

THE ELECTORAL COLLEGE: AN ANALYSIS OF REFORM
PROPOSALS THROUGH THE LENS OF PAST PRESIDENTIAL
ELECTIONS

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I. INTRODUCTION

Since its formal inception on September 6, 1787, the Electoral College has undergone harsh criticisms.¹ Even though the system is generally unpopular among a majority of Americans,² proposals to reform the Electoral College have been largely unsuccessful. The individuals taking part in the Constitutional Convention of 1787 were among the first to raise concerns about the system.³

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1. *Madison Debates: September 6*, AVALON PROJECT (2008), http://avalon.law.yale.edu/18th_century/debates_906.asp (last visited August 31, 2015); see also William C. Kimberling, *The Pro's and Con's of the Electoral College System*, US ELECTION ATLAS, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege_procon.php (last visited Aug. 31, 2015).

2. Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), <http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx>.

3. See generally Kimberling, *supra* note 1.

Over the past few decades, *Gallup* has polled U.S. citizens on their approval of the Electoral College and has consistently found that at least fifty-nine percent of the population, in any given year, favors reforming the process by which the United States chooses its President.⁴ This results in the commonly asked questions – why don't we reform the system? And if we do, how should we change it?

II. BACKGROUND

The Electoral College was not only designed to provide greater influence to smaller states, but it was also intended to serve as a "cushion between the popular vote" and the choice of the President.⁵ Article II, Section 1, Clause 2 of the United States Constitution is the foundation for the Electoral College.⁶ However, the states' interpretation of this clause varied greatly in the years following its creation.⁷ Whether it was the state legislatures themselves choosing their state's presidential nominee, electors being apportioned in accordance with the results in each congressional district, or the now-commonly-used unit voting (or "winner-take-all") system, states had not yet agreed on a uniform system.⁸

It was not until the years preceding the Presidential election of 1816 that more and more states began to adopt the unit-based system.⁹ However, even in the 1824 election, a quarter of states still chose their electors within their respective state legislatures.¹⁰ While these states were reluctant to adopt the system, once some states began to do so, it became imperative for the others to do the same to maintain their influence in the outcome of the election.¹¹ Even Thomas Jefferson, who supported the district-based voting system, noted in 1800 that, "[a]ll agree that an election by districts would be best if it could be general but while ten states choose either by their legislatures or by a general ticket,

4. Saad, *supra* note 2.

5. Rhonda D. Hooks, *Has the Electoral College Outlived Its Stay?*, 26 T. MARSHALL L. REV. 205, 205 (2001).

6. U.S. CONST. art. II, § 1, cl. 2.

7. See William Logan Martin, *Presidential Electors: Let the State Legislatures Choose Them*, 44 A.B.A.J. 1182, 1185-87 (1958); see also *McPherson v. Blacker*, 146 U.S. 1, 28-35 (1892).

8. Martin, *supra* note 7.

9. See generally Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 4-5 (1968).

10. Robin Kolodny, *The Several Elections of 1824*, 23 CONGRESS & PRESIDENCY 2, 142 (1996).

11. See generally *id.* at 142-43.

it is folly and worse than folly for the other six not to.”¹² Every state in the country, besides for South Carolina, had adopted the unit voting system by 1836.¹³

A. Constitutionality

With a system as contentious as the Electoral College, there have understandably been challenges to its constitutionality. While the unit voting system has been held unconstitutional in statewide elections, the Supreme Court has held that the framers clearly intended to include the foundation of the Electoral College, for federal elections, into the Constitution.¹⁴

The Second Circuit Court of Appeals, in *Strunk v. U.S. House of Reps.*, reasoned that “states are constitutionally empowered to determine how to select [its] electors.”¹⁵ Further, “the individual citizen has no federal constitutional right to vote for electors . . . unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”¹⁶

One challenge that has been brought to the courts multiple times is that of the “one person-one vote” principle.¹⁷ While the Supreme Court in *Gray v. Sanders* ruled against Georgia’s district-based voting system in their state elections, the Court held that there was a clear difference between a state election and the federal presidential election.¹⁸ The Supreme Court reasoned that “the inclusion of the electoral college in the Constitution, as a result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality...”¹⁹

Similar to *Gray*, the Court also dismissed a constitutional challenge to the Electoral College in *Trinsey v. United States*.²⁰ The Court held that “neither the Constitution nor the ‘one person-one vote’ doctrine vests a right in the citizens of this country to vote for Presidential electors . . . or

12. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN 63 (2007).

13. Michael J. O’Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2428 (1992).

14. *Id.* at 2433-37.

15. *Strunk v. U.S. House of Reps.*, 24 Fed. App’x. 21, 23 (2d Cir. 2001).

16. *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)).

17. *New v. Ashcroft*, 293 F. Supp. 2d 256, 258 (E.D.N.Y. 2003).

18. *Gray v. Sanders*, 372 U.S. 368, 378 (1963).

19. *Id.*

20. *Trinsey v. United States*, No. 00-5700, 2000 WL 1871697, at *2 (E.D. Pa. Dec. 21, 2000).

empowers the courts to overrule constitutionally mandated procedure in the event that the vote of the electors is contrary to the popular vote.”²¹

Effectively, the courts have held that it is within the discretion of each individual state legislature to determine how its presidential electors are chosen. While there has been a large number of published works discussing the constitutional challenges to the Electoral College, this Note will focus instead on the feasibility of different reform proposals.

B. Current Methods Used

With the widespread adoption of the unit voting method, the individual states have independently decided which system will ensure them the most influence. Except for Maine and Nebraska, every state in the country now uses the unit voting method.²² This “winner-take-all” system affords the full amount of a state’s electoral votes to the candidate who wins a plurality of the popular vote within that state.²³

The only other voting system currently used (in Maine and Nebraska) is that of the congressional district-based system.²⁴ This system affords one electoral vote to the candidate who wins the plurality of the popular vote in each congressional district, with the winner of the statewide popular vote receiving the two remaining electoral votes.²⁵ Both states have adopted this method rather recently, with Maine being the first to institute the system in 1972 and Nebraska following suit in 1996.²⁶

C. Reform Proposals

Since its creation over two hundred years ago, there have been numerous proposals to reform the Electoral College.²⁷ However, it is evident that the 2000 presidential election reinvigorated these reform

21. *Id.*

22. Hooks, *supra* note 5, at 212.

23. See generally WILLIAM R. KEECH, WINNER TAKE ALL: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON REFORM OF THE PRESIDENTIAL ELECTION PROCESS 17-69 (1978).

24. *Maine & Nebraska*, FAIRVOTE.ORG, <http://www.fairvote.org/reforms/national-popular-vote/the-electoral-college/solutions-and-the-case-for-reform/maine-nebraska/> (last visited Sept. 1, 2015).

25. *Id.*

26. *Id.*

27. Christopher Anglim, *A Selective, Annotate Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 LAW LIBR. J. 297, 313-14 (1993).

efforts more than any other single event in recent history.²⁸ While it is common knowledge that George W. Bush prevailed, the election results led to an outcry for reform. Even though Bush was awarded more electoral votes than Al Gore (271 electoral votes to 266 electoral votes), Al Gore had received 543,895 more popular votes than Bush.²⁹ This result gave added support to the Electoral College's critics who believe that the system fails to accurately reflect the popular will of the nation.³⁰

The 2000 election is not the only one that has encountered this type of "inconsistency." The elections of 1876 and 1888 both produced victors who failed to receive a plurality of the popular vote.³¹ In 1876, Rutherford B. Hayes was awarded a one-point victory, in the Electoral College, over Democrat Samuel J. Tilden despite losing the popular vote by over 200 thousand people.³² Similarly, in 1888, challenger Benjamin Harrison unseated President Grover Cleveland.³³ This time, however, the disparity in the final electoral vote was much more significant. Despite receiving over 100 thousand more votes than Harrison, Cleveland lost the electoral vote by a substantial sixty-five votes.³⁴

Even with these "inconsistent" results, it is highly unlikely that nation-wide reform will happen anytime soon. While individual states can determine how their electors are chosen, a Constitutional amendment is necessary to change or dissolve the Electoral College.³⁵ Article V of the US Constitution lays out the process of amending the Constitution.³⁶ To pass a Constitutional amendment, which would then be sent to the states for ratification, one of two procedures must be followed: (1) either two-thirds (a supermajority) of members in both the US House of Representatives and the US Senate must vote in favor of the amendment, or (2) a two-thirds (supermajority) amendment vote must be held by a

28. G. Terry Madonna & Dr. Michael Young, *Fiddling with the Rules – Franklin & Marshall* (March 9, 2003), <http://www.fandm.edu/uploads/files/123954780353592209-fiddling-with-the-rules-3-9-2005.pdf>.

29. 2000 Official Presidential Election Results, FEC.GOV, <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited Sept. 1, 2015).

30. William C. Kimberling, *The Electoral College*, FEC.GOV (May 1992), <http://www.fec.gov/pdf/eleccoll.pdf>.

31. Historical Presidential Elections, 270ToWin.COM, <http://www.270towin.com/historical-presidential-elections/> (last visited Sept. 1, 2015).

32. 1876 Presidential Election, 270ToWin.COM, http://www.270towin.com/1876_Election/ (last visited Sept. 1, 2015).

33. 1888 Presidential Election, 270ToWin.COM, http://www.270towin.com/1888_Election/ (last visited Sept. 1, 2015).

34. *Id.*

35. See generally ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION* 47-49 (1994).

36. U.S. CONST. art. V.

national convention, which is called by Congress at the request of the state legislatures of at least thirty-four states (two-thirds).³⁷ Because of these almost insurmountable obstacles, proposals have focused on reforming how individual states choose how to apportion their electoral votes.

The criticisms of the Electoral College have evolved into three very different proposals for reform: (1) the National Popular Vote plan, (2) the congressional district-based plan, and (3) the proportional representation plan.³⁸ The proponents of each system hope to persuade states to adopt their respective system of vote allocation.

The analysis section will not only discuss the advantages and disadvantages of each system, but will also discuss how previous presidential elections would have resulted if these systems had been in place. The State of Michigan will specifically be considered as an example of how each proposal would drastically affect the amount of electors a presidential candidate would receive under each system.

III. ANALYSIS

A. Electoral College System

To understand the arguments for each reform method, it is necessary to look at the drawbacks of the current Electoral College system. The Electoral College was instituted, partially, as a way to give more power to smaller states, and also to act as a buffer between the direct popular vote and the election outcome.³⁹ An inherent protection against foreign influence was also important in the creation of the Electoral College system, with electors, a small group of individuals, ultimately choosing which candidate is awarded the state's electoral votes.⁴⁰ The rationale

37. *Id.*

38. See generally Roberta A. Yard, *American Democracy and Minority Rule: How the United State Can Reform Its Electoral Process to Ensure 'One Person, One Vote'*, 42 SANTA CLARA L. REV. 185, 207-218 (2001).

39. Michael McLaughlin, *Direct Democracy and the Electoral College: Can A Popular Initiative Change How A State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 2951-52, 2954 (2008), (citing JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 431-32 (Books for Libraries ed. 1970) (E.H. Scott ed., 1840)).

40. *Id.* at 17 (citing Madison, *supra* note 39, at 365); see also THE FEDERALIST No. 68, at 394 (Alexander Hamilton) (contending that the Electoral College guards against cabal, intrigue, and corruption by not depending "on any pre-existing bodies of men who might be tampered with beforehand"; making ineligible former office holders who might have too great a connection to an incumbent President; and defining their office as transient and dispersed to make corruption more difficult); see also NEAL R. PEIRCE &

was that if there was ever a suspicion of foreign sabotage, this small group could award the electoral votes to the candidate they believed truly had the support of the state's citizens.⁴¹

After fifty-seven presidential elections, there have been four separate times where the winner of the popular vote was the loser under the Electoral College system.⁴² While supporters of the Electoral College may argue that four occurrences out of fifty-seven elections is a small percentage, any change in the outcomes of these elections would have had large-scale effects on the policy decisions of this country. In the United States, a large emphasis is placed on democracy and the right of individuals to vote for the candidate of their choosing; this is why naming a victor who has received fewer votes than their competitor is so contrary to popular belief.

Further, the Electoral College contains a provision that if no candidate has received a majority of the electoral votes, the decision will be left to the House of Representatives, with each state delegation receiving one vote.⁴³ This was a victory for smaller states in the compromise since each individual state would be on equal footing and population size would not be taken into effect.⁴⁴ While this may have been appealing to members of Congress during the Electoral College formulation, it is hard to comprehend how the future President being chosen by congressional voting is a better process than reform proposals that focus on the will of the public.

One of the biggest drawbacks of the Electoral College in recent elections, with technological advances and the media playing a more active role, is that specific "battleground states" are much more important than other states.⁴⁵ For example, in the last month of the 2004 Presidential campaign between George W. Bush and John Kerry, seventy-two percent of the \$237 million spent on advertising was spent in a total of five states (Florida, Ohio, Iowa, Wisconsin, and Pennsylvania).⁴⁶ Even more astounding, a total of twenty-three states did

LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 22 (rev. ed. 1981).

41. *THE FEDERALIST* No. 68, at 394 (Alexander Hamilton).

42. See generally *U.S. Electoral College System*, ARCHIVES.GOV, <http://www.archives.gov/federal-register/electoral-college/historical.html> (last visited Sept. 7, 2015).

43. McLaughlin, *supra* note 39, at 2955.

44. *Id.* at 2955 n. 81.

45. Hendrick Hertzberg, *Count 'Em*, *NEW YORKER* (Mar. 6, 2006), <http://www.newyorker.com/magazine/2006/03/06/count-em-2>.

46. Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 *HARV. J. ON LEGIS.* 205, 218 (Winter 2007); see also *U.S. Presidential*

not see a single dollar spent by either candidate during this last month of the campaign.⁴⁷

While supporters of the Electoral College argue that battleground states vary from election to election, the fact that each election has a certain number of states that are more important than others results in the discrimination against voters in so-called "safe states."⁴⁸ Detractors of the Electoral College suggest that reforming the system would force candidates to broaden their campaign and reach out to different areas of the country.⁴⁹ This is a point of contention amongst the system's supporters and detractors.

Voter turnout is another argument against the Electoral College. As is apparent from prior elections, many of the electoral votes in a given election can be predicted for one candidate or another long before election season even begins.⁵⁰ The understanding of this "pre-designed" outcome decreases the incentive for an individual to vote in that state.⁵¹ For example, California has not awarded its electoral votes to a Republican candidate since 1988.⁵² With an average of approximately sixty-one percent of California residents favoring Democratic candidates over the past two elections, a Republican voter has much less reason to vote in the presidential election; they may feel that their vote will not matter.⁵³ A recent report by the Committee for the Study of the American Electorate discovered that the 2004 voter turnout in swing states increased by 6.3 percent from the 2000 presidential election while non-competitive states only saw an increase of 3.8 percent.⁵⁴ Similarly, a report by the Center for Information on Research and Civic Learning and Engagement (CIRCLE) discovered that the turnout of eligible voters under the age of thirty was 64.4 percent in the ten most competitive

Campaign Spending Triples, CBC NEWS (Nov. 1, 2004, 11:37 AM), http://www.cbc.ca/world/story/2004/11/01/us_campaigncost041101.html.

47. Chang, *supra* note 46.

48. Bonnie J. Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 *PUBLIUS* 337, 343 (2005).

49. Craig J. Herbst, *Redrawing the Electoral Map: Reforming the Electoral College With the District-Popular Plan*, 41 *HOFSTRA L. REV.* 217, 217-18 (Fall 2012).

50. See generally David Hill & Seth C. McKee, *The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election*, 33 *AM. POL. RES.* 700 (2005).

51. See Herbst, *supra* note 49, at 245.

52. *California*, 270TOWIN.COM, <http://www.270towin.com/states/California> (last visited Sept. 7, 2015).

53. *Id.*

54. Rob Ritchie, *Election 2004 By the Numbers*, COUNTERPUNCH (Nov. 4, 2004), <http://www.counterpunch.org/2004/11/04/election-2004-by-the-numbers/>.

states while turnout for this same demographic reached only 47.6 percent throughout the rest of the country.⁵⁵

While the Electoral College is the long-established practice in the United States, to say it is an antiquated system with major flaws is an understatement. These flaws, which have produced questionable election outcomes at times, have led individuals to propose reform methods in order to alleviate some of these issues.

B. Direct Popular Vote

In recent years, a movement known as the National Popular Vote plan has gained traction in persuading individual states to pass laws that would award their electoral votes to the winner of the direct popular vote.⁵⁶ For the plan to work, a certain number of states would have to pass these laws.⁵⁷ However, not every state would need to buy in for the system to work.⁵⁸ Only a total number of states whose electoral votes equal 270, or greater, would need to participate in the model for it to function according to plan.⁵⁹ Since the winner of the popular vote would automatically receive these states' electoral votes, the candidate with the plurality of the popular vote would effectively win the election.⁶⁰

On April 15, 2014, New York Governor Andrew Cuomo signed the National Popular Vote bill (NPV) into law, becoming the tenth state to do so.⁶¹ Since the formulation of the NPV model, ten states and Washington D.C. have signed this legislation, with 165 electoral votes committed out of the 270 electoral votes needed to make the model functional.⁶² In addition to New York and Washington D.C., NPV legislation has also been passed into law by Maryland, Massachusetts, Washington, Vermont, Rhode Island, Hawaii, New Jersey, Illinois, and California.⁶³ The NPV has now been introduced in the state legislatures

55. See Mark Hugo Lopez, Emily Kirby & Jared Sagoff, *The Youth Vote*, CTR. FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT (July 2005), http://www.civicyouth.org/PopUps/FactSheets/FS_Youth_Voting_72-04.pdf.

56. *Explanation of National Popular Vote Bill*, NATIONALPOPULARVOTE.COM, <http://www.nationalpopularvote.com/pages/explanation.php> (last visited Sept. 7, 2015).

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. Pearl Korn, *Is It Time to Implement a National Popular Vote in Presidential Elections?*, HUFFPOST POLITICS (June 17, 2014, 8:53 AM), http://www.huffingtonpost.com/pearl-korn/is-it-time-to-implement-a_b_5502397.html.

62. *Id.*

63. *Explanation of National Popular Vote Bill*, *supra* note 56.

of all fifty states, with at least one chamber of the legislature passing the bill in twenty-two of the states.⁶⁴

Most recently, on February 4, 2016, the Arizona House of Representatives passed the National Popular Vote bill, with exactly two-thirds of its members voting in favor.⁶⁵ As the proposal gains recognition, politicians from both sides of the aisle are coming forward in favor of this plan. The Arizona House of Representatives becomes the third Republican-controlled state legislative chamber to pass a National Popular Vote bill.⁶⁶ The Oklahoma Senate and New York Senate have both passed similar bills.⁶⁷ Additionally, in February 2016, a bipartisan group of thirty-one state senators sponsored the National Popular Vote bill, proposed by two Republican lawmakers, in the Missouri Senate.⁶⁸ Newt Gingrich, longtime Republican and former Speaker of the U.S. House of Representatives, has even expressed his support for the plan.⁶⁹

During the nation's founding years, when a lack of technology and long distances were of concern, one of the main arguments against a direct popular vote system was that the process would be too burdensome.⁷⁰ However, a direct popular voting system, such as the NPV model, has many positive aspects and is slowly gaining acceptance from states across the country. As mentioned previously, a state has no incentive to abandon the "winner-take-all" system without other states following suit.⁷¹ With the NPV, however, the interstate compact provision within the statute mandates that the system would only go into effect if enough states had passed the same bill by a certain date.⁷²

Proponents of the NPV argue that the winner of the election should be the candidate that is preferred by a plurality of American citizens.⁷³ Under this model, the winner of the popular vote would automatically be

64. Korn, *supra* note 61.

65. *Arizona*, NATIONALPOPULARVOTE.COM, <http://www.nationalpopularvote.com/state/az> (last visited Feb. 12, 2016).

66. *Id.*

67. *Id.*

68. *Missouri*, NATIONALPOPULARVOTE.COM, <http://www.nationalpopularvote.com/state/mo> (last visited Feb. 12, 2016).

69. *Newt Gingrich Endorses National Popular Vote*, NATIONALPOPULARVOTE.COM (Jan. 14, 2014), <http://www.nationalpopularvote.com/newt-gingrich-endorses-national-popular-vote>.

70. Korn, *supra* note 61.

71. Kolodny, *supra* note 10.

72. *Explanation of National Popular Vote Bill*, *supra* note 56.

73. See generally L. PAIGE WHITAKER & THOMAS H. NEALE, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS (Cong. Res. Serv. Rep. No. RL30804, Jan. 16, 2001), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30804_01162001.pdf.

awarded the electoral votes of the states that have passed the NPV legislation.⁷⁴ There would be no way a candidate who wins less than a plurality of the popular vote could win the election.

Supporters of the NPV model also suggest that this proposal would greatly diminish “battleground” states and would encourage candidates to reach out to citizens in states across the country.⁷⁵ Since the outcome of the election would depend directly on the popular vote, there would be more of an effort to not only increase voter turnout, but to campaign in different geographic areas in the hopes of swaying independent voters.⁷⁶

Critics of the NPV model have many arguments that should be considered before adoption of this proposal. First, they argue that candidates would be more inclined to focus on urban centers and states with larger populations, while less populated states would receive little attention.⁷⁷ Although this argument may have merit, candidates already focus on a few select “battleground” states.⁷⁸ While candidates may be more inclined to visit highly-populated areas under the NPV model, the fact that each individual vote is weighed the same throughout the country would likely encourage candidates to reach out to as many voters as possible. Of course, candidates may be encouraged to visit areas where they can spread their message to as many people as possible, but under the NPV model, they would have to do so in many different states and metropolitan areas to ensure voter turnout and a popular vote advantage. Under this plan, individuals in traditional “safe” states would be much more motivated to vote if they thought that their vote could actually have an impact on the election outcome. Voter turnout and participation in every state would be key to a candidate’s success.

Secondly, election fraud concerns have been discussed as a possible drawback of the NPV model.⁷⁹ Some have suggested that a direct popular vote in an election with a slim margin of victory, such as the 2000 election, could result in election fraud or mistakes in tallying which could have harmful effects on the outcome of the election.⁸⁰ Essentially, the concern is that it would be much more difficult to prevent election

74. *What is the National Popular Vote Plan?: Facts & FAQ's*, FAIRVOTE.ORG, <http://www.fairvote.org/reforms/national-popular-vote/what-is-the-national-popular-vote-plan/> (last visited Sept. 7, 2015).

75. *Id.*

76. *Id.*

77. Gail Dryden & Barbara Klein, *LWVUS National Popular Vote Compact Study, Opposing Arguments*, LEAGUE OF WOMEN VOTERS (2008), http://www.lwvpba.org/issuesactions/NPVArgument_con.pdf.

78. Hertzberg, *supra* note 45.

79. Dryden & Klein, *supra* note 77.

80. *Id.*

fraud on a national level than in the Electoral College where “battleground” states are the only ones where this type of fraud could potentially impact the election results.⁸¹ While election fraud or tallying mistakes are always a concern, NPV supporters argue that with a large pool of roughly 122 million voters, the chance of a fraudulent outcome is much less likely than in the Electoral College system where it only takes a fraudulent outcome in one of the fifty states to produce a flawed result.⁸² An extremely large number of municipalities would have to have been subjected to fraudulent votes or made tallying mistakes to deprive the rightful individual of victory.

A third argument against the NPV model is that the majority of voters in a given state could be disenfranchised.⁸³ This would occur if the state participating in the NPV interstate compact had to award its electoral votes to the candidate who lost the popular vote within that particular state.⁸⁴ Under the NPV model, the state’s electoral votes would only be awarded to the candidate who has won a plurality of the national popular vote while completely disregarding the decision of that state’s citizens.⁸⁵ The majority opinion of that state would be meaningless.⁸⁶ The NPV model would instead focus on the will of the collective United States citizenry.⁸⁷ While the outcome of the popular vote in a given state would be of less importance, the nationwide majority vote would be the deciding factor.⁸⁸ These concerns are tough to reconcile since the United States was founded on compromise amongst states, but the President is the only elected office in the country where every citizen, in every state, has a say. Should the majority opinion of a respective state’s citizens be the focus, at the risk of electing a President who loses the nationwide popular vote?

Fourth, detractors contend that the implementation of a direct popular vote system would give rise to third parties.⁸⁹ The belief is that the rise of such parties could lead to a more divisive government, with an influx of different ideas and ideologies.⁹⁰ However, as *Gallup* polling has

81. *Id.*

82. *Agreement among the States to Elect the President by Nationwide Popular Vote*, NATIONALPOPULARVOTE.COM (June 1, 2007), <http://www.nationalpopularvote.com/resources/7-Page-NPV-Memo-V33-2007-6-1.pdf>.

83. Dryden & Klein, *supra* note 77.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Agreement among the States to Elect the President by Nationwide Popular Vote*, *supra* note 82.

88. *Id.*

89. WHITAKER & NEALE, *supra* note 73, at 16.

90. *Id.*

shown, most citizens do not believe that Congress, with only two parties, has done an acceptable job over the past few decades.⁹¹ It is also questionable how strong this argument is. The states involved in the interstate compact would only award its electoral votes to the candidate who wins a plurality of the nationwide popular vote. A third-party candidate would have to receive millions of votes throughout the country to make any type of impact. On the other hand, under the current Electoral College system, a third-party candidate only has to win a majority of votes in a single state to have a dramatic impact on the final election outcome.

While it is difficult to imagine a reform method that is perfect, supporters of the National Popular Vote method contend that not only is this plan the simplest and easiest to understand, it directly relates to a theory that is held in the highest regard in the United States: majority rule.⁹²

1. Historical Application

In applying the National Popular Vote model to previous presidential elections, it is easy to discern the different outcomes that would have occurred had this system been in place. First, in 1824, Andrew Jackson received over 151 thousand votes, while his competitor, John Quincy Adams, tallied just over 113 thousand.⁹³ The election was decided by the House of Representatives which ultimately chose Adams to serve as President.⁹⁴ Under the NPV model, Andrew Jackson would have won the presidency without controversy.

Again, in 1876, Rutherford B. Hayes had a final vote total of approximately 4.034 million while his main competitor, Samuel Tilden, totaled over 4.2 million.⁹⁵ Hayes ultimately received one more electoral vote than Tilden and Congress referred the matter to the Electoral Commission which gave the election to Hayes.⁹⁶

In 1888, just twelve years after Hayes was elected, the Electoral College again came under scrutiny. Benjamin Harrison, who had

91. See *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited Nov. 29, 2015).

92. WHITAKER & NEALE, *supra* note 73, at 16.

93. *Electoral College Box Scores 1789-1996*, U.S. ELECTORAL COLL., <http://www.archives.gov/federal-register/electoral-college/scores.html#1824> (last visited Sep. 8, 2015).

94. Robert McNamara, *The Election of 1824 was Decided in the House of Representatives* (2007), <http://history1800s.about.com/od/leaders/a/electionof1824.htm>.

95. *Electoral College Box Scores 1789-1996*, *supra* note 93.

96. *Id.*

received 233 electoral votes and approximately 5.44 million popular votes, came out as the victor against Grover Cleveland (who was President at the time), who had received only 168 electoral votes but roughly 5.53 million popular votes, approximately ninety thousand more than Harrison.⁹⁷

Finally, and most famously, the 2000 election between George W. Bush and Al Gore resulted in another “inconsistent” outcome. George W. Bush received a total of 271 electoral votes to Gore’s 266.⁹⁸ However, Bush received a total of approximately 50.456 million votes to Gore’s roughly 50.999 million votes.⁹⁹ Even though Gore had received over five hundred thousand more votes than Bush, Bush was declared the victor.¹⁰⁰

A fifth “flawed result” was narrowly avoided in 2004 when John Kerry would have won the election over George W. Bush if just over fifty-nine thousand votes in Ohio had shifted his way even though Bush had a nationwide lead of over three million votes.¹⁰¹ Similarly, in 2012, a shift of just over 214 thousand votes from President Obama to Mitt Romney would have given the victory to Romney even though he trailed Obama by more than five million votes nationwide.¹⁰² While these outcomes were consistent with the popular vote totals, it is clear just how easy it is for a result to be inconsistent with the choice of a majority of U.S. citizens.

Under the National Popular Vote method, Andrew Jackson would have been elected President four years sooner than he was, Samuel Tilden would have become President instead of Rutherford B. Hayes, Grover Cleveland would have prevailed in his second term bid, and Al Gore would have become President in 2000 instead of George W. Bush.¹⁰³ Not only would the results in these years have changed the course of history, but also, because of the common practice of serving only two terms, as well as the ratification of the 22nd Amendment to the United States Constitution establishing term limits, it is likely that the complete lineage of Presidents in the United States would have completely changed.¹⁰⁴

The 2000 election is a perfect example of this. If Al Gore had been victorious, it is likely that he either would have served until 2008 or

97. *Id.*

98. 2000 *Presidential Electoral and Popular Vote* (2001), <http://www.fec.gov/pubrec/fe2000/elecpop.htm> (last visited Sept. 8, 2015).

99. *Id.*

100. *Id.*

101. *Explanation of National Popular Vote Bill*, *supra* note 56.

102. *Id.*

103. *Electoral College Box Scores 1789-1996*, *supra* note 93.

104. See U.S. CONST. amend. XXII.

would have been defeated after only one term in 2004. Whatever the outcome would have been, it is reasonable to assume that George W. Bush may have never been elected President, Barack Obama might not have been elected in 2008, or a completely different individual would be the current President of the United States.

C. Congressional District Method

This second proposal does not dismantle the current system, but rather, reforms it so that each electoral vote is awarded to the candidate who wins the plurality of votes in that respective congressional district.¹⁰⁵ The two remaining electoral votes in each state would be awarded to the candidate who wins the plurality of votes throughout the entire state.¹⁰⁶ This system is currently in use in both Maine and Nebraska.¹⁰⁷ Instead of the current “winner-take-all” system, congressional district votes would decide who receives each electoral vote.¹⁰⁸ As we have seen in Maine and Nebraska, this could result in a state awarding its electoral votes to more than one candidate.¹⁰⁹ Many states adopted this system following the Constitutional Convention before states slowly began to transition to a “winner-take-all” system.¹¹⁰

Supporters of the congressional district plan argue that by keeping the Electoral College system in place, under this proposal, small states would continue to receive the advantages that they currently do under the traditional Electoral College model.¹¹¹ This includes a small state being allocated a minimum of three electoral votes, regardless of their population.¹¹² Supporters also suggest that the congressional district method would encourage candidates to reach out to less populated areas within a state since each congressional district would equally count as one electoral vote.¹¹³ The reasoning is that instead of campaigning only in urban areas, a candidate would be encouraged to reach out to diverse geographic areas in each state.¹¹⁴

105. WHITAKER & NEALE, *supra* note 73.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. O’Sullivan, *supra* note 13.

111. See WHITAKER & NEALE, *supra* note 73.

112. *Id.*

113. Bryan Fischer, *It’s Time to Award Electoral College Votes by Congressional District*, AM. FAM. ASS’N (Feb. 3, 2015, 10:27 AM), <http://www.afa.net/the-stand/government/its-time-to-award-electoral-college-votes-by-congressional-district/>.

114. *Id.*

This congressional district-based method, however, has come under a great deal of scrutiny. First, the current problem of a candidate winning the electoral vote while losing the popular vote would still exist.¹¹⁵ As this Note briefly discusses below, this proposal could actually lead to more “inconsistent” results than the current “winner-take-all” system.

Second, detractors contend that a system focused heavily on congressional districts would increase the temptation of a political party to gerrymander the districts within their state.¹¹⁶ While there are already charges of gerrymandering throughout the country, having presidential elections hinge on how congressional lines are drawn every ten years would give state legislators an even greater reason to gerrymander.

Third, while supporters of this system believe that this reform method will encourage candidates to visit less-populated areas, opponents of the system argue that it will actually achieve the opposite.¹¹⁷ In a given presidential election there may be anywhere from ten to twenty “swing” states, but encouraging candidates to only focus on “swing” congressional districts could possibly persuade them to ignore huge portions of a state altogether.¹¹⁸

Michigan serves as an example of this possible drawback. In 2010, the Republican Party saw huge victories at the state level and was, therefore, given the opportunity to draw the congressional districts based on the 2010 census data.¹¹⁹ The 2012 presidential and congressional elections were the first to show the new voting margins of these newly redrawn districts. As a result of the redistricting, only one congressional district race saw a final margin within five percent (1st congressional district).¹²⁰ Every other congressional district was considered “safe Republican” or “safe Democratic.” So, while presidential candidates would usually focus on different areas within Michigan, under the congressional district-based proposal, presidential candidates would be inclined to campaign only in the 1st congressional district. Since all of the other districts are “safe” Republican or Democratic, winning the 1st

115. See WHITAKER & NEALE, *supra* note 73.

116. *Reform Options & Wrong Way Reforms*, CTR. FOR VOTING & DEMOCRACY, <http://www.fairvote.org/reforms/national-popular-vote/the-electoral-college/solutions-and-the-case-for-reform/reform-options-wrong-way-reforms/#congdismet> (last visited Sept. 8, 2015).

117. *Id.*

118. *Id.*

119. David Weigel, *The Long Tail of 2010: Why Michigan Republicans Can Get Away with Their Last-Minute Anti-Labor Push*, SLATE (Dec. 7, 2012, 12:27 PM), http://www.slate.com/blogs/weigel/2012/12/07/the_long_tail_of_2010_why_michigan_republicans_can_get_away_with_their_last.html.

120. *2012 Michigan House Results*, POLITICO (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/house/michigan/>.

district would be of utmost importance, while the others would receive little-to-no attention.¹²¹

As a result of these new congressional district boundaries, President Obama only won a plurality of votes in five out of the fourteen congressional districts in Michigan while outpacing Mitt Romney in the statewide popular vote 2,561,911 to 2,112,673, a 54.3 percent to 44.8 percent margin.¹²² Under this congressional district-based reform method, President Obama would have received seven electoral votes to Romney's nine, even while receiving almost ten percent more of the Michigan popular vote.¹²³

While incumbency, open congressional seats, fundraising prowess, and an extraordinary candidate may provide for upsets in some situations, "safe" districts are common in every state.¹²⁴ In 2012, statistician and political scientist Nate Silver even suggested that, based on his research, only thirty-five "swing" congressional districts existed while, on the other hand, 242 could be considered "landslide" districts (extremely safe).¹²⁵

Opponents contend that the lack of competitive congressional districts and the existence of gerrymandering are strong reasons against implementing the district based method.¹²⁶ Gerrymandering provides an opportunity for a political party to "pack" groups of voters who support the other side into a small number of congressional districts.¹²⁷ This is even easier to accomplish in urban areas where large amounts of minority voters, usually Democratic supporters, are located.¹²⁸ As evidenced in Michigan, a state with the large urban communities of Detroit and Flint, it was easy to "pack" a large number of Democratic voters into just five congressional districts.¹²⁹

121. *Id.*

122. *Id.*

123. *Id.*

124. Nate Silver, *As Swing Districts Dwindle, Can A Divided House Stand?*, N.Y. TIMES (Dec. 27, 2012, 9:46 AM), http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/?_r=0.

125. *Id.*

126. *Reform Options & Wrong Way Reforms*, *supra* note 116.

127. Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all>.

128. *Id.*

129. *2012 Michigan House Results*, *supra* note 120.

1. *Historical Application*

It is easy to see how drastically different prior presidential elections would have turned out if the congressional district system was in place.

In the 2012 election, Mitt Romney would have been victorious, even while losing the popular vote.¹³⁰ Under the current “winner-take-all” Electoral College, Barack Obama was awarded 332 electoral votes to Mitt Romney’s 206.¹³¹ While this margin is much larger than the 51.1% to 47.2% popular vote result, it is still a “consistent” result.¹³² However, if the district-based system had been in place, Romney would have received 273 electoral votes to President Obama’s 262 while receiving approximately five million fewer votes than President Obama.¹³³

If this congressional district-based system was in place today, the Democratic candidate, in an average election, would lose at least twenty electoral votes from the state of California alone.¹³⁴ Even in a smaller state such as North Carolina, a Democratic candidate would lose three to four electoral votes under this system.¹³⁵ If this system had been in place during the 2000 election, George W. Bush would have beaten Al Gore by thirty-eight electoral votes (an even wider margin than under the Electoral College) while losing the popular vote.¹³⁶

While there is little research on how other presidential elections would have changed under this system, it is evident that this proposal does not solve the issues many people have with the Electoral College - “inconsistent” results.¹³⁷

130. FEDERAL ELECTIONS COMM’N, *FEDERAL ELECTIONS 2012: RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* (2013), <http://www.fec.gov/pubrec/fe2012/federalections2012.pdf>.

131. Aaron Bycoffe & Andrei Scheinkman, *What the 2012 Election Would Look Like Under the Republicans’ Vote-Rigging Plan*, HUFF. POST (Jan. 24, 2013, 10:02 PM), http://www.huffingtonpost.com/2013/01/24/republican-vote-rigging-electoral-college_n_2546010.html.

132. FEDERAL ELECTIONS COMM’N, *supra* note 130.

133. Bycoffe & Scheinkman, *supra* note 131.

134. Moni T., *History of Congressional District Method for Presidential Elections Fraught with Partisan Intrigue*, FAIRVOTE.ORG (Aug. 16, 2007), <http://www.fairvote.org/research-and-analysis/blog/history-of-congressional-district-method-for-presidential-elections-fraught-with-partisan-intrigue/>.

135. *Id.*

136. *Id.*

137. Anglim, *supra* note 27.

D. Proportional Representation Plan

Similar to the congressional district plan, the goal of the proportional representation plan is to reform the Electoral College rather than abolish it.¹³⁸ Instead of a prevailing candidate receiving the full number of electoral votes from a state, the electoral votes from each state would be awarded to each candidate proportional to the percentage of the popular vote each candidate received.¹³⁹ To avoid issues with accuracy, most proportional representation proposals suggest rounding to the nearest thousandth vote, or third decimal point.¹⁴⁰

Supporters of this plan suggest that this could be the easiest solution to the current problems of the Electoral College without completely abolishing it.¹⁴¹ Its supporters contend that by reforming the Electoral College in a manner that heavily weighs the popular vote in its application, it would be far less likely that a “minority” candidate (one who loses the popular vote but wins the electoral vote) would prevail.¹⁴²

Proponents of the plan also argue that this proposal would rid the current system of “wasted votes.”¹⁴³ The amount of voters that come out to support a candidate in a given state, even if greatly outnumbered by the other party, would still have an effect on the overall chances of their favored candidate to prevail nationwide.¹⁴⁴

An additional argument to support this proposal is that candidates would be encouraged to reach out to as many states as possible rather than just those states with a large number of electoral votes.¹⁴⁵ The reasoning is that a large minority voter turnout in a given state could give the losing candidate in the state an extra electoral vote or two, which would be lost by the prevailing candidate.

For an example of this, one only needs to consider a single state’s result in the 2012 election. In Michigan, Barack Obama received 54.3% of the popular vote while Mitt Romney received 44.8%.¹⁴⁶ Under the current “winner-take-all” system, Obama received the full sixteen

138. WHITAKER & NEALE, *supra* note 73, at 17-19.

139. *Id.*

140. *Id.* at 19.

141. *Id.*

142. *Id.* at 20.

143. *Id.*

144. James D. Pitner & Connor A. Mocsny, *Electoral College Reform*, U. PAC. McGEORGE SCH. OF L. (2008), <http://www.mcgeorge.edu/Documents/Publications/2008ElectoralCollegeReform.pdf>.

145. WHITAKER & NEALE, *supra* note 73, at 17-19

146. 2012 Michigan Presidential Results, POLITICO (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/house/michigan/>.

electoral votes Michigan was able to award.¹⁴⁷ Under the proposed proportional representation plan, Obama would have received approximately 8.688 electoral votes while Romney would have received approximately 7.168 electoral votes. These two candidates were separated by roughly 450 thousand votes in the State of Michigan.¹⁴⁸ However, if the losing candidate, Romney in this case, had continued to campaign in Michigan in an effort to raise his vote count or get more Republicans to the voting booth, he may have won an additional one-tenth, or more, of an electoral vote. While this may not seem like much, when you consider that these two candidates only had a difference of slightly over one electoral vote in Michigan, one-tenth of a vote could make a huge difference.

While there are strong arguments for this proposal, opponents of the plan will point out that there are some negatives as well. Opponents suggest that this plan could lead to the undermining of the two-party system since it would be much easier for a third party to emerge and win electoral votes by earning even a small percentage of votes in a given state.¹⁴⁹ Under this proposal, a candidate would only need to win ten percent of the vote in a state to receive a portion of that state's electoral votes.¹⁵⁰ The emergence of a strong third party, or multiple third parties, would increase the likelihood that no candidate would receive a majority of the electoral votes, and thus, would leave the decision to Congress.¹⁵¹

Further, opponents suggest that by awarding proportional electoral votes to small, third parties "the possibility that a party with extreme points of view could gain political power is greatly increased."¹⁵² These same groups could "use their electoral power as leverage" to gain concessions or favors from either the Democratic or Republican parties in exchange for dropping out of the race.¹⁵³

Both proponents and detractors agree that amending the Constitution would be necessary for this plan to take effect. As this Note discusses above, this is no small task.

1. Historical Application

A 2001 report for the Congressional Research Service looked specifically at the 1996 election between Bill Clinton and Bob Dole to

147. *Id.*

148. See Pitner & Mocsny, *supra* note 144, at 8.

149. WHITAKER & NEALE, *supra* note 73, at 20.

150. Pitner & Mocsny, *supra* note 144.

151. *Id.*

152. *Id.* at 9.

153. *Id.*

see just how the proportional representation system would have played out in an actual election.¹⁵⁴ The 1996 election, under the current “winner-take-all” system, resulted in Bill Clinton receiving 379 electoral votes to Bob Dole’s 159.¹⁵⁵ However, under the proportional representation plan, these results would become 268.358 electoral votes for Clinton, 223.420 for Dole, and 46.221 for Ross Perot.¹⁵⁶ The national popular vote in 1996 resulted with Clinton defeating Dole by a 49.2% to 40.7% margin.¹⁵⁷

While the results of the electoral vote allocation under the proportional representation method mirror the percentage of the popular vote Clinton and Dole each received, it is apparent that a third-party candidate like Perot could receive dozens of electoral votes under this system.¹⁵⁸ While the pros and cons of a third-party is a debate that continues in this country, the fact is that the proportional method would undoubtedly allow third-party candidates to play a bigger role during presidential elections.

IV. CONCLUSION

While all three reform proposals have their positives and negatives, only two of them would improve the system currently in place. The National Popular Vote plan and the proportional representation plan would both alleviate many of the issues the Electoral College system currently faces.

As previously mentioned, the chance that the system will be changed in the near future is slim. A constitutional amendment is almost impossible in today’s political environment and widespread agreement amongst all fifty states to change their respective systems would be unheard of.

However, the National Popular Vote Model has the opportunity to succeed. While unlikely, there is a chance that the required number of states will pass this legislation and, effectively, change the system for future elections. While a constitutional amendment would be necessary for proportional representation plan proposals, reforming the Electoral College under the National Popular Vote plan is up to the states. As the plan gains support from both sides of the aisle in states across the country, a sliver of hope emerges that Electoral College reform is

154. WHITAKER & NEALE, *supra* note 73, at 17-19.

155. *Id.* at 18.

156. *Id.*

157. 1996 *Presidential Election*, 270TOWIN.COM, http://www.270towin.com/1996_Election/ (last visited Sept. 8, 2015).

158. See WHITAKER & NEALE, *supra* note 73, at 19.

possible in the future. With citizens throughout the country favoring a direct popular vote method to choose the President, more and more states should look into the NPV legislation as a way to eliminate the disadvantages of the Electoral College. Until reforms are made, the United States will continue to be at risk of "inconsistent" election results determined by a very small number of "swing" states.