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# Presidents Must Be Elected Popularly: Examining Proposals and Identifying the Natural Endpoint of Electoral College Reform

**Democracy and the Constitution Clinic**  
Fordham University School of Law

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Gianni Mascioli, Caroline Kane, Meira Nagel, Michael McGarry,  
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This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic is supervised by John D. Feerick and John Rogan.

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# Executive Summary

This report examines ways states can change elector allocation in the Electoral College to better reflect the popular vote. It considers four options: (1) direct election; (2) proportional allocation based on the results of the statewide popular vote in each state; (3) the congressional district method, which involves allocation based on the results of the popular vote in congressional districts; and (4) ranked choice/instant runoff voting. We recommend direct election implemented via the National Popular Vote Interstate Compact, an agreement among states to assign their electoral votes to the winner of the national popular vote. The NPVIC takes effect when compacting states have enough electoral votes—270—to choose the president. Fifteen states and the District of Columbia, which together hold 196 electoral votes, have joined the compact.

We also recommend instant runoff voting to ensure the winning candidate obtains a majority of votes. This system requires voters to rank their preferences when there are more than two candidates. If no candidate receives a majority of first choice votes, the votes of the candidate with the fewest first choice votes are reassigned in a process that repeats until a candidate wins a majority.

We endorse the NPVIC for several reasons. Proportional allocation and the congressional district method are both less effective at improving the electoral vote's conformance with the popular vote. They also present many of their own problems. Proportional allocation of votes according to states' respective popular votes requires states to design rules designating thresholds for obtaining electors—a process that would be subject to partisan gaming and could threaten the integrity of the interstate and largely uniform system. Allocating a state's electoral votes based on the vote in its congressional districts creates similar incentives for legislatures to manipulate the system for partisan advantage, especially by gerrymandering congressional districts. Both systems are susceptible to additional problems when there are third party candidates. Such contests involve increased risk that no candidate will receive a majority of the electoral votes, which would trigger the highly problematic contingent election process. In that process, the House of Representatives is tasked with choosing the president from the top three candidates. In sum, neither proportional allocation nor the congressional district method would

ameliorate the popular-electoral vote conformance problem enough to justify the other problems they would cause.

Given these realities, a direct popular vote is the only effective method for remedying the Electoral College's defects. The rationale behind the advantage that the Electoral College confers on small states is tenuous. The current system does little to functionally privilege those states' interests even when they are competitive. More importantly, the system is remarkably effective at disenfranchising broad swaths of the American electorate, especially voters who live outside of battleground states and those who are members of in-state political minorities. Implementing a direct national vote ensures that every vote is equal and incentivizes candidates to compete for votes in big and small communities across the country. Furthermore, it affirms the fundamental notion that the popular vote decides who wins and uses an election system familiar to every American.

The NPVIC is the most workable means to reform the Electoral College outside of the amending the Constitution, which is made impractical by the requirements for approval in two-thirds of both houses of Congress and in three-fourths of state legislatures. State-by-state allocation changes are unrealistic because any single state loses power in the Electoral College by switching away from winner-takes-all to either the district or proportional systems. There are also still considerable questions about whether the NPVIC is constitutional, with or without congressional approval. This report does not seek to answer those questions; even if it faces credible court challenges, it is still a powerful political mechanism to spur other reform measures.

Finally, we advocate for instant runoff, or ranked choice, voting because a first-past-the-post direct national election introduces too great a possibility of a candidate winning the presidency with less than a majority of the popular vote. One benefit of the Electoral College system is that it forces the winner to obtain a majority (of electors or state House delegations), manifesting the importance of a true governing mandate. Accordingly, we believe a direct national election should go to an instant runoff via a ranked-choice voting procedure if no candidate has obtained a majority of the popular vote.

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# Introduction: An Executive Accountable to the People

The Electoral College is a unique system of voting: no other democracy chooses its executive in the same manner, nor does any U.S. state use such a system to elect its governor.<sup>1</sup> This complicated system reflects an attempt by the Constitution's framers to balance competing desires for an executive who would be independent of Congress and insulated from the pressure of a potentially ill-informed public.<sup>2</sup> But the Electoral College system as it currently functions is not what the framers envisioned. Beginning with the nation's earliest elections, the system evolved in response to demands for more representative government.<sup>3</sup> In modern elections, the statewide popular vote is used in all but two states to determine how electors will cast their votes for president.<sup>4</sup> In 48 states and the District of Columbia, all electors are awarded to the plurality winner of the vote in a system more commonly known as winner-takes-all.<sup>5</sup> Two states allocate electors according to the outcome the vote in their congressional districts.<sup>6</sup>

The use of the popular vote at the state and district level has not always resulted in the winner of the national popular vote capturing the presidency. In two of the last five presidential elections, closely-contested races were awarded to the loser of the national popular vote due to narrow statewide popular victories leading to an electoral majority.<sup>7</sup> The candidate who won the most popular votes across the nation has lost in a total of five elections.<sup>8</sup>

The key question today is whether the system can remain legitimate in the eyes of the American people. Moreover, voters in solidly blue and red states who prefer candidates from a different party now are "effectively disenfranchised."<sup>9</sup>

These problems are a fundamental threat to the system's efficacy that demand immediate reform. In its first Part, this report addresses the Electoral College system's evolution from a deliberative check on the public to a mere mathematical quirk in voting. The second Part addresses the system's advantages and disadvantages by examining the five times it failed to select the winner of the national popular vote. The third Part examines four proposals for reform. The final Part advocates for coordinated state action to allow voters to select the president through a national popular vote.

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1 Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 906 (2017).

2 Brandon H. Robb, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 426-27 (2008).

3 Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2124-25 (2001).

4 *Id.* at 2126.

5 U.S. Electoral College: Frequently Asked Questions, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/faq.html> (last visited Dec. 17, 2018).

6 JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE xxxvi (4th ed. 2013).

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7 Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. 317, 346-47 (2017).

8 Jose A. Del Real & Julie Turkewitz, *Should the Electoral College Be Eliminated? 15 States Are Trying to Make it Obsolete*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/electoral-college.html>.

9 See Koza, *supra* note 6, at 11.

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# I. A Brief History of Electing the President

This Part discusses the Electoral College’s development at the Constitutional Convention in 1787. It then discusses how the Electoral College quickly evolved to become more democratic. The final section of this Part provides an overview of some of the major attempts to reform the Electoral College.

## A. The Convention Plan for a Deliberative Body

The Electoral College was a compromise created after competing coalitions at the Constitutional Convention could not agree on whether to select the executive through direct national election, legislative appointment, or some combination of the two. Many of the framers believed appointment by the legislature would make the president beholden to lawmakers.<sup>10</sup> The other main option—direct popular election—would be more democratic, but some delegates had concerns that an ill-informed public could be swayed to install a demagogue.<sup>11</sup> This conflict of values was highly factional, with small states and southern states banding together against direct election.<sup>12</sup> Small states feared direct election would diminish their voting power, while the southern states wanted the same power they secured in legislative apportionment via the Three-Fifths Clause to count in executive selection.<sup>13</sup> The clause provided that three-fifths of the slaves in southern states would be counted toward the states’ population size in determining how many representatives they would have in the House of Representatives.<sup>14</sup> The number of electors each state would receive in the Electoral College would be determined by the respective sizes of states’ combined representation in the House and Senate.<sup>15</sup>

The delegates passed the issue to a subcommittee after several contradicting votes.<sup>16</sup> Seeking to resolve the impasse, it recommended a body convened every four years through separate proceedings in each state to select the president called

the Electoral College.<sup>17</sup> States would select the members of this group to deliberate on candidates for the presidency and choose the one who would best serve the nation.<sup>18</sup> The proposal conceded to the smaller and southern states outsized voting power, while still making the national executive accountable to the whole nation. Delegates left satisfied they had created a legitimate and fair process that would choose highly competent leaders who were invested in the Republic.<sup>19</sup>

## B. Partisanship and Popular Demand Hijack The System

The states were empowered to determine how their respective electors would be chosen.<sup>20</sup> Courts have held that this power is unqualified;<sup>21</sup> the only constitutional restriction is that an elector may not be a “Senator or Representative, or Person holding an Office of Trust or Profit under the United States.”<sup>22</sup> For some time, the flexibility provided to states resulted in a patchwork of processes across the country.<sup>23</sup> The Electoral College’s evolution into the consistent system we know today reflects the demands of popular and partisan politics, manifested in several critical shifts in the nation’s early history.

The first such shift occurred in 1796.<sup>24</sup> In the first two presidential elections, in 1788 and 1792, electors had carefully deliberated as the framers envisioned, but this did not occur during the nation’s first competitive election between Federalists and Democratic-Republicans.<sup>25</sup> Both parties in the 1796 election left nothing to chance, and only chose electors in the states they controlled who would commit to voting for their party’s candidate.<sup>26</sup> The winner, Federalist John Adams, secured a majority by a three-vote margin with all but one elector voting for their party’s candidate.<sup>27</sup> This election marked the beginning of electors serving a ministerial function of casting votes as instructed, instead of engaging in deliberation.<sup>28</sup>

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10 John D. Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 *FORDHAM L. REV.* 1, 6 (1968).

11 ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 48 (1994).

12 See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 *J. AM. HIST.* 35, 41 (1986) (discussing small state interests in avoiding a national popular election).

13 See *id.* See also GEORGE C. EDWARDS, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 87 (2004) (discussing southern states’ desires to retain Three-Fifths Compromise in executive selection).

14 See U.S. CONST. art. I, § 2, cl. 3.

15 See U.S. CONST. art. II, § 1, cl. 2.

16 See EDWARDS, *supra* note 13, at 79-80 (stating that the issue was referred to the Committee of Eleven).

17 See Festa, *supra* note 3, at 2116.

18 See EDWARDS, *supra* note 13, at 79-80.

19 See Slonim, *supra* note 12, at 36.

20 Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 *FORDHAM L. REV.* 965, 967 (2016).

21 See *McPherson v. Blacker*, 146 U.S. 1 (1892); see also *Bush v. Gore*, 531 U.S. 98 (2000).

22 U.S. CONST. art. II, § 1, cl. 2; see Goldfeder, *supra* note 20, at 969.

23 See KOZA, *supra* note 6, at 74.

24 See *id.* at 75.

25 See *id.*

26 See *id.*

27 See *id.* at 76.

28 See *id.* at 78 (“Since 1796, the Electoral College has had the form, but not the substance, of the deliberative body envisioned by the Founders.”).

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The Electoral College’s evolution continued with the 12th Amendment, which was prompted by the election of 1800.<sup>29</sup> In that contest, Democratic-Republican candidate Thomas Jefferson received 73 electoral votes to incumbent John Adams’ 65.<sup>30</sup> Yet Jefferson did not win the presidency outright.<sup>31</sup> His party had failed to correctly account for the Electoral College’s rules when it instructed electors on how to vote.<sup>32</sup> Under the Electoral College’s original rules, the candidate who received a majority of electoral votes would be president and the candidate who received the second most votes would be vice president.<sup>33</sup> Due to the Democratic-Republicans’ oversight, Jefferson’s running mate, Aaron Burr, received the same number of electoral votes as Jefferson.<sup>34</sup> A tie between two candidates required the House of Representatives to choose the president.<sup>35</sup> After 35 ballots, Jefferson ultimately prevailed.<sup>36</sup>

Seeking to avoid a repeat of the 1800 election, Congress approved the 12th Amendment to require that electors cast separate ballots for president and vice president.<sup>37</sup> The amendment was ratified in September 1804, in time for that year’s presidential election.<sup>38</sup>

The next shift in the Electoral College’s functioning was the move away from selection of electors by state legislatures. Over the nation’s first decades, states used several different methods for choosing electors. The most common methods were appointment by legislatures, statewide and district popular voting, or some combination of those methods.<sup>39</sup> A trend toward statewide popular vote steadily emerged, and by 1832 all but one state chose electors by popular vote.<sup>40</sup>

State legislatures also realized they could maximize electoral votes for their preferred candidate by using a “unit rule,” or winner-takes-all system.<sup>41</sup> States had strong incentives to switch to this rule: maximizing the winner’s votes put more pressure on candidates to compete there, and other states switching to winner-takes-all only reduced a state’s relative

power if it did not switch too.<sup>42</sup> In the 1832 election, all of the states that appointed electors through the popular vote used the winner-takes-all system.<sup>43</sup> This dynamic still looms for states considering a switch away from winner-takes-all systems.

## C. Reform Attempts Fail to End Winner-Takes-All

Three periods in American history provide especially strong examples of the flaws in the Electoral College system. The elections that took place in two of these periods ignited debate about reforming or abolishing the Electoral College.

The first period immediately followed the 1876 presidential election, the second election in which the popular vote winner did not obtain an electoral vote majority.<sup>44</sup> Democrats made allegations of fraud in key southern states where the Republican candidate, Rutherford B. Hayes, purportedly won narrow popular victories.<sup>45</sup> With no clear winner of the majority of electoral votes, the House of Representatives could have chosen the president.<sup>46</sup> Instead, both parties in Congress decided to create a commission to resolve the conflict over the disputed electoral votes. Hayes ultimately prevailed following a key party-line vote by the commission.<sup>47</sup> The moment highlighted how partisan conflict and obscure procedures could lead either candidate to victory in a close race. Twelve years later, a Democrat again lost the Electoral College after winning the popular vote.<sup>48</sup> The dysfunction of the 1876 election gave proponents of Electoral College reform a compelling example of some of the flaws in the system that they have continued to cite.<sup>49</sup>

The second moment occurred in the late 1960s and 1970s. The 1968 election was a key event in this period that added significant momentum to the push for reform. In that race, Alabama Governor George Wallace ran a third-party candidacy focused on winning enough electoral votes to deny one of the major party candidates—Richard Nixon and Hubert Humphrey—enough votes to win an Electoral College

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29 See Goldfeder, *supra* note 20, at 976.

30 See *id.* at 975.

31 *Id.*

32 See *id.*

33 See U.S. CONST. art. I, § 1, cl. 3.

34 See Goldfeder, *supra* note 20, at 975.

35 See *id.*

36 See *id.* at 976.

37 See U.S. CONST. amend. XII; Goldfeder, *supra* note 20, at 976.

38 See Goldfeder, *supra* note 20, at 976.

39 See Festa, *supra* note 3, at 2124.

40 *Id.* at 2125.

41 See *id.* at 2124-25.

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42 See Michael J. O’Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2427 (1992).

43 See Festa, *supra* note 3, at 2125.

44 See Robb, *supra* note 2, at 441-42.

45 See *id.*

46 See U.S. CONST. amend. XII.

47 See *id.*

48 See *id.* at 442-43.

49 See, e.g., KOZA, *supra* note 6, at 126-27; ABA COMM’N ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT 31-32 (1967).

majority.<sup>50</sup> Wallace wanted to bargain his electoral votes in exchange for policy concessions from Nixon or Humphrey.<sup>51</sup> He ultimately won 45 electoral votes by winning five southern states, but Nixon did not need those votes to capture the presidency.<sup>52</sup> Still, the election was close<sup>53</sup> and Wallace's strategy highlighted vulnerabilities in the system that many believed justified broad reform.

Senator Birch Bayh of Indiana championed the most prominent reform plan—a constitutional amendment providing for direct popular election.<sup>54</sup> Under his proposal, a plurality winner receiving 40 percent or more of the national popular vote would become president. If no candidate reached that threshold, the top two vote-getting candidates would proceed to a runoff.<sup>55</sup> The American Bar Association promoted a direct election amendment with the same runoff threshold during this period.<sup>56</sup>

The Bayh proposal won a required two-thirds vote in the House in 1969, but progress stalled when it reached the Senate.<sup>57</sup> As the chamber considered the amendment, a coalition of southern senators concerned with states' rights and small-state conservatives emerged to filibuster the amendment.<sup>58</sup> Yet reform regained some momentum after the 1976 election, which saw Jimmy Carter narrowly avoid defeat in the Electoral College despite exceeding Gerald Ford in the popular vote count by more than 1.5 million.<sup>59</sup> A "shift of 3,687 popular votes in Hawaii and 5,559 popular votes in Ohio" would have cost Carter the presidency.<sup>60</sup> Bayh's proposal received a final vote in the Senate in 1979, when it garnered majority support but not the required two-thirds.<sup>61</sup> Although unsuccessful, the reform effort of the 1960s and 1970s was the closest the nation has come in modern times to implementing popular election.<sup>62</sup>

Renewed enthusiasm for Electoral College reform followed the two recent popular-electoral splits in 2000 and 2016.<sup>63</sup> The close national popular vote margins between the two major party candidates in recent presidential elections increases the likelihood of popular-electoral vote splits.<sup>64</sup> The margins have also been close in many key states, and several large states have increasingly awarded their electoral votes to candidates winning the statewide vote by less than two percent. In 2016, the margin was less than two percent in five states with more than ten electoral votes.<sup>65</sup>

The 2000 election inspired a new approach to reform that received fresh interest following the 2016 election. Instead of attempting the politically difficult option of amending the Constitution, many reformers have turned their attention to changes to the way states allocate electors. The National Popular Vote Interstate Compact ("NPVIC") has been the most novel and successful of these efforts.

The NPVIC is an agreement among states to award their electors to the winner of the national popular vote, but only once the enacting states hold a majority of the electoral votes.<sup>66</sup> The plan was initially advocated in 2001 by Robert Bennett,<sup>67</sup> and later elaborated on by Akhil and Vikram Amar.<sup>68</sup> An organization called National Popular Vote Inc. was founded in 2006 to draft template NPVIC legislation and advocate for its passage in legislatures across the country.<sup>69</sup>

Though appealing in its simplicity, the compact stalled out after some success in heavily Democratic states through the late 2000s and early 2010s.<sup>70</sup> However, the 2016 election helped lead to the NPVIC's adoption in Connecticut in 2018 and

50 See KOZA, *supra* note 6, at 127.

51 *Id.*

52 *Id.*

53 *Id.*

54 See John R. Bohrer, *Birch Bayh's Long War On The Electoral College*, BUZZFEED (Nov. 6, 2012, 1:39 PM), <https://www.buzzfeednews.com/article/johnrbohrer/birch-bayhs-long-war-on-the-electoral-college>.

55 Florey, *supra* note 7, at 381.

56 See ABA COMM'N ON ELECTORAL COLLEGE REFORM, *supra* note 49.

57 See Florey, *supra* note 7, at 381.

58 See *id.* at 382.

59 KOZA, *supra* note 6, at 128.

60 *Id.*

61 See *id.*

62 See Florey, *supra* note 7, at 318.

63 Jillian Robbins, *Changing the System Without Changing the System: How the National Popular Vote Interstate Compact Would Leave Non-Compacting States Without A Leg to Stand On*, 2017 CARDOZO L. REV. DE NOVO 1, 9 (2017).

64 See Florey, *supra* note 7, at 344.

65 *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president>.

66 Dennis A. Lienhardt, Jr., *The Electoral College: An Analysis of Reform Proposals Through the Lens of Past Presidential Elections*, 61 WAYNE L. REV. 439, 447 (2016).

67 See Robert Bennett, *Popular Election of the President Without A Constitutional Amendment*, 4 GREEN BAG 241 (2001).

68 See Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution: Part Three of a Three-Part Series on the 2000 Election and the Electoral College*, FINDLAW: U.S. SUPREME COURT CTR. (Dec. 28, 2001), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html>.

69 Tim Alberta, *Is the Electoral College Doomed?*, POLITICO MAG. (Sept./Oct. 2007), <https://www.politico.com/magazine/story/2017/09/05/electoral-college-national-popular-vote-compact-215541>.

70 See KOZA, *supra* note 6, at 282-91.

Colorado, Delaware, New Mexico, and Oregon in 2019.<sup>71</sup> The compact covers states and the District of Columbia comprising 196 electoral votes so far.<sup>72</sup> Significantly, states have only enacted the NPVIC when Democrats have had unified control of their government.<sup>73</sup> It may also face constitutional challenges, and courts would likely need to resolve lawsuits challenging the compact before it would ever go into effect.<sup>74</sup>

## D. The Electoral College Today: A Brief Review

There are currently 538 electoral votes in the Electoral College.<sup>75</sup> Each state has electors equal to its total number of representatives in Congress, and the District of Columbia has three electors pursuant to the 23rd Amendment.<sup>76</sup> A presidential candidate must receive a majority of 270 electoral votes to win. If no candidate receives a majority of electoral votes, the House of Representatives elects the president in a

contingent election where each state delegation has one vote and a candidate must receive a majority to become president.<sup>77</sup>

There are currently two schemes in the US for choosing electors: 48 states and the District of Columbia use the winner-takes-all-method, while Maine and Nebraska use the congressional district method.<sup>78</sup> Most states empower political parties to choose a slate of electors, and allow voters to select a slate that will vote for the party's candidate.<sup>79</sup> In winner-takes-all states (as well as DC), the slate that receives at least a plurality of the votes cast is elected.<sup>80</sup> In Maine and Nebraska, the popular vote winner state-wide is awarded two electors, and the winning candidate in each congressional district is awarded one.<sup>81</sup> Even in this system, votes for candidates who do not obtain a plurality on a state or district level are not represented in the electoral vote count.<sup>82</sup>

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71 *National Popular Vote*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> (last visited June 26, 2019).

72 Caroline Kelly, *Oregon governor signs bill granting state's electoral votes to national popular vote winner*, CNN (June 12, 2019, 6:06 PM), <https://www.cnn.com/2019/06/12/politics/oregon-joins-national-popular-vote-compact/index.html>.

73 *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/state-status> (last visited June 17, 2019).

74 See, e.g., David Gringer, *Why the National Popular Vote Plan is the Wrong way to Abolish the Electoral College*, 108 COLUM. L. REV. 182 (2008); Robb, *supra* note 2, at 419; see generally Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

75 See Goldfeder, *supra* note 20, at 965.

76 See U.S. CONST. art. II, § 1; US CONST. amend. XXIII, § 1.

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77 See U.S. CONST. amend. XII ("The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all states shall be necessary to a choice."); see also Nicholas G. Karambelas, *The Electoral College and the Race to 270*, 72 J. MO. B. 260 (2016).

78 See Goldfeder, *supra* note 20, at 989; see Karambelas, *supra* note 77, at 261.

79 See Goldfeder, *supra* note 20, at 969.

80 See *id.* at 966; see also Karambelas, *supra* note 77, at 261.

81 See *id.*

82 Alexander S. Belenky, *District Vote Proposals Fall Short*, BALT. SUN (Dec. 11, 2017), <https://www.baltimoresun.com/news/bs-xpm-2007-12-11-0712110033-story.html>.

## II. Why Reform Is Necessary

This Part addresses arguments for retaining the Electoral College, specifically those made on practical, historical and political grounds. It concludes by arguing that benefits the Electoral College may have provided in the past are no longer present and that it is not justifiable to continue using the system to select the president.

### A. The Practical Argument

Proponents note that the Electoral College makes election administration easier. They argue that limiting a campaign's geographic scope to battlegrounds helps candidates keep costs down and makes lower-budget candidacies possible.<sup>83</sup> They also argue that the Electoral College lessens voter fraud and tabulation error because every vote's impact is limited to the state where it is cast.<sup>84</sup> Finally, proponents believe the system decreases the chance that a third-party candidate will earn electoral votes, which helps winning candidates secure a higher vote percentage.<sup>85</sup> Presidents elected with a smaller plurality "would only aggravate the sense that the executive branch governs without a real electoral mandate."<sup>86</sup>

Some of these points are thinly reasoned. For instance, vote manipulation's "limited impact" in the Electoral College is still large enough that many state legislatures passed voter suppression measures through the 2010s.<sup>87</sup> These measures were arguably effective at flipping several states in the 2016 election and, ultimately, the result itself, even though their impacts were technically limited to only in-state vote totals.<sup>88</sup> The Electoral College only discourages manipulation in states where one party has a strong advantage. It incentivizes manipulation in competitive states.

However, even those more salient points troublingly presuppose that concerns regarding popular will should give way to "making elections easier." The answer to the difficulties of democracy should not be to rein in democracy; rather, it should be make those difficulties easier to manage. Moreover, the argument that the Electoral College is an "easy to administer" system is tenuous: it is mathematically more complex than a direct vote and creates deeply perverse incentives for our institutions.

83 See Jack Rakove & Michael W. McConnell, *Should We Abolish the Electoral College?*, STANFORD MAG. (Sept. 1, 2016), <https://stanfordmag.org/contents/should-we-abolish-the-electoral-college>.

84 Allen C. Guelzo, *In Defense of the Electoral College*, NAT'L AFFAIRS, Winter 2018, at 75-76.

85 See *id.* at 76.

86 See *id.*

87 See, e.g., Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump*, MOTHER JONES (Nov./Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016>.

88 See *id.*

### B. The Historical Argument

The Electoral College is the only method in the Constitution for electing the president; the founding document says nothing about the popular vote.<sup>89</sup> As illustrated in Part I, the framers' final compromise was meant to embody two key values of the competing factions: extra voting power for small and southern states and careful deliberation by a representative body.<sup>90</sup> Notions of federalism were also at play—state legislatures' ultimate control of elector allocation made the states the key players in selecting an executive.<sup>91</sup> Proponents argue that these values should weigh heavily in any proposed reform.<sup>92</sup>

However, the framers' design for executive selection may not have much merit when examined in the modern era. The compromise with small and southern states on voting power was less a reasoned bargain than it was an acquiescence to keep the Convention together and avoid additional conflict.<sup>93</sup> This suggests the Electoral College, while necessary at the time, may not have been the preferred system of a majority of delegates nor upheld values they felt were particularly important.<sup>94</sup> Furthermore, this agreement effectively extended the Three-Fifths Compromise to executive selection.<sup>95</sup> Needless to say, concessions meant to preserve slavery and its vestiges must be viewed as extremely suspect.<sup>96</sup>

Moreover, the Electoral College's successful history of facilitating transfers of power glosses over underlying issues. While most elections have ended with an electoral majority, those that have not were resolved by contingent elections.<sup>97</sup>

89 See Guelzo, *supra* note 84, at 66-67 ("While it is true that, since the 19th century, each state has decided to appoint its electors by a popular vote, this is a compliment to our democratic predilections and is not required by the Constitution. And it should be noted that popular votes for electors occur only within each state; the electors then go on to do the presidential balloting.").

90 See *supra* Part I.

91 See generally Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1251-54 (2012).

92 See, e.g., Tara Ross, *The Electoral College: Enlightened Democracy*, HERITAGE FOUND. (Nov. 1, 2004), <https://www.heritage.org/the-constitution/report/the-electoral-college-enlightened-democracy>.

93 See EDWARDS, *supra* note 13, at 87.

94 See *id.* ("As early as June 2, James Wilson had suggested, as a possible compromise, an intermediate election plan involving an electoral college, and during the summer this alternative developed as 'the second choice of many delegates though it was the first choice of few.'").

95 See *supra* Part I.

96 See Akhil Reed Amar, *The Electoral College, Unfair from Day One*, N.Y. TIMES (Nov. 9, 2000), <https://www.nytimes.com/2000/11/09/opinion/the-electoral-college-unfair-from-day-one.html>.

97 See Karambelas, *supra* note 77, at 262.

Two presidential elections have been decided this way, in 1800 and 1824.<sup>98</sup> Today, a contingent election would fundamentally threaten the broader system's efficacy and legitimacy, creating the potential for undue delay, and perceived or actual corruption, and a selection unrelated to the will of voters.<sup>99</sup> Such potential suggests a manifest need for reform and a broader notion that the system the framers designed is not as sacrosanct as some may deem it.

## C. The Political Argument

Proponents of the Electoral College also believe that its unequal voting power is good for the representativeness of the system.<sup>100</sup> They claim it forces candidates to appeal to the interests of rural voters in competitive states instead of only focusing on densely populated parts of the country.<sup>101</sup> Moreover, proponents believe the battleground state focus incentivizes greater candidate moderation and outreach to a constituency broader than a candidate's most ardent supporters.<sup>102</sup> A candidate cannot win the presidency by simply running up huge margins in a certain area of the country—victory requires substantial support in multiple distinct locations.<sup>103</sup> Finally, proponents argue presidents with popular mandates can be dangerous.<sup>104</sup> Majoritarian politics can produce demagoguery, and the Electoral College checks the president from asserting a popular mandate to trammel the government's other branches.<sup>105</sup>

There are some fundamental problems with this framing. For one, the battleground states candidates focus on are not necessarily states with large moderate populations.<sup>106</sup> Even in competitive states, candidates' best strategies may involve appealing to partisan voters, instead of moderates, to

ensure they turn out to vote.<sup>107</sup> Additionally, though traditional television and radio advertising has greater effect in denser locales, modern campaign strategy has trended toward voter targeting that weighs demographic and psychographic variables more heavily than geography.<sup>108</sup> Without the Electoral College, campaigns would still focus on targeting individual voters. It is far from clear that campaigns would only focus on densely populated areas. Still, there is more merit to these arguments than the others put forth by Electoral College advocates. They are answerable by the following two contentions.

## D. The Case for Reform

First, there is reason to believe the Electoral College no longer has the moderating impact on politics it once did. American presidential elections have become increasingly partisan, with candidates focusing on turning out partisan voters, even in competitive states.<sup>109</sup> There is significant evidence that because battleground states control elections, voters in a majority of the states are "effectively disenfranchised,"<sup>110</sup> depressing voter turnout in non-battleground states.<sup>111</sup> Such a dynamic demands asking which voters are being left out of the process, and whether the Electoral College actually contributes to the hyper-partisan dynamic by deterring voters who would help mediate it.

Additionally, there is not a clear imperative for treating some voters differently than others. There may be some systemic benefit to elevating rural and small-state voters through the Electoral College, but that benefit does not clearly offset the cost of distorting the result of a popular election.<sup>112</sup> The Electoral College effectively uses electors to multiply certain states' vote totals by a coefficient. One might ask those who support this feature whether voters would ever approve, or politicians could ever defend, a popular vote system that multiplied some voters' votes at the expense of others.

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98 See Goldfeder, *supra* note 20, at 975-77.

99 Rami Fakhouri, *The Most Dangerous Blot In Our Constitution: Retiring the Flawed Electoral College 'Contingent Procedure'*, 104 Nw. U. L. Rev. 705, 715 (2010). In the election of 1824, Jackson won the popular vote and received the most electoral votes, but lost the contingency election. See Goldfeder, *supra* note 20, at 977.

100 See KOZA, *supra* note 6, at 45-46.

101 See Guelzo, *supra* note 84, at 75-76.

102 Geoffrey Calderaro, *Promoting Democracy While Preserving Federalism: The Electoral College, the National Popular Vote, and the Federal District Popular Vote Allocation Alternative*, 82 MISS. L.J. SUPRA 287, 305 (2013).

103 Richard A. Posner, *In Defense of the Electoral College*, SLATE (Nov. 12, 2012, 11:57 AM), <https://slate.com/news-and-politics/2012/11/defending-the-electoral-college.html>; see also Craig J. Herbst, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 227-28 (2012).

104 Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 533 (1994).

105 See generally Guelzo, *supra* note 84, at 77.

106 See Florey, *supra* note 7, at 371-73.

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107 See *id.*

108 Frederik J. Zuiderveen Borgesius et al., *Online Political Microtargeting: Promises and Threats for Democracy*, 14 UTRECHT L.R. 82, 85 (2018).

109 See generally Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUDIES 12 (2016).

110 See KOZA, *supra* note 6, at 11.

111 See *id.* at 37.

112 Even when a presidential candidate wins both the popular vote and the Electoral College, the margin of victory in the Electoral College is usually greater than the margin of victory in the popular vote. Drew Desilver, *Trump's Victory Another Example of How Electoral College Wins Are Bigger Than Popular Vote Ones*, PEW RES. CTR. (Dec. 20, 2016), <https://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/>.

## III. Proposals for Reform

We no longer live in the era of the framers—over 200 years of history and constitutional development separate us from the 1787 Convention. Over the nation’s history, a notion of an inalienable and equal right to vote developed as one of the most fundamental elements of American democracy.<sup>113</sup> As this notion has taken root, several vestiges of indirect democracy have fallen to the wayside through progressive-minded reform, like the indirect election of senators.<sup>114</sup> It is not revolutionary to claim that the Electoral College should do the same—it is merely the natural endpoint of such a political and cultural shift.

However, we recognize that reform will be difficult. A constitutional amendment to abolish the Electoral College proved unachievable during the most sustained reform effort to date in the mid-20th century and would be only more challenging today.<sup>115</sup> Accordingly, this Part examines a set of proposals discussed in existing literature for reforming the Electoral College through the state legislatures. We considered the specifics of what such a reform would look like and the impact it would have on the system.

### A. Direct National Election

The reform squarely addressed to the Electoral College’s deficiencies is abandoning it in favor of a direct national popular vote. Recent polls indicate a majority of Americans support it, and several presidential candidates for the 2020 election have endorsed it.<sup>116</sup> In the vast majority of democracies where the head of state and head of government is a combined office, the position is filled by direct election by the national populace.<sup>117</sup> That it is not the case in the United States even after intense advocacy is a testament to the procedural and sociological barriers to moving to direct election.

#### 1. Methodology

The methodology of direct popular election is quite simple from a descriptive standpoint—all votes nationwide for the

presidency are totaled, and the candidate with the most votes wins the presidency. There are practical challenges of implementing direct election because it would require either a constitutional amendment or implementation of the NPVIC. Both avenues are challenging, but the constitutional amendment route is the hardest to achieve. Additionally, there are several issues related to calculating the vote total and setting a threshold for victory in races with more than two candidates.

First, states would have to standardize elections so votes could be totaled on a national basis.<sup>118</sup> They would either need to adopt similar voting procedures or have systems adaptable to the needs of a national vote count.<sup>119</sup> Maine, for instance, recently adopted ranked choice voting for its elections.<sup>120</sup> Accordingly, there would need to be clarity on whether first-choice Maine votes are counted, or whether Maine only sends votes for president after a candidate has secured a statewide majority. State requirements for ballot placement, write-in candidacies and ballot-counting would raise additional procedural and standardization concerns.<sup>121</sup>

Questions would also emerge about substantive differences in state election conduct. A state that provides an inadequate number of polling places or poorly designs its ballots, for instance, would have collateral impacts on the total popular vote that implicate the interests of other states.<sup>122</sup> This conflict area could create the need for greater standardization across state elections, perhaps requiring a separate and universal presidential ballot and polling system.<sup>123</sup>

Additionally, a threshold would be needed for a candidate to win the election by national popular vote. A majority is an intuitive and desirable choice, but it may not be feasible given the realities of direct elections. The winner-takes-all system of awarding electoral votes virtually ensures the electoral majority that the Electoral College requires to avoid a contingent election in Congress, but a popular vote majority is much less common: no candidate achieved it in seven of the 18 presidential elections since World War II, and four of those seven elections have

113 See *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2530 (2001).

114 Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 237-38 (2011).

115 See *supra* Part I.C.; Lienhardt, *supra* note 66, at 459.

116 Miles Parks, *Abolishing the Electoral College Would be More Complicated Than it May Seem*, NPR (Mar. 22, 2019, 3:32 PM), <https://www.npr.org/2019/03/22/705627996/abolishing-the-electoral-college-would-be-more-complicated-than-it-may-seem>.

117 Drew Desilver, *Among Democracies, U.S. Stands Out in How it Chooses its Head of State*, PEW RES. CTR. (Nov. 22, 2016), <https://www.pewresearch.org/fact-tank/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/>.

118 Anthony J. Gaughan, *Ramshackle Federalism: America’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1038-39 (2016).

119 See *id.*

120 See Lawrence Lessig, *Ranked-choice voting worked in Maine. Now we should use it in presidential races.*, USA TODAY (Nov. 16, 2018), <https://www.usatoday.com/story/opinion/2018/11/16/ranked-choice-voting-maine-protest-candidates-election-2018-column/2023574002/>.

121 See Gaughan, *supra* note 118, at 1038-39.

122 See *id.* at 1041.

123 See *id.*

occurred since 1990.<sup>124</sup> In most cases, there was no major third-party candidate.<sup>125</sup> A direct popular vote system would make third-party candidates more common because fewer candidates would decide not to run out concern they would be “spoilers” who would prevent one of the major party candidates from winning an electoral vote majority.<sup>126</sup>

The system could still require a popular vote majority and use a runoff election if no candidate secures one outright. It could also identify a plurality threshold for victory. The Bayh Amendment to abolish the Electoral College set such a threshold at 40 percent.<sup>127</sup> This would reduce the odds that no candidate would secure victory, which would be a real possibility if candidates were required to win a majority. No president has failed to win at least 40 percent of the popular vote since the election of 1860.<sup>128</sup> Still, it would be necessary to include a runoff provision if there were a victory threshold, and there would be important questions about how it would work, including when a runoff would occur, how states would conduct it, who would be eligible to vote in it, and whether states where a candidate already received a majority would participate.

If a direct popular election were conducted without a runoff, it would create the possibility of a candidate receiving a very low vote share and winning the presidency in a highly contentious multi-candidate race.<sup>129</sup> A popular mandate is important to effective governance, so some threshold may be cumbersome but more desirable.<sup>130</sup>

## 2. Advantages

The most important advantage of a direct national popular vote is its most well-known feature: it selects a winner with the most legitimate claim to a popular mandate. Equalizing the voting power of every citizen means the candidate with the most popular support wins the election every time.<sup>131</sup> This is the only electoral system that guarantees such an outcome. Putting the vote directly to the people does away with the need to allocate electoral votes by geography and population, a process that is impossible to design without privileging some voters.

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124 *United States Presidential Elections*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> (last visited Apr. 23, 2019).

125 *See id.*

126 See Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 474-75 (2007).

127 Florey, *supra* note 7, at 381.

128 Robb, *supra* note 2, at 461.

129 *See id.* at 460.

130 *See generally id.*

131 See Lienhardt, *supra* note 66, at 449.

Privilege currently permeates our presidential voting system. As discussed in Part II, small-state voters get a boost from overrepresentation, and “swing states” attract significantly more campaign investment in the winner-takes-all environment.<sup>132</sup> This leaves vast swaths of the American electorate undervalued in campaigning and governance because candidates do not view many states’ votes as valuable or obtainable.<sup>133</sup>

Even in competitive states, winner-takes-all renders voters for a losing candidate unrepresented in the final tabulation, effectively disenfranchising them.<sup>134</sup> This feature contributes to actual and perceived political polarization: blue state Democrats and red state Republicans are better represented by candidates, leading the public and political system to perceive those states as partisan monoliths.<sup>135</sup> In an era of increasing partisanship, this may be the feature of the Electoral College that most diminishes moderate voices and contributes to a sense of us-versus-them.<sup>136</sup> A national popular vote eliminates these distorting effects and fosters a more nuanced understanding of the nation’s political geography.

One key question is whether state legislatures would exercise greater or lesser control over elections in a national direct vote. On the one hand, legislatures would no longer decide how their state’s presidential vote is tabulated. On the other, they would retain control over voting and could implement measures that turn out their party’s voters at the expense of the other.<sup>137</sup> Whereas only swing state legislatures have an incentive to manipulate voting in the Electoral College, every state’s votes would matter in a direct vote.<sup>138</sup> However, that same feature might serve to dampen or mitigate an individual legislature’s incentives in a national vote: for instance, whereas voting measures in Florida today could tip the state’s 29 electoral votes (10.7% of the total) to a given candidate, such measures would have a narrower impact on the total nationwide popular vote.

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132 *See supra* Part II; Florey, *supra* note 7, at 352-53.

133 *See id.*

134 See Florey, *supra* note 7, at 354. During the 1970s effort in Congress to abolish the Electoral College, southern Senator Strom Thurmond staunchly opposed eliminating the Electoral College but called for an end to the winner-takes-all system. He proposed proportional allocation of electoral votes to allow for better representation of voters who supported a candidate who lost their state. See S. REP. NO. 96-111, at 71 (1979).

135 Abraham M. Rutchick et al., *Seeing Red (and Blue): Effects of Electoral College Depictions on Political Group Perception*, 9 ANALYSES OF SOC. ISSUES & PUB. POL’Y 269 (2009).

136 *See id.* at 270-71.

137 See Robb, *supra* note 2, at 459-60 (discussing the related issue of whether direct popular election would encourage voter fraud).

138 *See id.*

A national direct vote is also very simple, both to administer and to explain to the public.<sup>139</sup> Beyond being intuitive, it is the system that Americans are familiar with for nearly every other elected office.<sup>140</sup> It also compels greater voter participation, both because of its simplicity and because of the re-enfranchising impacts mentioned at length above.<sup>141</sup> These changes would improve public confidence and the legitimacy of elections.

### 3. Disadvantages

The Electoral College has chosen the president for over 200 years and has utilized winner-takes-all in every state for roughly the same time.<sup>142</sup> Switching to national popular vote would be a dramatic shift in an otherwise stable process, which popular vote critics believe is a deeply undervalued feature of the system.<sup>143</sup> Election rules should remain as consistent as possible to avoid partisan gaming of the system, and the weight of precedent arguably makes legislatures more deferential to the winner-takes-all system even where changes to it could benefit their party.<sup>144</sup> One dramatic shift in the system could precipitate others that are less politically neutral, which would more substantively threaten legitimate American elections than the Electoral College's current defects.<sup>145</sup> This is even more the case if a switch to the national vote is perceived to favor one party over another.<sup>146</sup>

Even with all of its attendant benefits, any change this sweeping would also carry substantial adjustment costs. Parties would reformulate their presidential selection strategies and candidates would change their campaigning strategies.<sup>147</sup> Federal and state election authorities would need to coordinate to a greater degree and develop protocols for the country's only nationwide popular election.<sup>148</sup> The public and the media would need to re-orient around new conceptions of the electorate and

strategic voting in the primary and general election.<sup>149</sup> Everyone in the system would need to adjust to delayed election results, as certain states spend days after Election Day certifying a final tabulation and litigation threatens final vote counts.<sup>150</sup> None of these adjustments are necessarily bad, but they highlight that a switch will have short-term financial, social, and political costs.

Finally, Electoral College advocates fear that presidential candidates will ignore small-state interests when campaigning and enacting policy in a direct vote system.<sup>151</sup> But this argument is unconvincing for two reasons. First, presidential races in the modern era are exceedingly close, and votes from both small and large constituencies could be sufficient to throw a race to one of the candidates.<sup>152</sup> Second, campaigns today target their efforts based on demographic and psychographic features more than geography. In a direct vote system, where voters were located would not matter to campaigns.<sup>153</sup> Perhaps more relevant to these advocates is a potential disadvantage to dispersed voters—economizing limited campaign resources may require focusing on denser areas, where a single lawn sign or volunteer has the potential to activate more support.<sup>154</sup> That said, cost arguments can still cut both ways. The media market adjusts for density differences with price, but administration of more media buys in several sparsely populated locales is a fixed and unavoidable cost that candidates may want to avoid.<sup>155</sup>

## B. Proportional Allocation

One approach to achieving more parity between electoral and popular vote results without abolishing the Electoral College is to allocate electors proportionally based on the popular vote in each state. Forms of proportional allocation are used all over the world to allocate legislative seats within borders.<sup>156</sup> What makes proportional representation systems attractive is that every vote has an impact, irrespective of which candidate or option receives the most votes.<sup>157</sup> Though such a system would be unusual for a single office, the Electoral College is itself a multi-

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139 Florey, *supra* note 7, at 367.

140 Rhonda D. Hooks, *Has the Electoral College Outlived Its' Stay?*, 26 T. MARSHALL L. REV. 205 (2001).

141 See Robb, *supra* note 2, at 459.

142 Herbst, *supra* note 103, at 228-29.

143 See *id.*

144 See Michael McLaughlin, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints its Electors?*, 76 FORDHAM L. REV. 2943, 2994 (2008).

145 Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 170-71 (2016).

146 Matthew Sheffield, *Poll: Democrats Want to Abolish Electoral College, Republicans Want to Keep It*, HILL (Mar. 26, 2019), <https://thehill.com/hilltv/what-americas-thinking/435816-poll-republicans-support-electoral-college-while-democrats-want>.

147 Roberta A. Yard, *American Democracy and Minority Rule: How the United States can Reform its Electoral Process to Ensure "One Person, One Vote."*, 42 SANTA CLARA L. REV. 185, 210 (2001).

148 See Gaughan, *supra* note 118.

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149 See Yard, *supra* note 147.

150 Bonnie Berkowitz & Shelly Tan, *Think you'll know who won on election night? Not so fast.*, WASH. POST (Oct. 29, 2018), <https://www.washingtonpost.com/graphics/2018/politics/voting-quirks/>.

151 See Lienhardt, *supra* note 66, at 449.

152 See *id.*

153 See *supra* note 109.

154 See Calderaro, *supra* note 102, at 302-05.

155 See Robb, *supra* note 2, at 457.

156 Lydia Miljan & Geoffrey Alchin, *Proportional Representation in Practice: An International Comparison of Ballots and Voting Rules*, FRASER INST. (2018), <https://www.fraserinstitute.org/sites/default/files/proportional-representation-in-practice.pdf>.

157 See Yard, *supra* note 147, at 212.

member body and could be proportionally allocated in each state based on the popular statewide result.

## 1. Methodology

Proportional allocation could be implemented through a constitutional amendment or, much more plausibly, on a state-by-state basis. But many states may hesitate to implement it out of concern that moving away from winner-takes-all allocation will reduce their influence in presidential elections. Additionally, lawmakers in traditionally red or blue states will likely avoid using proportional allocation to ensure that their respective parties' presidential candidates do not lose electoral votes they would receive under winner-takes-all allocation. Accordingly, implementation of proportional allocation on a state-by-state basis would require most states to agree to switch to it at the same time. That way, no one state or political party would clearly be sacrificing influence or support.

One way to implement proportional allocation would be through an integral proportional system, wherein states would allocate electors in rough proportion to the statewide popular vote.<sup>158</sup> Exactly how that allocation would work would depend on the number of electors a state has, the number of candidates running, and the rules the state sets for allocation.<sup>159</sup>

For example, a state with three electoral votes could choose to round the share of popular vote to the nearest elector so that a candidate receiving 53% of the popular vote would be entitled to a share of 1.59 electoral votes, rounded to 2. This becomes more complicated, however, if no candidate wins a majority—in a scenario where two major party candidates receive 48% and 46% of the vote, both are entitled to less than 1.5 electoral votes, which rounds to 1 each. The state would need a provision that allocates that third vote to one of the candidates—either a third-party candidate receiving a marginal amount of the vote, or (more likely) to the plurality winner.

This would not necessarily just be a problem in small states. In 2016, Arizona gave all 11 of its electors to Donald Trump after he won an exceedingly narrow 48% to 45% victory in the state.<sup>160</sup> Under strict proportional representation, he and Hillary Clinton would have each received 5 electors (being entitled to less than 5.5 electoral votes). However, no single third-party candidate in

the state achieved the requisite 4.5% required to earn them at least one rounded elector vote. As a result, the last vote would have been unawarded without another rule to assign it.

In the 2016 election, 18 states would have had a single unawarded elector using a strict integral proportional allocation, and one state, Michigan, would have actually over-allocated by one elector.<sup>161</sup> This specific issue would become more problematic if more marginal third-parties enter presidential races. Third-party candidates could become more common as a consequence of switching to proportional allocation, as they would have a more plausible chance of accumulating electoral votes.<sup>162</sup> Accordingly, integral proportional allocation could not be as simple as basic math and rounding.<sup>163</sup>

One workaround would be to adopt a perfect proportional system. Decimals of electors could be awarded to candidates in this system so their share of the electoral vote could track precisely with the popular vote.<sup>164</sup> However, this would create its own difficulties. For one thing, such precise adherence to popular vote share would put much more weight on the exact accuracy of statewide vote totals, which are already frequently subject to challenge and litigation in close elections.<sup>165</sup> Moreover, this system would almost certainly require a constitutional amendment to abolish the human element of the Electoral College and give more flexibility to state legislatures.<sup>166</sup>

More importantly, however, states would not necessarily want to allocate electors purely proportionally even if they adopted these systems.<sup>167</sup> They might opt to grant one or two extra electors to the plurality winner in their state or grant extra electors to any candidates who reach a certain threshold.<sup>168</sup> To discourage third-party candidates, states might also set a minimum vote percent for a candidate to receive any electors.<sup>169</sup> At any rate, even nationwide adoption of proportional electoral allocation would involve some degree of patchwork rules that could be manipulated to partisan ends.<sup>170</sup>

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158 See Vincy Fon, *Integral Proportional System: Aligning Electoral Votes More Closely with State Popular Votes*, 16 SUP. CT. ECON. REV. 127, 130 (2008).

159 See *id.*

160 *Arizona Results*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/arizona>.

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161 See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9 2017), <https://www.nytimes.com/elections/2016/results/president>.

162 David S. Wagner, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect That Change*, 25 REV. LITIG. 575, 587 (2006).

163 See also Florey, *supra* note 7, at 367.

164 Vincy Fon, *Electoral College Alternatives and US Presidential Elections*, 12 SUP. CT. ECON. REV. 41, 45 (2004).

165 See *id.*

166 See *id.* at 45.

167 See Fon, *supra* note 158, at 130.

168 See *id.*

169 See Florey, *supra* note 7, at 367.

170 See *id.*

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## 2. Advantages

Much like other proposed reforms, proportional allocation reduces the likelihood of a split between the popular and electoral votes.<sup>171</sup> However, it does so without dispensing with the Electoral College system.<sup>172</sup> Retaining the Electoral College would appease groups who fear changing an otherwise stable system and those who believe that smaller states should be granted an electoral advantage.<sup>173</sup> For reform advocates, it also may be easier to garner support for an approach that still improves conformance between the electoral and the popular votes while preserving the Electoral College.<sup>174</sup>

Third parties are also likely to benefit from proportional representation, where receiving just a small percentage of a state's vote could lead to winning electors.<sup>175</sup> A proportional system would significantly reduce the "spoiler effect" that marginal third parties currently have in presidential races, eliminating a major impediment to their candidacies.<sup>176</sup> Though only a substantial third-party could win the electoral majority needed for the presidency, there could be other benefits for third-parties to run credible candidates at the top of the ticket. It could promote down-ballot third-party candidates and a third-party's public image. Such a change would likely be popular too—surveys indicate that a majority of Americans believe a third-party is needed,<sup>177</sup> and many have argued that a bipartisan system is a bad fit for a population as socially and geographically diverse as that of the United States.<sup>178</sup>

Finally, a proportional system would make every vote count. Non-plurality candidates would be awarded electors in proportion to their popular support, and plurality candidates would benefit from a larger margin of victory.<sup>179</sup> It could also emphasize to Americans that their votes choose electors rather than the president, and that states have discretion over how those votes are allocated. This is a poorly understood feature

of presidential politics.<sup>180</sup> Such an educative effect might help people understand the system's advantages and disadvantages better and could spur other reform efforts.

## 3. Disadvantages

Though this method makes it likelier the electoral and popular votes will align, it does not guarantee it.<sup>181</sup> Small states would still have outsized weight, and states would likely modify any enacted proportional vote system to grant some electors on a non-proportional basis.<sup>182</sup> For example, if a proportional vote system proposed in Pennsylvania in 2013 had been applied nationally in 2016, it would have still awarded more electors to Donald Trump than to Hillary Clinton due to its bias toward plurality statewide winners.<sup>183</sup>

Moreover, proportional allocation systems are very susceptible to triggering contingent elections where the House of Representatives chooses the president and the Senate chooses the vice president. As discussed, the Electoral College's rules mandate this procedure when no candidate receives a majority of electoral votes. Contingent elections are more likely with proportional allocation because it allows third parties to siphon away the electoral votes needed for the major party candidates to obtain a majority.<sup>184</sup> This outcome would be hard to avoid in a close contest—a proportional system that does not privilege plurality winners would have sent the 2016 election to Congress.<sup>185</sup> Allowing Congress to select the president would move the choice further from the people, effectively eliminating one of the primary benefits of proportional allocation.

The higher complexity of proportional systems compared to statewide winner-takes-all systems presents another disadvantage. The rules for allocating electors mathematically need some exceptions, and state legislatures would have wide discretion to set those rules.<sup>186</sup> This could decrease the public's understanding of the electoral process. A complicated system that varies state-by-state would be more confusing to the average American. It would also have downstream effects on

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171 See Lienhardt, *supra* note 66, at 457.

172 *Id.*

173 See Fon, *supra* note 158, at 129.

174 See *id.* at 130-31.

175 See Florey, *supra* note 7, at 358-59.

176 See *id.*

177 R.J. Reinhart, *Majority in U.S. Still Say a Third-Party is Needed*, GALLUP (Oct. 26, 2018), <https://news.gallup.com/poll/244094/majority-say-third-party-needed.aspx>.

178 Mark Schmitt, *Why America Should Have More Than 2 Political Parties*, VOX (Sept. 16, 2016, 2:30 PM), <https://www.vox.com/polyarchy/2016/9/16/12934792/more-than-two-parties-good>.

179 See Wagner, *supra* note 162, at 586-87.

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180 Alex Vandermaas-Peeler et al., *American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization*, PUB. RELIGION RES. INST. (July 17, 2018), <https://www.prii.org/research/american-democracy-in-crisis-voters-midterms-trump-election-2018>.

181 See Robb, *supra* note 2, at 451.

182 See *id.*

183 *Gaming the Electoral College*, 270TOWIN, <https://www.270towin.com/alternative-electoral-college-allocation-methods> (last visited Apr. 23, 2018).

184 See Lienhardt, *supra* note 66, at 458.

185 See *Gaming the Electoral College*, *supra* note 183.

186 See Wagner, *supra* note 162, at 586.

campaigns strategizing to reach thresholds in certain states, many outside of the traditional battlegrounds.<sup>187</sup> There may even be an interplay between campaigns and state legislatures, which would have the ability to enact arbitrary rules that favor their party's candidate.<sup>188</sup> All of this emphasizes simplicity in the process as a virtue, and that moving from winner-take-all to a more complex system would carry consequences.

## C. Congressional District Method

Two states—Maine and Nebraska—have moved away from winner-takes-all allocation in favor of the congressional district method.<sup>189</sup> Several states adopted this method or something similar after the Constitutional Convention, when states were more experimental with their elector allocation power.<sup>190</sup> The congressional district method puts a premium on geography and gives a greater political voice to communities over a state as a whole. It also disrupts the pernicious impacts of winner-takes-all in a less mathematically-cumbersome way than proportional allocation.

### 1. Methodology

Like proportional allocation, the congressional district method could be implemented either through constitutional amendment or by individual states. States and political parties may have concerns similar to those they would have with proportional allocation—that implementing it absent an agreement among many states to do so could result in a reduction of influence for a state or support for candidates of one of the parties.

Maine and Nebraska use very similar procedures to implement the congressional district method. In both states, each congressional district tabulates its own presidential vote and awards a single electoral vote to their plurality winner.<sup>191</sup> Additionally, a statewide vote is tabulated and the winner receives the state's two remaining electoral votes.<sup>192</sup>

This method makes it possible for a state to split its electoral votes between candidates. In a state with two congressional districts and two candidates for president, the districts could award their electors to different candidates, resulting in a 3-1 split of electors in favor of the statewide vote winner. This is

what happened in Maine in 2016—Hillary Clinton was the statewide winner and won Maine's 1st District, while Donald Trump won the 2nd District. Accordingly, Clinton won three electoral votes to Trump's one.<sup>193</sup> Similarly, Barack Obama won one congressional district in Nebraska district in 2008 while losing the other districts and the statewide vote.<sup>194</sup>

It is possible in this system for a statewide plurality winner to receive less than a plurality of electoral votes.<sup>195</sup> This is likeliest in states with many electors, where one candidate obtains wide plurality margins in a few districts and the other candidates obtains narrower plurality margins in the others.<sup>196</sup> Electoral geography and partisan gerrymandering by Republican state legislatures have made Democrats susceptible to this problem since 2010.<sup>197</sup> For this reason, Obama would have lost re-election in 2012 despite winning a four-point national popular vote majority if every state had used the congressional district method.<sup>198</sup> He also would have received less electoral votes than his Republican opponent in several large states despite commanding popular vote majorities in those states, which included Florida, Ohio, Michigan, Wisconsin, and Pennsylvania.<sup>199</sup>

Some find this unfair and believe legislatures should adopt a rule ensuring that the statewide plurality winner obtains a statewide electoral majority or electoral votes equaling their plurality share of the vote.<sup>200</sup> In such a scenario, Barack Obama's 2012 Electoral College margin would have been reduced but still enough to win the presidency. Others believe the electoral geography features of congressional district method should be enhanced and that a state's two additional electors should be awarded to the candidate who wins the greatest number of districts.<sup>201</sup> This would give greater control of a state's elector allocation to its legislature when it redistricts.

187 See *id.* at 588.

188 See Florey, *supra* note 7, at 367.

189 See Goldfeder, *supra* note 20, at 968.

190 See Robb, *supra* note 2, at 449.

191 See Lienhardt, *supra* note 66, at 453.

192 See *id.*

193 Edward D. Murphy, *Trump Takes 1 of Maine's 4 Electoral Votes, in a First for the State*, PORTLAND PRESS HERALD (Nov. 8, 2016), <https://www.pressherald.com/2016/11/08/mainers-take-matters-into-their-own-hands-after-bitter-presidential-campaign/>.

194 Jean Ortiz, *Obama Wins 1 of Nebraska's Electoral Votes*, LINCOLN J. STAR (Nov. 13, 2008), [https://journalstar.com/news/local/govt-and-politics/obama-wins-of-nebraska-s-electoral-votes/article\\_a5b75308-4ae0-58d8-9ba1-47e151b40604.html](https://journalstar.com/news/local/govt-and-politics/obama-wins-of-nebraska-s-electoral-votes/article_a5b75308-4ae0-58d8-9ba1-47e151b40604.html).

195 See Fon, *supra* note 158, at 132-33.

196 See *id.*

197 See Lienhardt, *supra* note 66, at 455.

198 *Id.* at 456.

199 Micah Cohen, *Electoral College Changes Would Pose Danger for Democrats*, N.Y. TIMES (Jan. 25, 2013), <https://fivethirtyeight.blogs.nytimes.com/2013/01/25/electoral-college-changes-would-pose-danger-for-democrats/>.

200 See Fon, *supra* note 164, at 54.

201 See, e.g., S.B. 723, Gen. Assembly, 2013 Sess. (Va. 2013).

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Finally, though the congressional district method typically uses congressional districts, states have devised alternative methods for creating districts.<sup>202</sup> In the Republic's early years, states experimented with special single-member and multi-member districts exclusively drawn for presidential electors.<sup>203</sup> Some used county and municipal boundaries to create electoral districts.<sup>204</sup> Maryland took an even more novel approach during the first presidential election, holding a statewide election but forcing a set number of electors to be chosen from its eastern and western sides.<sup>205</sup> Each method has its advantages and drawbacks, but all demonstrate that it is essential to use congressional districts with the district method.

## 2. Advantages

The congressional district method does much to improve on the winner-takes-all system. Though less effective at mitigating winner-takes-all than proportional allocation or a national direct election, it creates a mechanism for voters to exercise electoral power independent from the statewide plurality.<sup>206</sup> Even the antidemocratic features of this method are arguably less problematic than those of winner-takes-all—voters who are not part of the statewide plurality might still propel their chosen candidates to victory in their respective districts.<sup>207</sup>

The congressional district method also preserves the Electoral College system and one of its key advantages: the lowered stakes of the vote count.<sup>208</sup> Both proportional allocation and a direct national election rely on a single vote count and exact vote margins.<sup>209</sup> Election litigation and partisan interventions into elections could increase quickly if specific vote margins are more closely tied to the election's outcome.<sup>210</sup> The congressional district method cabins these effects by limiting the impact of any single vote to the district in which it is cast, making only the most competitive districts subject to scrutiny.<sup>211</sup>

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202 See *Koza*, *supra* note 6, at 69-71.

203 See *id.*

204 See *id.*

205 See *id.*

206 See, e.g., Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 *YALE L.J.* 935, 1011-12 (1996) (describing how racial minorities could be empowered through the congressional district method, since many states must draw majority-minority districts pursuant to the Voting Rights Act).

207 See *id.*

208 See *infra* notes 209-11.

209 See *Fon*, *supra* note 164, at 44-45.

210 See *id.*

211 Note that under congressional district method, votes also count toward the statewide popular vote for the two statewide electors. In a very close election, litigation may scrutinize vote counts for these electors as well.

Given that districts will be on a spectrum of competitiveness, candidates are likely to focus on voters in competitive districts at the expense of others. However, the congressional district method encourages candidates to focus on a more diverse group of voters that cut across state lines.<sup>212</sup> This would break up the "swing states" in the winner-takes-all system and give more constituencies the attention of presidential campaigns.<sup>213</sup> It would also incentivize candidates to focus on swaying moderate voters in competitive districts rather than energizing their base to win a statewide election.<sup>214</sup>

Finally, the congressional district method is simple from both an administrative and educational standpoint. Voters are familiar with congressional districts and would understand how their district's vote impacts the broader election.<sup>215</sup> States also have already integrated district maps into their election procedure.<sup>216</sup> Counting presidential votes within those boundaries would likely require minimal changes to existing processes.

## 3. Disadvantages

Though it is an improvement over the winner-takes-all system, the congressional district method still retains one of its most pernicious elements: voters outside the plurality still have no representation to pick the president.<sup>217</sup> Because districts cannot split their electors, plurality power merely shifts from the statewide winner to the district winner.<sup>218</sup> The congressional district method is akin to a winner-takes-all system that operates on a district level rather than a state level.<sup>219</sup>

Accordingly, candidates can still take advantage of narrow majorities in enough places to win the election, albeit through a more dispersed and numerous group of voting bodies.<sup>220</sup> This dynamic is fundamental to why Obama would have lost the 2012 election under a congressional district method system and illustrates why it may be likelier to produce splits between the popular and electoral votes in the modern era.

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212 See *Calderaro*, *supra* note 102, at 312-15.

213 See *id.*

214 See *id.*

215 Hoffman, *supra* note 206, at 1011.

216 See *id.*

217 Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating A Federal Electoral System*, 141 *U. PA. L. REV.* 1991, 1993 (1993) (describing how votes for non-plurality candidates in single-member districts are effectively "wasted").

218 See *Fon*, *supra* note 164, at 56-57.

219 See *id.*; see also *Robb*, *supra* note 2, at 449-50.

220 See *supra* note 214.

Pulling congressional districts into the Electoral College would also bring all of the attendant concerns about gerrymandering and state legislative abuse of redistricting power into presidential selection. Legislatures would become much more powerful parties in deciding how their states allocate presidential electors.<sup>221</sup> Voters may question the legitimacy of such a process, especially where district lines create substantial deviance between the statewide vote and elector allocation.

Moreover, redistricting would itself become even more political as legislators would have enormous incentive to draw maps benefitting their parties in both presidential and congressional elections.<sup>222</sup> These maps would persist for a decade absent judicial intervention. The public may demand redrawing of the districts out of frustration with perceived corruption and disempowerment by state governments.<sup>223</sup> This same anger could effectively nationalize the politics of state-level elections, turning them into a proxy for national politics and distorting otherwise independent state governance.<sup>224</sup> However, a compelling counterargument is that state legislatures may have an incentive to create competitive districts to avoid public discontent and incentivize candidate attention in their state.<sup>225</sup>

## D. Ranked Choice Voting

Even without reform to the Electoral College or the way votes are allocated, states have the power to marginally improve their systems' representativeness through voting reform. First-past-the-post systems amplify winner-takes-all unfairness by awarding a state's electors to a non-majority plurality winner in a multi-candidate election.<sup>226</sup> Most alternative voting systems correct for this effect by incorporating voters' next-choice preferences or preference strength to identify a candidate with majority support.<sup>227</sup> Ranked choice voting is one of the more

commonly implemented alternative voting systems and could substantially improve the fairness of the Electoral College system on the state level.

## 1. Methodology

Some foreign governments, municipal American governments and one state have implemented ranked choice or instant runoff voting, wherein voters rank candidates for an office sequentially according to their preference.<sup>228</sup> An initial count of first preferences is tabulated after all votes are cast, and if no candidate receives a majority, the lowest vote-getter is removed and has her votes re-allocated to the other candidates based on their voters' second preferences.<sup>229</sup> This process continues until a candidate has secured a majority of the votes among the remaining candidates.<sup>230</sup>

In a winner-takes-all system, this would mean that a candidate would need an in-state majority to win a state's electors.<sup>231</sup> For example, if candidates A, B, and C are on the ballot in Pennsylvania and they split the popular vote 45-35-20, Candidate A would not necessarily receive Pennsylvania's 20 electoral votes. The winner would be determined by the second-choice preferences of Candidate C's voters. If enough of them supported Candidate B as their next-preferred option, she would win Pennsylvania's electors.

Some assume that ranked choice voting always selects a candidate with the majority support of voters. This is not true. Because voters are not required to rank every candidate on the ballot, tabulation rounds exclude voters whose ranked candidates have been eliminated.<sup>232</sup> In the above example, if the second preferences of candidate C's voters split 70-10 between B and A, and 10% selected no second option, the new tabulation would result in B receiving 51% of tabulated votes and A receiving 49%. However, among all voters, B and A split the vote 49-47, with 4% of voters choosing neither candidate.

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221 See Lienhardt, *supra* note 66, at 454.

222 See *id.*

223 Brett Neely & Sean McMinn, *Voters Rejected Gerrymandering in 2018, but Some Lawmakers Try to Hold Power*, NPR (Dec. 28, 2018, 5:00 AM), <https://www.npr.org/2018/12/28/675763553/voters-rejected-gerrymandering-in-2018-but-some-lawmakers-try-to-hold-power>.

224 Emily Badger et al., *Republicans Dominate State Politics. But Democrats Made a Dent This Year*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/interactive/2018/11/10/upshot/republicans-dominate-state-politics-but-democrats-made-a-dent.html> (citing redistricting as an existing reason for Democratic gains in statehouses in the 2018 midterm elections).

225 Lee Drutman, *America Has Local Political Institutions But Nationalized Politics. This is a Problem.*, VOX (May 31, 2018, 2:10 PM), <https://www.vox.com/polyarchy/2018/5/31/17406590/local-national-political-institutions-polarization-federalism>.

226 Florey, *supra* note 7, at 356-58.

227 See generally Renée Steinhagen, *Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections*, N.J. LAW., August 2008, at 15, 17.

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228 Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 FORDHAM L. REV. 993, 1020 (2016).

229 *How Does Ranked Choice Voting Work?*, COMM. FOR RANKED CHOICE VOTING, [http://www.rcvmaine.com/how\\_does\\_ranked\\_choice\\_voting\\_work](http://www.rcvmaine.com/how_does_ranked_choice_voting_work) (last visited Apr. 23, 2019); see Yard, *supra* note 147, at 214.

230 *Id.*

231 See Foley, *supra* note 228, at 1013-14 (showing how Al Gore would have won Florida's electoral votes in 2000 after iterative rounds gave him a majority).

232 Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 346-47 (2004) (showing an example election in which exhausted ballots are not counted in subsequent rounds).

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Methods similar to ranked choice voting like the Condorcet method avert this possibility.<sup>233</sup> However, they are significantly more complex and would present other challenges in both enactment and implementation.<sup>234</sup> Legislatures would also need to consider rules for when voters have equal preferences between candidates or when write-in candidacies get substantial support.<sup>235</sup> Maine is the only state to enact a ranked choice system statewide and addresses both issues in its election procedures.<sup>236</sup>

## 2. Advantages

Third-party and independent candidates benefit from ranked choice voting because the spoiler effect is mitigated.<sup>237</sup> Some scholars argue that spoilers have had a very substantial impact on American elections. In a 2016 article advocating for ranked choice voting in presidential elections, Edward Foley identifies at least six presidential elections where third-party candidates changed the major party candidate who won the election.<sup>238</sup> It might be argued that this was the case in the 2016 election, where votes for third-party candidates outnumbered the vote margin between Hillary Clinton and Donald Trump in several key states.<sup>239</sup>

Ranked choice voting allows third-party candidates to run without preventing their preferred major party candidate from winning electors—unless, of course, the third-party candidate is strong enough to win a statewide majority on their own.<sup>240</sup> This gives a fair shot to more candidates and diversifies the viewpoints represented on the national stage.<sup>241</sup> This increase in third-party activity could also have impacts on voter participation and satisfaction, as more voters could support a candidate with whom they strongly agree without forfeiting their right to decide the presidency.<sup>242</sup>

Most importantly, ranked choice voting is an easily implemented approach to making it likelier that the winner of a statewide election commands a majority of popular support.<sup>243</sup> Many other nations, recognizing the benefit of majority support, require candidates for elected office to win a popular majority and hold runoff elections between the top two vote-getters when no candidate secures a majority in the first round of voting.<sup>244</sup> A key advantage of ranked choice over runoff systems is that it does not limit the field of candidates to the top two first-choices through its iterative process.<sup>245</sup> It also avoids the financial costs of a second election and avoids turnout issues in subsequent and more consequential runoffs.<sup>246</sup>

## 3. Disadvantages

While ranked choice voting corrects the anti-majoritarian spoiler effect, its key disadvantage is that it leaves alone and even enhances other problems in the Electoral College system. The risk of a split between the popular and electoral votes is still present as long as the winner-takes-all system is in place.<sup>247</sup> Though ranked choice voting would have likely prevented the popular-electoral splits in 2000 and 2016, other presidential elections may have been thrown to a popular vote loser.<sup>248</sup>

Additionally, if ranked choice voting caused an emergence of third parties, the possibility of contingent elections would be increased. A contingent election would occur where a third-party candidate won enough states to deprive a major party candidate of a majority of electoral votes, but not enough states to form their own majority.<sup>249</sup> Resolving such hotly contested elections by a nondemocratic and highly partisan process as contingent elections would jeopardize the legitimacy of the nation's election process, as highlighted in Part II.<sup>250</sup> However, these circumstances might create public momentum for greater reform.<sup>251</sup> Likewise, a third-party candidate could bargain with major party candidates and instruct their electors to vote for them instead, avoiding the contingent process.<sup>252</sup>

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233 See Foley, *supra* note 228, at 1018-19.

234 See *id.*

235 *Ranked-choice Voting, ST. OF ME.*, <https://www.maine.gov/sos/cec/elec/upcoming/pdf/RCVFAQs.51618.pdf> (last visited Apr. 23, 2018).

236 Ella Nilsen, *Maine Voters Blew up Their Voting System and Started From Scratch*, *Vox* (June 12, 2018, 7:00 AM), <https://www.vox.com/2018/6/12/17448450/maine-ranked-choice-voting-paul-lepage-instant-runoff-2018-midterms>.

237 See also Florey, *supra* note 7, at 358-59.

238 See generally Foley, *supra* note 228.

239 See *Presidential Election Results*, *supra* note 161.

240 See Yard, *supra* note 147, at 216-17.

241 Jay M. Zitter, Annotation, *Validity of Runoff Voting Election Methodology*, 67 A.L.R. 6TH 609 (2011).

242 See Yard, *supra* note 147, at 216.

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243 See Zitter, *supra* note 241.

244 See Yard, *supra* note 147, at 217-18.

245 See Zitter, *supra* note 241.

246 See Yard, *supra* note 147, at 216-17.

247 See generally Foley, *supra* note 228, at 1014-16.

248 See *id.*

249 See Foley, *supra* note 228, at 1016-17.

250 See *supra* Part II.

251 See Foley, *supra* note 228, at 1016-17.

252 See *id.*

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Finally, there are some indications that ranked choice voting is not a good fit for the voting public. Critics allege that it is more complicated than first-past-the-post, and that it has been repealed in some jurisdictions in favor of reverting to traditional systems.<sup>253</sup> The empirical evidence on both points is mixed. Some jurisdictions implementing ranked choice have

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253 See Liam Sigaud, *Thanks to Ranked-Choice Voting, Expect a Spike in Spoiled Ballots*, MAINE WIRE (May 17, 2018), <https://www.themainewire.com/2018/05/ranked-choice-voting-expect-spike-spoiled-ballots/>; see also Joe Fitzgerald Rodriguez, *Amid Heated SF Mayor Contest, Pressure Mounts to Repeal Ranked-Choice Voting*, S.F. EXAMINER (June 10, 2018), <https://www.sfexaminer.com/news/amid-heated-sf-mayor-contest-pressure-mounts-to-repeal-ranked-choice-voting/>.

seen ballot invalidation rates about equal to first-past-the-post elections, while others have seen much higher rates.<sup>254</sup> Likewise, more racially or politically diverse candidates being elected has often precipitated ranked choice voting repeal, suggesting these efforts are motivated more by powerful interests than dissatisfaction with the process.<sup>255</sup>

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254 Drew Penrose, *Ranking is Easy—A Response to Misleading Claims About Voter Errors*, FAIR VOTE (May 21, 2018), [https://www.fairvote.org/ranking\\_is\\_easy\\_a\\_response\\_to\\_misleading\\_claims\\_about\\_voter\\_error](https://www.fairvote.org/ranking_is_easy_a_response_to_misleading_claims_about_voter_error).

255 Andrew Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 CUMB. L. REV. 377, 410-14 (2016).

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## IV. Our Recommendation: Nationalize the Vote, Restore the College, and Give the People a Meaningful Choice

Proportional allocation and the congressional district method both aim to make the better of a difficult situation. They preserve the Electoral College framework while bringing it more in line with popular democracy by lessening the problems of winner-takes-all. Even if one believes the Electoral College should not be abolished, proportional allocation and the congressional district method are better alternatives than the system we have today. Although popular-electoral splits are still possible under these systems, they more effectively implement the values that many use to argue for the Electoral College, namely empowering small states and representing the nation's diverse electoral geography.

These values are manifested elsewhere in our electoral system as well: equal voting power in the Senate was expressly designed to protect smaller states and geographic communities were meant to be elevated in the House. One could argue that making elector apportionment equal to congressional representation indicates these values were meant to be preserved in presidential selection. We cannot know this for sure. What we do know is that the framers did not view electors as bound to vote for any candidate.<sup>256</sup> They desired electors who would deliberate and select a candidate with care, much in the way they resolved difficult questions at the Convention.<sup>257</sup>

This check between the people and the president was borne out of fear that Congress or the public would select a leader who was not fit for the presidency.<sup>258</sup> This is the paramount value embodied by the Electoral College. It is a safeguard designed to protect the Republic from itself by handing selection of the president, in some sense, to nobility. The framers created a body in their own image—appointed by states, comprised of the elite—to have a final say on who would be president.

But the Electoral College practically never functioned in this manner. The norms around how the nation chooses the president have evolved to make it unimaginable that a small group of elite citizens would deliberate to choose the president. Such a group would be fundamentally anti-democratic. No other democracy uses such a body. Accordingly, we propose abolishing the Electoral College system as it exists in favor of a direct national election winnable by a simple majority. We also implore the states to use ranked-choice voting to ensure candidates achieve majority support.

Without a realistic path to a constitutional amendment, we endorse the effort to implement direct popular election via interstate compact and encourage states to adopt the NPVIC. States should also implement ranked-choice voting and stipulate that the iterative process will identify a majority winner using ballots from states employing it. Though there are clear obstacles to its adoption, we believe the NPVIC represents the best and most practical effort to improve the way the nation chooses the president.

States use the winner-takes-all system because the Electoral College incentivizes it. As discussed, an individual state's incentive is to maximize its impact on the total by awarding all electors to the winner, and solidly partisan states have an incentive to award as many of their electors as possible to their statewide winner.<sup>259</sup> These effects are enhanced for every other state that chooses to use winner-takes-all.<sup>260</sup> In that way, an unspoken sort of compact already exists between the states, with deviance punished by devaluation in presidential selection and costs for a state's presidential preference.<sup>261</sup>

Accordingly, all the states must act in concert to amend it. Absent a constitutional amendment, there is no practical path to meaningful Electoral College reform on a state-by-state basis aside from a compact.

We recognize that the NPVIC has attracted solely partisan support and that support by only one of the political parties will likely be insufficient to gain implementation in states holding a majority of the electoral votes. However, we do not accept the premise that electoral reform is necessarily a partisan issue. That Democratic presidential candidates lost the two most recent races where there was a split between the popular and electoral votes does not mean that a Republican candidate could not lose a future election in the same manner. This would shift the politics of reform dramatically. If more states continue to sign onto the NPVIC and it gets closer to an electoral majority necessary, conversation about electoral reform will follow and force reluctant politicians on both sides of the aisle to defend the deeply unpopular proposition of keeping the Electoral College unchanged.

There are valid questions regarding the compact's constitutionality. The Constitution's Interstate Compact Clause may require that NPVIC receive congressional approval.<sup>262</sup>

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256 See Slonim, *supra* note 12, at 36.

257 See *id.*

258 See Hooks, *supra* note 140, at 206-07.

259 See Lienhardt, *supra* note 66, at 448.

260 See Robb, *supra* note 2, at 462.

261 See *id.*

262 See Amar, *supra* note 114, at 252.

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It is important for members of the public to understand this issue and lobby Congress to approve the compact. Similarly, members of the public in states that have not approved the compact should lobby their representatives to support it. Even if the NPVIC is not adopted by enough states or is struck down

on constitutional grounds, we believe public momentum should be brought to bear on Electoral College reform, and that more avenues for reform will open up if this one is pursued to its endpoint.

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## Conclusion

The NPVIC represents the most promising and meaningful reform effort in a generation. We urge those invested in Electoral College reform to commit to supporting it and continue the important work of truly democratizing American presidential elections.

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# Notes





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