com/2016/12/19/minnesota-electoral-college-bittersweet-votes-hillary-clinton-donald-trump/.

[41] Total and percentage computed by CRS. See also Peirce and Longley, *The People's President*, pp. 96-102.

[42] For example, in the 2016 presidential election, Republican nominee Donald Trump won Florida by a margin of 49.0% of the popular vote to Democratic nominee Hillary Clinton's 47.8%. Under the general ticket system, however, Trump won all 29 of the state's electoral votes. "Florida Presidential Results," CNN Politics at http://www.cnn.com/election/results/states/florida/president.

[43] See also Peirce and Longley, *The People's President*, pp. 110-112.

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.[44] 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 distortions 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.[45] 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" or "at large" 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 2016, voters in Wyoming, the least populous state, cast 255,849 popular votes and three electoral votes for President, or one electoral vote for every 85,283 voters. By comparison, Californians cast 14,181,595 popular votes and 55 electoral votes, or one electoral vote for every 257,847 voters.[46] As a result of this distribution of electoral votes 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.[47]

While it is generally recognized, as noted above, that small states possess an *arithmetical* advantage in the electoral college, 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 they control have greater ability to influence the outcome of presidential elections. To use the previously cited example, a voter in Wyoming in 2016 could influence only three electoral votes, 1.1% of the 270 electoral votes needed to win the presidency, whereas a voter in California could influence 55 electoral votes in

[44] 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.

[45] 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.

[46] U.S. Federal Election Commission, *Official 2016 Presidential General Election Results*, January 13, 2017, at https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

[47] 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.

the same presidential election, 20.4% of the votes needed to gain an electoral college majority. 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.[48]

Another theory centers on an 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.[49]

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.[50]

Except for the two "senatorial electors,"[51] 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 enjoy a bias in the allocation of both Representatives and electoral votes.[52] For instance, the United States Election Project estimated that in 2016, 16.7% of California's population was noncitizens, the highest proportion of any state, followed by Texas at 13.5% and Nevada at 12.6%.[53] Critics of the current method have argued that counting noncitizens for the purposes of apportionment of Representatives and presidential electors provides an unfair advantage to states with large noncitizen populations.[54] A 2012 *Washington Post* article discussing this alleged bias concluded that, due to large concentrations of noncitizens, California gained five electors from the 2010 reapportionment that it would not have received if Representatives and electoral votes were allocated according to

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[48] Peirce and Longley, *The People's President*, p. 125.

[49] 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, 96th Cong.*, 1st 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.

[50] U.S. Constitution, 14th Amendment, Section 2, clause 1.

[51] 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.

[52] Leonard Steinhorn, "Without Voting, Non-Citizens Could Swing the Election for Obama," *Washington Post*, 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. Sean Darling-Hammond, "The Electoral College Is Even More Biased than You Think, Here's How Democrats Can Beat It," *The Nation*, January 19, 2017, at https://www.thenation.com/article/the-electoral-college-is-even-more-biased-than-you-think-heres-how-democrats-can-beat-it/.

[53] United States Election Project, 2016 General Election Turnout Rates, at https://docs.google.com/spreadsheets/d/1VAcF0eJ06y_8T4o2gvIL4YcyQy8pxb1zYkgXF76Uu1s/edit#gid=2030096602.

[54] Jack Martin, "Who Represents Illegal Aliens?" FAIR-Federation for American Immigration Reform, Washington, 2008, at http://www.fairus.org/DocServer/apportion.pdf.

citizen population, rather than *resident* population. According to this calculation, Texas gained two additional electors and New York, Florida, and Washington each gained one because Representatives are apportioned according to population. 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.[55]

Another alleged advantage or bias of the electoral college centers on differing rates of 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.[56] For instance, in the 2016 election, Hawaii, with four electoral votes, had the lowest rate of voter participation: 42.2% of eligible voters participated, casting 428,937 votes for President, a figure that equals 107,234 votes for each elector. By comparison, Minnesota, with 10 electoral votes, had the highest rate of participation, 74.2% of eligible voters, who cast 2,944,813 votes for President, a figure that equals 294,481 votes per elector.[57]

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[58] as a reason for their support of the electoral college system during hearings before the Senate Judiciary Committee's Subcommittee on the Constitution during its 1979 consideration of a direct election amendment,[59] while Alexander Bickel also supported the electoral college in this context.[60] Conversely, other commentators have sought to refute many of the "biases" of the electoral college system.[61]

The "Electoral College Lock"

A final asserted bias considered in this report is the so-called "electoral college lock," a perceived phenomenon identified in the late 1960s that was claimed to provide a long-term election advantage to the candidates of a particular party, originally to Republicans, and later, Democrats, at least through the 2016 election. The lock was loosely defined as a tendency of the system to favor presidential candidates of one party over another. It was said to operate because a bloc of states possessing a large, sometimes decisive, number of electoral votes could be reliably expected to vote in successive elections for the candidates of the political party that tended to dominate those states. For instance, California is regarded as a reliably Democratic or "blue" state in presidential elections, one that dependably delivers its 55 electoral votes to the Democratic

[55] Steinhorn, "Without Voting, Non-Citizens Could Swing the Election for Obama."

[56] Peirce and Longley, *The People's President*, pp. 113,114.

[57] United States Election Project, 2016 General Election Turnout Rates, at https://docs.google.com/spreadsheets/d/1VAcF0eJ06y_8T4o2gvIL4YcyQy8pxb1zYkgXF76Uu1s/edit#gid=2030096602.

[58] 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, 96th Cong., pp. 163-219.

[59] 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.

[60] Alexander M. Bickel, *Reform and Continuity: The Electoral College, the Convention, and the Party System* (New York: Harper and Row, 1971), pp. 4-9.

[61] See, for instance, Harvey Zeidenstein, *Direct Election of the President* (Lexington, MA: D.C. Heath, Lexington Books, 1973).

Party presidential candidates. Texas is similarly cited as a "red" state that reliably produces its 36 electoral votes for Republican presidential candidates.[62] These one-word descriptors quickly gained currency during the first decade of the 21st century, and have since become a standard verbal identifier for defining a state's political record and voting patterns.

As with other electoral college issues, the electoral college lock was also said to be dependent on the general ticket system discussed earlier in this report, because it delivers a state's entire electoral vote to the winning candidates.

The electoral college lock theory dates to the late 1960s, when analyst and historian Kevin Philips developed a thesis that political and social developments were responsible for a partisan 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.[63] Political commentators generally credit Horace Busby, a political advisor to President Lyndon B. Johnson, with naming rights for the lock.[64] 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."[65]

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

[62] According to press accounts, the categorization of states as "Red" or "Blue" originated during the presidential election campaign of 2000. Although national television networks had favored red and blue for their election-night electronic maps of the states for at least 20 years, they had not previously associated particular colors with either party on a consistent basis from election to election. NBC television journalist Tim Russert is generally credited with making the first nationwide reference to "red states" and "blue states," in remarks he made during an October 30, 2000, broadcast of "Meet the Press." See Paul Farhi, "Elephants Are Red, Donkeys Are Blue, Colors Are Sweet, So States Have Their Hue," *Washington Post*, November 2, 2004, p. C1, at http://www.washingtonpost.com/wp-dyn/articles/A17079-2004Nov1.html. The red state/blue state label is also often used to identify a state's political history over the longer run: of the two examples cited above, "blue" California has voted Democratic in every presidential election since 1988, while "red" Texas has voted for Republican presidential candidates in every election since 1972. A more recent addition to the state political color spectrum is the "purple state," one which is closely contested by the competing parties; Ohio and Colorado have been characterized as purple states, but also as swing or battleground states. See Michael Barone, "States Aren't Red or Blue Forever," *The American* (American Enterprise Institute), March 13, 2012, at http://www.american.com/archive/2012/march/states-arent-red-or-blue-forever. Purple status can also be used to identify a state whose voters may be trending away from previous voting patterns to support of a different party. For example, Virginia, which voted Democratic in the 2008 presidential election for the first time since 1964, and continued to vote Democratic in 2012 and 2016, has been characterized by some commentators as a red state that is trending toward purple.

[63] See Kevin P. Phillips, *The Emerging Republican Majority* (New Rochelle, NY: Arlington House, 1969).

[64] Charlie Cook, "Color Them Competitive," *Cook Political Report*, January 30, 2007, at http://cookpolitical.com/story/1359.

[65] Godfrey Hodgson, *More Equal Than Others, America from Nixon to the New Century* (Princeton, NJ: The Century Foundation, 2004), p. 47.

lock.[66] Republican candidates won five of six elections during this period, taking an average of 417 of 538 electoral votes per election.[67]

In the years following the 2008 and 2012 presidential elections, some observers discerned a shift in the electoral college lock in favor of Democratic Party presidential candidates.[68] They noted that Democratic candidates had won four of the previous six presidential elections (1992, 1996, 2008, and 2012) by convincing electoral college margins, taking an average of 327 electoral votes per election.[69] In addition, it was noted that 18 states disposing of 242 electoral votes, sometimes referred to as "the blue wall,"[70] had voted Democratic in all six.[71] This tendency was said to provide both a structural electoral vote advantage for Democratic candidates, and a serious obstacle to Republicans in these contests.[72] It was attributed in part to the fact that social attitudes in the general public were said to have grown more favorable to Democratic candidates, and that, as one observer claimed, "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."[73]

Other observers, however, cautioned against accepting the electoral college lock as an inevitable process that would advantage its current beneficiary notwithstanding other influences. They claimed that the purported Republican lock of the 1960s through 1980s, and the perceived Democratic lock that began in the 1990s were not a deterministic phenomenon, but could also be attributed to, and influenced by, a wide range of factors, including such influences as domestic social and economic conditions, international issues affecting public attitudes toward national security, U.S. involvement in conflict abroad, scandals of various sorts, candidate popularity,

[66] "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.

[67] 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.

[68] Nate Silver, "As Nation and Parties Change, Republicans Are at an Electoral College Disadvantage," *New York Times*, November 8, 2016, at https://fivethirtyeight.blogs.nytimes.com/2012/11/08/as-nation-and-parties-change-republicans-are-at-an-electoral-college-disadvantage/.

[69] "Historical Election Results," at http://www.archives.gov/federal-register/electoral-college/historical.html.

[70] 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/.

[71] The blue wall has generally been defined as 18 states that currently cast a combined total of 242 electoral votes (California, 55 electoral votes; Connecticut, 7; Delaware, 3; the District of Columbia, 3; Hawaii, 4; Illinois, 20; Maine, 4; Maryland, 10; Massachusetts, 11; Michigan, 16; Minnesota, 10; New Jersey, 14; New York, 29; Oregon, 7; Pennsylvania, 20; Rhode Island, 4; Vermont, 3; Washington, 12; and Wisconsin, 10. See Jon Greenberg, "18 States Have Voted Democratic in Six Consecutive Elections with 242 Electoral Votes, George Will Says," *Punditfact, Politifact.com*, November 10, 2013, at http://www.politifact.com/punditfact/statements/2013/nov/10/george-will/george-will-paints-dire-electoral-picture-gop-says/.

[72] Richard Baehr, "Electoral College: Advantage Democrats," *American Thinker*, March 1, 2013, at http://www.americanthinker.com/blog/2012/11/electoral_college_advantage_democrats.html.

[73] 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.

"time for a change"[74] sentiment, and even the competence, or lack thereof, of a presidential nominee's campaign.[75]

The 2016 presidential election arguably confirmed some of these cautions about the inevitability of the electoral college lock or the durability of the "blue wall," given that three of the claimed blue wall states, Michigan, Pennsylvania, and Wisconsin, voted for the Republican candidates, providing a combined total of 46 electoral votes to the GOP ticket, thus ensuring its election.[76]

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, or a majority, of the votes cast 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.[77] Some would require simply that the candidates that gain the most 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.

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[74] Generally defined as the feeling in the voting public that one party has been power long enough, and that it's "time for a change." See William Safire, "Time for a Change," in *Safire's New Political Dictionary, the Definitive Guide to the New Language of Politics* (New York: Random House, 1993), pp. 804-805.

[75] 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; 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. Jonathan Bernstein, "Democrats Have No Lock on the Electoral College, Why the 'Blue Wall' Theory Is a Lot of Nonsense," *Bloomberg View*, May 4, 2016, at https://www.bloomberg.com/view/articles/2016-05-04/democrats-have-no-lock-on-electoral-college. Albert R. Hunt, "The Myth of the Electoral College Lock," *Wall Street Journal*, August 31, 2000, at https://www.wsj.com/articles/SB967685202654568172.

[76] Amy Walter, "How Trump Broke the Blue Wall," *Cook Political Report*, December 9, 2016, at http://cookpolitical.com/story/10191.

[77] 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.

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.[78] All other procedures 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, could plurality Presidents or those elected by Congress, a practice that was rejected by the founders, be reconciled with the ideal of strict majoritarianism?[79] 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 postelection struggles, rather than eliminate them. A runoff election would, they might suggest, simply offer more incentives to bargaining and intrigue, thus confirming the founders' worst fears. Under direct election, they suggest, every close election might resemble the bitter postelection 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 presidency and federal government.[80]

[78] For further information on the succession question, please consult CRS Report R44648, *Presidential Elections: Vacancies in Major-Party Candidacies and the Position of President-Elect*.

[79] Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. 54-56.

[80] Curtis Gans, "Why National Popular Vote Is a Bad Idea," *Huffington Post*, January 6, 2012, at http://www.huffingtonpost.com/curtis-gans/national-popular-vote_b_1189390.html.

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 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

- the automatic plan or system, which would mandate the assignment of electoral votes automatically on the current general ticket/winner-take-all basis in each state and the District of Columbia;
- the district plan or system, 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 automatically assign each state's two additional "senatorial" electoral votes to the statewide popular vote winners; and
- the proportional plan or system, which would automatically award each state's electoral votes in proportion to the percentage of the popular vote gained by each ticket.[81]

Electoral College Reform—Discussion

Supporters of the electoral college, as presently structured, or reformed, offer various arguments in its defense.[82] 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 19th century. They cite the electoral college as a major component of 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

[81] 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 Thomas H. Neale.

[82] 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).

noted previously in this report, few votes have been cast against instructions, 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.[83]

Supporters of direct election and critics of the electoral college counter that the existing system is cumbersome, potentially antidemocratic, 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 four occasions, by electing as President a candidate who received fewer popular votes than his principal opponent, and by throwing election into the House of Representatives in a fifth. 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.[84] 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.[85] This option was discussed in Florida in 2000 during the postelection recounts,[86] and they claim its survival confirms their argument 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 the same amendment in the same Congress.[87]

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[83] Judith A. Best, *The Choice of the People? Debating the Electoral College*, pp. 10-16.

[84] 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 Thomas H. Neale.

[85] 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.... "

[86] 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.

[87] For a detailed examination and analysis of these efforts, see Peirce and Longley, *The People's President*, rev. ed. pp. 131-206.

Following the 1979 defeat of a direct popular election amendment on the Senate floor, and the subsequent departure 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. Reform or replacement proposals had been familiar items on the congressional agenda; for instance, 26 amendments were introduced to abolish or reform the electoral college in the 96th Congress (1979-1980). In the ensuing years, however, the number of related constitutional amendments introduced in the House or Senate dropped from an average of eight per Congress for the 101st through 110th Congresses, to none in the 113th Congress (2013-2014).

In 2016, however, as noted previously, according to official state returns reported by the Federal Election Commission, a President and Vice President were elected with a majority of electoral votes, but fewer popular votes than their principal opponents. The recurrence of this outcome in 2016 contributed to renewed interest among some in replacing the electoral college with direct popular election. Following the election, four proposals to establish direct popular election were introduced in the last weeks of the 114th Congress. To date in the 115th Congress, two amendments to establish direct popular election have been introduced: H.J.Res. 19, offered on January 5, 2017, by Representative Steve Cohen, would replace the electoral college with direct popular election of the President and Vice President by plurality vote. It would also authorize Congress to set voter qualifications, times, places, and manner of holding presidential elections, and other election-related policies. H.J.Res. 65, the "Every Vote Counts Amendment," introduced by Representative Gene Green on February 7, 2017, provides for direct popular election by plurality, and also provides Congress with additional authority over related activities. Both resolutions have been referred to the House Committee on the Judiciary and to its Subcommittee on the Constitution and Civil Justice. For additional information and analysis of current electoral college reform or replacement proposals, see CRS Report R44928, *The Electoral College: Reform Proposals in the 114th and 115th Congress*, by Thomas H. Neale.

Trends in Congressional Electoral College Reform Proposals

Two trends are identifiable within the context of congressional proposals to reform or replace the electoral college introduced since the late 20th century. First, 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 107th Congress (2001-2003). Second, the scope of proposed direct popular election amendments has arguably grown in complexity and detail.

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 arguable that supporters of the current system would coalesce to defend the electoral college if its existence or integrity were endangered. 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.[88]

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 subfederal governments, and as such would be subject to points of order on the floor of both the House and Senate.[89] 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).[90] 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.

Action at the State Level Since 2008

While Congress has not taken significant action on the question of electoral college reform in recent years, there has been considerable activity in the states.

Only an amendment can alter the constitutional structure of the electoral college, but the states retain considerable authority concerning various aspects of 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 appointment 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

[88] 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 Direct How States Administer Elections*, by Kenneth R. Thomas.

[89] For additional information, please consult CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger.

[90] Help America Vote Act (HAVA): P.L. 107-252; 116 Stat. 1666.

plan proposals have been advanced in the states, as identified in the following section, but none has been successfully adopted to date. These have included efforts in the following states:

- **California**—Ballot initiative campaigns in 2008 (the California Presidential Reform Act) and 2012 (the California Electoral College Reform Act) sought to establish a district system of electoral vote distribution and in 2014 (the California Split Electoral College Vote Distribution Initiative) to establish a proportional system by popular vote, but all three failed to gain ballot access.[91]
- **Colorado**—On November 2, 2004, Colorado voters rejected a state constitutional amendment, Amendment 36, which would have provided a proportional allocation of electoral votes.[92] After a contentious campaign that gained a degree of national interest, the proposal was ultimately defeated by the voters.[93]
- **Michigan**—In 2011 and 2014, bills were introduced in the legislature to change electoral vote allocation in Michigan from the general ticket to the district system. No action beyond hearings was taken on either proposal.[94]
- **Nebraska**—Bills to return Nebraska from the district system to the general ticket allocation of electoral votes were introduced in the state's unicameral legislature several times after 2011, most recently in 2016. None of these proposals has been successful to date.[95]
- **Pennsylvania**—In 2011 and 2012, two proposals were introduced in the Pennsylvania legislature to award the commonwealth's electoral votes according to the district system, but neither bill was enacted.[96] In 2013, legislation was introduced to award electoral votes according to the proportional system. As with earlier proposals, no action was taken beyond committee referral.[97]

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[91] 2008: please consult Shane Goldmacher, "Electoral College Measure Falls Short," *Sacramento Bee Capitol Alert*, February 5, 2008, available at http://blogs.sacbee.com/capitolalertlatest/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). 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).

[92] 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.

[93] 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.

[94] Jonathan Oosting, "Michigan Panel Debates Presidential Election System, Electoral College Votes," *MLive.com*, September 25, 2015, at http://www.mlive.com/lansing-news/index.ssf/2015/09/michigan_2016_electoral_colleg.html.

[95] Martha Stoddard, "Bill to Return Nebraska to Winner-Take-All Electoral College Method Comes Up Short," *Omaha World Herald*, April 13, 2016, at http://www.omaha.com/news/legislature/bill-to-return-nebraska-to-winner-take-all-electoral-college/article_9c08b7c0-00be-11e6-b0fe-77966934ee98.html.

[96] SB 1282, Regular Session, 2011-2012, Pennsylvania General Assembly website, at http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=S&type=B&BN=1282; HB 94, Regular Session, 2013-2014, Pennsylvania General Assembly website, at http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2013&sind=0&body=H&type=B&bn=94.

[97] Senate Bill 538, Regular Session, 2013, Pennsylvania General Assembly website, 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.

- **Virginia**—In 2012, a variant of the district system was introduced in the Virginia General Assembly. In contrast to the system as enacted in Maine and Nebraska, which awards 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*.[98] The bill was "bypassed indefinitely" in 2013.[99]
- **Wisconsin**—Between 2011 and 2014, press accounts indicated that Wisconsin state legislators would introduce legislation to award the state's electoral votes according to the district system. The Wisconsin Legislature's database for this period does not, however, identify any such proposal as having been introduced.[100]

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.[101]

Related activity in state legislatures continued following the 2016 presidential election. According to press reports, bills to change from the general ticket to district systems were introduced in 2017 in the legislatures of Minnesota and Virginia.[102] At the time of this writing, neither proposal has progressed beyond committee assignment in the respective legislatures.[103]

NGO Proposal: The National Popular Vote Initiative

Another contemporary electoral college reform or replacement effort centers on the National Popular Vote initiative (NPV), a nongovernmental campaign. NPV is a nongovernmental initiative which seeks to establish direct popular election of the President and Vice President

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

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

[100] Wisconsin Legislature, at https://docs.legis.wisconsin.gov/2015; https://docs.legis.wisconsin.gov/2013/; http://docs.legis.wisconsin.gov/2011.

[101] 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.

[102] David Weigel, "Republicans in Virginia and Minnesota Propose Changes to Their Electoral College Rules," *Washington Post*, January 25, 2017, at https://www.washingtonpost.com/news/post-politics/wp/2017/01/25/republicans-in-minnesota-virginia-propose-changes-to-their-electoral-college-rules/?utm_term=.4370fb44dd49; "Proposals to Change Minnesota's Votes for President," Fox 9, January 26, 2017, at http://www.fox9.com/news/231915607-story.

[103] See Minnesota State Legislature, Minnesota House of Representatives, 90th Legislature, 2017-2018, HF 406, at https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF0406&ssn=0&y=2017; and LIS, Virginia's Legislative Information System, 2017 session, HB 1425, at http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1425.

through an interstate compact, rather than by constitutional amendment.[104] 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.[105] 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."[106]

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 participating state legislatures would then choose the slate of electors pledged to the "nationwide popular vote winner," *notwithstanding the results within their particular state*.[107] 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.

Between 2007 and 2014, 10 states and the District of Columbia joined the compact. They are allocated a total of 165 electoral votes, 61% of the 270 vote majority that would be required for

[104] 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 Thomas H. Neale and Andrew Nolan.

[105] 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; 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.

[106] U.S. Constitution, Article II, Section 1, clause 2.

[107] 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.

the compact to be implemented. 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.

According to National Popular Vote, Inc., the national advocacy group for the NPV initiative, the compact has been introduced in all 50 states and the District of Columbia.[108] The National Conference of State Legislatures reports that in 2017 it is "pending" in the legislatures of eight states that jointly dispose of 88 electoral votes.[109]

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.[110]

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 hosted a forum at which guest speakers, including five state secretaries of state, expressed their concern over the National Popular Vote campaign.[111] 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.[112]

[108] National Popular Vote website, "Status of National Popular Vote Bill in Each State," at http://www.nationalpopularvote.com/state-status.

[109] National Conference of State Legislatures website, 2011-2017 Elections Data Base, "National Popular Vote," at http://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx. These states are listed in alphabetical order, including electoral vote totals: Alaska (3), Georgia (16), Kansas (6), Minnesota (10), North Carolina (15), Ohio (18), and Pennsylvania (20).

[110] National Conference of State Legislatures website, at http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx.

[111] Heritage Foundation, "The Electoral College and the National Popular Vote Plan," available at http://www.heritage.org/events/2011/12/electoral-college.

[112] 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. For further information on the State Government Leadership Foundation and its election-law-related activities, see the foundation's website at http://www.sglf.org/election-law.

Concluding Observations

The electoral college system emerged from the Philadelphia Convention of 1787 as one of the many compromises incorporated in the United States Constitution. It did not satisfy everyone, but it incorporated many of the goals sought for the presidential election process, including independence from control or influence by Congress, a substantial role for the states, and an effort to 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 who would exercise restraint and balance in their choice of the President.

Since that time, it has been modified directly by the Twelfth and Twentieth Amendments to the Constitution and indirectly through the Fifteenth, Nineteenth, and Twenty-fifth Amendments, the passage of various federal and state laws, and changing political party practices and traditions. The electoral college functions today in a way that is far more democratic and political-party oriented than the founders might have anticipated or desired, but the three essential features of the system cited above remain intact: the process is largely free of structural interference by Congress; it is based strongly on federal principles; and the electors, although now all popularly elected, still make the final choice of the President an indirect one.

Despite the convention's satisfaction with its work, the electoral college has been criticized on various grounds from the earliest days under the republic; reform proposals were introduced in Congress as early as 1797.[113] Since that time, amendments have been introduced to reform or replace the electoral college with direct popular election in almost every session of Congress. Estimates vary, but they number at least 752 through the 115th Congress.[114]

For more than two decades in the mid-20th century, electoral college reform was actively considered in Congress. Relevant amendments were debated in the Senate on five occasions, and in the House twice, but despite public support and the efforts of congressional leadership, none of these proposals met the stringent qualifications required by Article V of the Constitution: a two-thirds vote in both houses of Congress.

Congressional support and public interest in the question waned in the 21st century, notwithstanding an electoral college "misfire" in the presidential election of 2000, when, for the first time since 1888, a President was elected with a majority of electoral votes but fewer popular votes than his major-party opponent. During this period, the arena of electoral college reform was dominated for more than a decade by efforts at the state level, and by a nongovernmental initiative, as noted earlier in this report. 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. Barring unforeseen circumstances, such experiments do not appear to enjoy widespread support, and even if enacted, they might be subject to legal challenges on various grounds, including dilution of minority voter influence.

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[113] Peirce and Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative*, p. 42.

[114] Sources include Herman V. Ames, "Proposed Amendments to the Constitution of the United States During the First Century of Its History," *Annual Report of the American Historical Association for 1896* (Washington: 1897), 1800-1896; various compilations, 1896-1972; Legislative Information System of the U.S. Congress, 1973-present, at http://www.lis.gov/.

With respect to the National Popular Vote Initiative, despite its successful adoption by California in 2011 and New York in 2014, and the results of the 2016 election, the NPV 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.

Following the presidential election of 2016, congressional interest in reform, specifically direct popular election of the President and Vice President, revived; as noted previously, two measures are pending in the 115th Congress. To date, however, they have received no action beyond committee referral. These proposals face the exacting standards required by Article V of the Constitution, which establishes procedures for constitutional amendments. The founders intentionally made it difficult to revise the Constitution, establishing requirements for three separate super-majority votes: by two-thirds in both the Senate and House of Representatives and ratification by three-quarters of the states. Congress exercises still further influence on the amendment process because it can choose ratification by state legislatures, or by ad hoc state ratification conventions, at its discretion. In practice, the standard for ratification is even higher, since it is customary to attach a seven-year deadline for ratification to all proposed amendments.

Notwithstanding sometimes vigorous advocacy in Congress, no electoral college reform amendment has been able to meet even the first step of this exacting requirement since the Twelfth Amendment in 1804. That measure, which responded to a fundamental constitutional crisis resulting from the deadlocked presidential election of 1800, led to an overwhelming consensus for reform. The Twelfth Amendment was debated and approved in Congress and ratified by the states within a span of six months, a remarkable achievement for the time. It is arguable that a contemporary electoral college reform amendment might require a comparable stimulus in order to succeed.

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