

# ELECTORAL VOTE ALLOCATION AND PENNSYLVANIA: HOW AND WHY WE SHOULD EMBRACE THE STATUS QUO

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*The Pennsylvania General Assembly has introduced bills to reform the allocation of electoral votes in presidential elections. These reforms include changing from a winner-take-all (unit) system of allocating electoral votes to inclusion in the National Popular Vote Interstate Compact and adopting the congressional district method of allocating electoral votes. This paper argues that while there are substantial problems with the current method by which Pennsylvania (and most other states) allocate its electoral votes, the potential problems associated with reform proposals would not improve the fairness of the current system, the efficacy of citizens' votes, nor the importance of the state of Pennsylvania in presidential elections.*

Arguments for making the presidential election more democratic by reforming the Electoral College system are abundant in both the academic literature and the popular press, although empirical studies on the subject are rather dated. Short of amending the United States Constitution, the path to changing the way Americans select their president lies within the state legislatures, who are given the power to determine the way electors are chosen.

While discussions of altering the Electoral College process tend to be limited to the time periods directly before and after the presidential election (Grofman and Feld 2005: 1), “the incentives to change the institution tend to fade fast after an election, as those who won become reluctant to give up

what they now come to regard as a winning formula” (Grofman and Feld 2005: 13). The arguments to change the way Americans elect their president tend to fall into several categories, including amending the Constitution to adopt a direct election and changing the way states allocate electoral votes. Within a larger discussion of attempts to reform the Electoral College, this paper will attempt to refute the reform proposals introduced into the Pennsylvania General Assembly to change the method by which our state allocates its electoral votes.

The Framers of the Constitution, after much debate, ultimately settled upon an indirect election of the executive. Whether the reasons for this decision were due to their mistrust of the citizenry to directly elect the president or a concession made to assuage the southern states as a side deal to the three-fifths compromise (Thomas et al. 2012: 3), their design resulted in a system with which most Americans are confused and few support.

According to Article II, section 1, of the United States Constitution, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” At the Constitutional Convention, the delegates proposed several methods of selecting electors: “by state legislatures, by governors, and popular election. Convention delegates, probably motivated by the desire to secure ratification, left it to the states” (Thomas et al. 2012: 3). The states not only have the power to determine how electors are selected, they have power over administering elections, including determining voter eligibility (Muller 2012: 1239).

Three basic methods of elector selection were used in the first presidential election: “state legislature, popular vote, and a hybrid of these two methods” (Adkinson and Elliott 1997: 78). Although states remain free to decide how to choose their electors, after experimenting with different processes, all states now use the popular election to determine their electors (Johnson 2012: 9-10; *The Philadelphia Inquirer* 2008; Haddock 2004; Adkison and Elliott 1997: 78). While the Framers of the Constitution assumed that electors would vote independently, the use of popular elections to determine the choice of electors and the winner-take-all method of allocating the electors “evolved as state political machines flexed their muscle” (*USA Today* 2004).

The delegates at the Constitutional Convention mandated that the candidate who achieved the most electoral votes would become president and the candidate receiving the second most electoral votes would become vice president. This system remained unchanged until a sharply divided election in 1800 between Aaron Burr and Thomas Jefferson forced Congress to make a change. On June 18, 1804, the states ratified the 12th Amendment to the Constitution, which created the separate election of the president and vice president by the Electoral College. The Electoral College has remained unchanged at its core since the ratification of the 12th Amendment.<sup>1</sup>

Despite the stability of the Electoral College as an institution for over 200 years, criticisms of the method by which Americans select their president abound. In fact, Muller argues that the country is closer to abolishing the Electoral College “than at any time in nearly fifty years and on pace for an overhaul as early as the next presidential election” (Muller 2012: 1238). Gallup polls measuring popular support for the Electoral College have revealed that Americans would prefer the Electoral College to be abolished (Johnson 2012: 34; Sampson 2008). The rationales for reforming the Electoral College predominantly stem from an issue of fairness.

Millions of citizens are disenfranchised every time they cast their ballot for president due to the current system (Duquette and Schultz 2011: 18). There is an inherent disparity in the Electoral College that causes votes in some states to count more than votes in other states. Because representation in the Senate is vastly disproportionate and representation in the House of Representatives is unbalanced as well, the number of electoral votes awarded to each state does not reflect the differences in population among the states (Patel 2012: 7). For example, California has 53 times the population of Wyoming, but only 18 times more of the vote in the Electoral College (Patel 2012: 7). Small states, due to their constitutionally guaranteed one member of the House of Representatives and two senators, have as much as three times the vote share in the Electoral College as they would if electoral votes were distributed purely on population (Johnson 2012: 33; Dahl 2003). “Montana has a population of approximately 940,000 people and receives three electoral votes while California’s population is near forty times Montana’s and receives 55 electoral votes, or only 18 times as many votes (Sampson 2008; Levinson 2006)” (Johnson 2012: 34).

The disparities in apportionment of electoral votes in the Electoral College create a dilution of citizens’ votes in every state other than the least populated states. “The dilution of voters potentially disenfranchises Americans and it violates the democratic tenets on which this nation was founded” (Johnson 2012: 33). However, the malapportionment of electoral votes is not the only way in which votes in some states are made to count for more at the state level in presidential elections.

The Electoral College wastes millions of votes (Edwards 2004). In *Reynolds v Sims* (1964), Chief Justice Earl Warren argued, “to the extent that a citizen’s right to vote is debased, he is that much less a citizen” (Edwards 2004: 53). Under the institution of the Electoral College, citizens who vote for the losing presidential candidate in their state have wasted their vote because it does not count at the national level.

Because the outcome of which presidential candidate’s party will win most states is virtually predetermined, citizens in states that are considered reliably blue or red states are ignored as if their vote for president does not matter (Johnson 2012: 18). Therefore, the issues of concern to safe states

are ignored throughout the election. “New Yorkers [who represent a very reliable blue state] are playing almost no role in picking the next leader of the free world. No inspiring rallies. No pandering to our local concerns. Precious few diner visits or door-to-door campaigning” (Hammond 2008). Typically, presidential candidates tend to ignore around 76% of the states (Richie and Levien 2013: 360) and instead focus their time, energy, and campaign dollars on the few states that are up for grabs. Table 1 shows changes in the number of competitive states in presidential elections from 1960 to 2012 and their electoral votes (Richie and Levien 2013: 363).

**Table 1**  
**Competitive States in Presidential Elections and Their Electoral Votes, 1960-2012**

Year	Number of Swing States	Total Electoral Votes in Swing States
1960	23	319
1964	17	204
1968	19	273
1972	22	235
1976	24	345
1980	15	221
1984	21	260
1988	21	272
1992	22	207
1996	13	206
2000	16	167
2004	13	159
2008	9	116
2012	11	140

The winner-take-all method of allocating electoral votes also causes Republican votes in reliably blue states as well as Democratic votes in reliably red states to not count at all. The citizens in safe states who vote contrary to the majority of the state’s citizens have no representation of their vote at all. In the 2000 presidential election, 4.5 million Californians (45% of the electorate in the state) voted for George W. Bush (Haddock 2004); however, none of their votes were reflected by the allocation of all the states’ electoral votes for Al Gore. The three most populous states in the country, New York, California, and Texas, receive virtually no attention from presidential candidates who assume that the winner in that state is a

foregone conclusion. “So White House hopefuls of both parties spend way too much time worrying about corn farmers and anti-Castro Cuban refugees and nowhere near enough focusing on concerns such as mass transit and protecting major cities from terrorist attacks” (Hammond 2008). In Barack Obama’s first presidential campaign, he solicited millions of dollars from citizens in California that was used to woo voters in Nevada, Iowa, Colorado, Ohio, New Hampshire, Florida, Pennsylvania, Virginia, and North Carolina. Campaigns focusing only on battleground states do not address national problems; rather, the campaigns ignore issues of concern to the majority of Americans (Johnson 2012: 21-22).

Voters in Pennsylvania, Ohio, and Florida have a much larger role in deciding who will be elected president than voters in safe states. In 2004, voters in swing states determined the winner of the presidential election, and their state populations consisted of only 27% of the total nation’s population (Johnson 2012: 20). The few swing states in presidential electoral politics decide the winner of the campaign. For the swing states, this is a huge advantage. Presidential candidates not only spend more money to attract potential voters, thereby contributing to the states’ economies, but they also spend more time campaigning in these states. In the last six months of the 2008 campaign, Ohio and Pennsylvania benefitted from over 40 visits from the presidential candidates (Johnson 2012: 69).

Depending upon the closeness of the election in the state and the election year, one citizen’s vote may count up to a hundred or a thousand times more than a citizen’s vote in another state (Duquette and Schultz 2011: 5; *The Philadelphia Inquirer* 2008). This is due to the winner-take-all method of allocating electoral votes.

The winner-take-all allocation of states’ Electoral College votes... leads to distortions every time a presidential election is held. These distortions undermine the public’s faith in democracy. A case can be made that they may run afoul of the constitutional principle of “one-person, one-vote”. When a vote for president in one state carries 215 times the impact on the final Electoral College tally of a vote for president in another state...the principle of “one-person, one-vote” is undermined. What all this suggests is that voters in some states, because of the winner-take-all method of allocating electoral votes, have significantly more influence in an election than do those in other states (Duquette and Schultz 2011: 18).

This criticism of the Electoral College is valid. Because the weights of some citizens’ votes count more during a presidential election than the weights of other citizens’ votes, it is possible that the interests and opinions of a majority of citizens are discounted (Johnson 2012: 17-18).

Critics of the Electoral College also argue that the institution decreases political participation (Johnson 2012: 21) and “results in stagnation in state elections” (Johnson 2012: 23). There is an estimated 6% lower voter turnout in reliably red and blue states than in swing states due to the fact that citizens in “safe states” correctly perceive that their presidential vote is not important (Johnson 2012: 23).

Some proponents of reforming the Electoral College have focused on plans to change the winner-take-all allocation of electoral votes. They argue that the winner-take-all system, in which the presidential candidate who receives a plurality of a state’s popular vote is awarded all of the state’s electoral votes, leads to bias and the possibility of electing as president the loser of the popular vote (Adkinson and Elliott 1997: 79; Longley and Dana 1992: 123). Although many authors argue that the Electoral College itself is biased, undemocratic, and can lead to the election of the loser of the plurality vote (Adkinson and Elliot 1997: 79), most fail to cite the winner-take-all system as complicit in these problems. Eliminating the Electoral College would be cumbersome at best due to the need to amend the Constitution, but the Constitution does not require that states allocate their electoral votes on a winner-take-all basis.

The winner-take-all system developed in the early nineteenth century as a way for the two-party system to create

incentives for a state’s dominant party...to maximize the impact of their state’s voters in determining the presidential outcome. As more states adopted a winner-take-all allocation rule, the remaining states generally followed suit out of self-defense, lest internal divisions reduce the state’s overall impact on outcomes (Grofman and Feld 2005: 13).

States essentially were compelled to adopt the winner-take-all system in order to maintain influence in presidential elections.<sup>2</sup>

States are not required by the U.S. Constitution to base the allocation of their electoral votes on a plurality of the state’s popular vote. In *Bush v Gore* (2000), the Supreme Court ruled that “the individual citizen has no federal constitutional right to vote for the electors for the President of the United States unless and until [his/her state] chooses a statewide election as the means” of choosing electors. Hypothetically, a state “could simply choose not to have a November general presidential election at all and select presidential electors by some means other than a general popular election” (Amar 2007). However, the Court also ruled that once a state chose the popular election as the method of allocating their electoral votes, “the right for voters to participate in that election is constitutionally ‘fundamental’ and cannot be denied or abridged except for compelling reasons” (Amar 2007).

In the twentieth century, the focus of presidential election criticism has become less about reforming the Electoral College and more about its abolition and subsequent replacement with a new method by which to elect the president. Thus far, the most popular alternative method for the Electoral College has been the direct election. This method, at its foundation, is the idea that the president be chosen by a plurality of voters from across the nation, regardless of state. Furthermore, various alternative electoral systems like runoff and ranked-choice voting have been proposed. Since the idea of the direct election gained popularity, 24 different legislatures have passed resolutions that call for their state to remove itself from the Electoral College and embrace a direct election. Although these states have made some progress toward the creation of a direct election, they remain well short of their goal because they have not achieved nearly enough support to make the necessary constitutional change for the direct election to replace the Electoral College. The process of amending the Constitution is enumerated in Article V.

The first such major reform proposal came in 1950 with the Lodge-Gossett Amendment, which called for a heavy modification of the Electoral College that would have replaced it with a proportional electoral vote. Under this plan, named for its creators, Senator Henry Cabot Lodge (R-MA) and Representative Edward Gossett (R-TX), the electors of the state would have remained in place, and rather than awarding all of the electoral votes to only the winner, the electoral votes would be allocated proportionally to the popular vote of that state. This amendment also would have required that the ticket with the most electoral votes would have to receive at least a 40% majority of all the votes. The amendment stated that if no ticket reached the necessary 40% threshold, a collaborative effort by the Senate and House would decide the winner from the two most successful tickets.

This amendment passed through the Senate of the 81st Congress but died in the House. A lingering concern that ultimately doomed this amendment was best stated by Senator Robert A. Taft (R-OH), “[t]here is no doubt that the Republican Party would fare worse under this amendment than under the present system, other things being equal. This is because the Republicans would receive a small proportion of the electoral vote in the southern states than the Democrats would receive in the northern states. We would have been somewhat worse off in every election” (Taft and Wunderlin 2006: 50). This amendment was revisited again in 1955 and received support from the Senate Judiciary Committee, but died in the Senate under the opposition of Senator John F. Kennedy (D-MA).

In 1956, Senator Hubert Humphrey (D-MN) proposed a new, unique constitutional amendment to the 84th Congress. His plan was not to eliminate the concept of electoral votes, but to drastically alter the way they were distributed. Of the 531 total electoral votes at the time, two would

be given to the candidate who won the popular vote in each state, and the remaining 435 would be distributed proportionally to the candidates in the nationwide popular vote. This proposal passed the House of Representatives but did not survive its consideration in the Senate.

Another attempt to reform the Electoral College arose following the presidential election of 1968. The third-party campaign of Governor George Wallace was successful enough to win 46 electoral votes, which fostered the concern that political parties may be willing to trade electoral votes for political concessions. In order to avoid this potential problem, Representative Emanuel Celler (D-NY) proposed a constitutional amendment to abolish the Electoral College and replace it with a true direct popular election. The only contingency that Representative Celler inserted was that the plurality winner would have to achieve at least 40% of the vote. If that percentage was not achieved by any candidate, a runoff election of the top two vote recipients would take place until the 40% minimum was achieved.

This amendment passed through the House 338–70 and received public support from President Richard Nixon. The Celler Amendment, however, ran into a massive roadblock as it was introduced into the Senate Judiciary Committee, chaired by James Eastland (D–MS) and including members like Strom Thurmond (D–SC). After a bitter round of Judiciary Committee hearings, which included threats by Thurmond to filibuster the proposal, the Celler Amendment was voted out of committee 11–6 and was sent to the floor for a vote. Opposition to the amendment, led by Sam Ervin (D–NC), Thurmond, and Eastland, claimed that the amendment would harm states' rights, disadvantage the smaller states, undo the stability of the two-party system, and ultimately encourage splinter parties, fraud, and intrusive national voting requirements. After long and bitter debates on the floor, two calls to invoke cloture failed, and the Celler Amendment died in the Senate (Keyssar 2009).

An ally of the Celler Amendment, Senator Birch Bayh (D–IN) introduced a similar proposal to eliminate the Electoral College altogether and replace it with a direct national vote. Inspired by the close election of 1976 between Governor Jimmy Carter and President Gerald Ford, Bayh proposed his amendment in the Senate to much the same criticism that the amendment had received previously. A close vote in the Senate of 51–48 ultimately doomed the Bayh reincarnation to failure, which deterred the House from even considering the issue.

Another attempt to eliminate the Electoral College and to institute a direct election of the president was proposed in the House of Representatives in 1989. The constitutional amendment received 338 positive votes and 80 negative votes (Dahl 2003). Despite the amendment's vast support in the lower chamber of Congress, it ultimately failed in the Senate due to a filibuster, despite the attempts of supporting senators, who rallied an



insufficient 54 cloture votes (Johnson 2012: 38; Dahl 2003). Consequently, the amendment's demise in the Senate led to its end.

After this series of attempted amendments, there have been at least 38 different proposals to amend the Constitution concerning the Electoral College. Each one has called for the elimination of the Electoral College and its immediate replacement with a direct nationwide election. In 2009, there were three similarly worded proposals from members of Congress to abolish the Electoral College and implement the direct popular election of the president, including Senator Bill Nelson (D-FL), Representative Jesse Jackson, Jr. (D-IL) and Representative Gene Green (D-TX). In defense of his proposal, Senator Nelson stated, "It's time for Congress to really give Americans the power of one-person, one-vote, instead of the political machinery selecting candidates and electing our president" (O'Brien 2009). The numerous attempts of Senator Nelson and others to present constitutional amendments in Congress since the Bayh proposal have failed to make it past committee. The reason these amendments to the Constitution keep dying in committee remains unknown, so little discussion is provided for them after they are introduced. One theory for the lack of consideration of these amendments is that lawmakers who represent larger states believe that eliminating the Electoral College would forfeit their state's significance in the presidential race. Another theory asserts that a direct election would cause rural areas to become irrelevant.

The most traditional means to amend the Constitution enumerated under Article V is the passage of an amendment through two-thirds majority of both houses of Congress. If Congress were to pass an amendment, it would then be subject to ratification by three-fourths of the state legislatures. This method of proposing an amendment in one of the houses has become a reoccurring practice in the last half of the twentieth century. In the last 60 years, there have been several proposals either to drastically reform the Electoral College or eliminate it completely, replacing it with a more democratic form of election.

However, representatives of large states believe that they benefit from the winner-take-all system of allocating electoral votes, and representatives of small states believe they benefit from the two-seat bonus (Grofman and Feld 2005: 13). Members of Congress, who would be initially involved in any attempts to change our system of selecting the president, are for the most part unwilling to risk undermining the power of their state under the current system.

The advantage that small states receive in the Electoral College due to the malapportionment in the House and especially in the Senate precludes any chance of reforming the Electoral College through constitutional amendment. Because the amendment process requires a two thirds vote in both houses of Congress, only 34 senators are necessary to prevent a

proposed amendment from moving on to the states for ratification. “Using the 2000 census data, the senators representing only 7.28% of the nation’s population can block an amendment” (Johnson 2012: 38). Even if both houses of Congress could manage to muster the two thirds majority to fulfill the first stage in the amendment process, it is actually more unlikely that the second stage of the amendment process could be completed—ratification by three fourths of the states. “Again using 2000 Census data, the legislatures from the thirteen smallest states can block an amendment from passing despite the fact that their legislatures represent only a minute 3.87% of the nation’s population” (Johnson 2012: 38). Therefore, prospects of abolishing or reforming the Electoral College through constitutional amendment are virtually nonexistent. Proponents of reform have had to resort to other methods of attempting to change the way the President of the United States is selected.

However, scholars, pundits, and politicians disagree about which states would be disadvantaged by the elimination of the Electoral College. Over 70% of Americans support adopting a nationwide, popular election of the president, avoiding the dominant focus “on only a few ‘battleground’ states while the interests of the rest of the nation are ignored” (Dean 2007). Regardless of its popularity with the American public, the political ramifications for the states losing any advantage they have due to the system in place now makes eliminating the Electoral College completely doubtful at best (Hasen 2007).

Although the people are not granted the power to vote for the president under the Constitution, American citizens widely believe the president represents every person equally; therefore, it is logical to believe that every American voter should have their presidential vote count equally (Amar 2006). This is one of the rationales for the National Popular Vote Compact. Because proposing and/or ratifying a constitutional amendment faces so many obstacles at the federal level, John Koza and Barry Fadem founded National Popular Vote in 2006 (Johnson 2012: 68; Sampson 2008), “an interstate compact in which the compacting states agree to award their electoral voters to the winner of the national popular vote, effectively converting the Electoral College into a direct election for president” (Muller 2012: 1238). This reform proposal would not require amending the U.S. Constitution because states would form a compact stating that they agree to allocate all of their electoral votes to the presidential candidate with the highest number of votes nationwide (Amar 2006). The agreement, officially called “the National Popular Vote Act,” would formally go into effect once enough states comprising a majority of the Electoral College adopt the proposal. The ultimate result of this compact would allow the presidential candidate with the highest percentage of the popular vote nationally to be awarded all of the electoral votes from the compacting states.

Proponents of the interstate compact reform idea argue that when enough states enter into the compact to comprise a majority of electoral votes, the unrepresentativeness of state citizens' votes will be eliminated (Johnson 2012: 78), presidential candidates would be forced to compete for every vote in every state equally (Haddock 2004), "the influence of small states and other sparsely populated areas" will be diminished (Patel 2012: 9), and reliably red and blue states would not be ignored. Because each citizen's vote would count equally, "state boundaries" would "not skew the power of the voter. This allows minority voters in each of the states to aggregate their votes with one another, potentially tipping the election in the favor of their candidate" (Johnson 2012: 61).

Currently, eight states—Maryland, Hawaii, Illinois, New Jersey, Washington, Massachusetts, Vermont, New York, Rhode Island, and California—and Washington, D.C. have successfully passed the National Popular Vote Act (National Popular Vote 2014). Together, these states only account for 165 total electoral votes, which places them 105 votes short of compact implementation. The progress of this reform proposal has been steady. Since its origin in 2006, the movement has amassed 61% of the electoral votes needed to go into effect. Additionally, the bill has passed both Houses in CO; another ten states have passed the bill through one house (CT, DE, ME, MI, NC, AR, NM, NV, OK, and OR); nine more states have passed the bill through one committee (WV, KY, AL, LA, MS, MT, MN, IA, and AK); 11 states have conducted committee hearings regarding the bill (NH, PA, VA, WI, MO, KS, NE, SD, ND, UT, and AZ); and the remaining nine states have introduced the National Popular Vote Bill (OH, IN, FL, GA, SC, TN, TX, WY, and ID) (National Popular Vote 2014).

However, there are fundamental political issues that arise with this reform idea. Some argue that the proposal "would essentially require all 50 states to sign on board to become effective. If any state were to continue to adhere to the current winner-take-all approach, then other states could not reasonably be expected to adopt a self-harming proportional approach. And this kind of prisoner's dilemma often proves an intractable obstacle to action" (Amar 2006). The prisoner's dilemma is not, however, applicable to the National Popular Vote Act. This Electoral College reform negates the possibility of such a dilemma by allowing "as few as 11 states" with an Electoral College majority to override the existing electoral system regardless of how the remaining states act (Amar 2006). If these 11 states command a majority of the votes in the Electoral College—as California (55), Texas (38), Florida (29), New York (29), Illinois (20), Pennsylvania (20), Ohio (18), Georgia (16), Michigan (16), North Carolina (15), and New Jersey (14) would (U.S. National Archives and Records Administration 2010)—and pledge to award their votes based on the national popular vote, the electoral votes of nonparticipating states will do nothing to sway the outcome.

Another criticism of the National Popular Vote Act is that interstate compacts were intended to settle disputes among regional state actors, not as a substitute for failure to enact national policy (Johnson 2012: 67). However, Robert W. Bennett, Akhill Reed Amar, and Vikram David Amar have argued that interstate compacts could be used to bypass the need for federal legislation (Pincus 2009: 520). In fact, the Compact Clause of the Constitution (Art. I, sec. 10), on which the National Popular Vote Act is predicated, requires congressional approval if the issue under compact empowers state governments over the federal government (Patel 2012: 3; Johnson 2012: 41-42, 83)

There continue to be strong arguments on either side of the issue of whether the National Popular Vote Initiative would require congressional approval. Patel (2012) argues the Compact

is likely to affect the power of states in terms of their influence on a presidential election. This factor seems unlikely to trigger a political-power limitation, however, as it relates to the power among the states, not to the federal government's power over any given state. As such, the Compact does not seem to "encroach upon or interfere with the just supremacy of the United States," and thus would fall outside the scope of the political power limitation (Patel 2012: 9).

Because passing a constitutional amendment to reform the Electoral College is unfeasible, the interstate compact may be the best and most effective manner of reforming the presidential selection system in the United States. "An interstate compact cannot be blocked by forty senators like an amendment and it can provide the same change. Instead, it unites states in an agreement to exercise their previously granted powers in a different manner" (Johnson 2012: 50). Additionally, many argue that the Compact does not require congressional approval because it does not bestow any powers to states that did not exist prior to the Compact. The Constitution guarantees states the power to decide how electors are chosen and thus allocated, therefore federal power is in no way diminished by states entering into this agreement.

Yet another idea for reforming the presidential election system would be for every state to adopt the method by which Maine and Nebraska currently allocate their electoral votes—the district method. This method allows a presidential candidate to receive one electoral vote for winning a plurality of the popular vote in each congressional district in the state, with a two-vote bonus for the candidate who wins a plurality of the popular vote statewide.

The district method of allocating electoral votes certainly allows each voter's selection of presidential candidate to count more than the winner-

take-all system, addressing “the problem of the tyranny of the majority on a statewide basis, allowing individuals in districts more power in the election process. Breaking down the election into many district-based segments allows each individual more authority in determining the results of the election” (Johnson 2012: 23-24). California proposed such a reform in the Presidential Election Reform Act, a state referendum, before the 2008 election (Thomas, et al. 2012: 2).

However, mathematicians have shown that the adoption of this plan nationwide would disadvantage the Democratic Party and favor Republican presidential candidates.

Indeed, if every state followed the Maine/Nebraska approach in 2000, Bush would have beaten Gore in the electoral college by a margin of 289 to 249, which [is] much larger than the margin by which Bush actually won. This result seems counterintuitive, give that Gore—not Bush—won the nationwide popular vote. While the move toward more equitable distribution within each state would seem analytically a step in the direction of a true nationwide popular election, the counting of results on a state-by-state basis creates numerical anomalies (Amar 2004).

Other critics of the district method argue that presidential candidates would campaign only in highly competitive congressional districts, thereby ignoring other voters and failing to solve the same problem most have with the winner-take-all system of allocating electoral votes (Thomas et al. 2012: 3). In fact, in a quantitative study, researchers found “[t]he direct popular vote and the current electoral college are both substantially fairer compared to those alternatives where states would have divided their electoral votes by congressional district” (Thomas et al. 2012: 1).

Another proposal to reform our presidential election system suggests that states should agree to allocate their electoral votes proportionally to the popular vote in the state. For example, if Candidate A received 60% of the popular vote in a state, she would then receive 60% of that state’s electoral votes. Critics of this plan argue that this plan would encourage third-party candidates to enter the presidential contest, knowing that even 5% of a state’s popular vote would result in a proportional 5% of the state’s electoral votes. This proposal could also result in no candidate winning a majority of electoral votes and throwing the presidential election into the House, allowing minor parties to demand concessions from the major parties (*USA Today* 2004). This idea was proposed as a direct democracy initiative in Colorado in 2004. The initiative was ultimately defeated, but critics argued that Colorado stepping out and adopting the plan before other states also agreed to do so would decrease the state’s influence in choosing the president and amount to “unwise unilateral disarmament” (Amar). Perhaps

a larger issue with this initiative is its likely demise in the judicial system. Because the U.S. Constitution permits only the state legislatures to decide how electors are appointed, a plan initiated and adopted by the voters of a state, although very democratic, would most likely be ruled unconstitutional by the United States Supreme Court.

Initiatives of such nature have not only been propagated within the federal legislature and through isolated state proposals, but Pennsylvania has also attempted to reform their method of electoral vote allocation internally through reformations of proportional representation, congressional district-based allocation, and the National Popular Vote Act. Representative Mark Cohen (D-Philadelphia) and Representative Thomas Creighton (R-Lancaster) sponsored House Bill 1270, the Pennsylvania version of the National Popular Vote Interstate Compact along with 33 other members of the Pennsylvania House of Representatives as co-sponsors (Pennsylvania General Assembly). On 12 March 2012, the Pennsylvania House Majority Policy Committee held a public hearing on Creighton's "legislation to change the way Pennsylvania casts its Electoral College votes....by aligning them with the national popular vote" (Pennsylvania General Assembly). Since this hearing and referral to committee, no other action has been taken (National Popular Vote 2014).

The National Popular Vote Interstate Compact was introduced into Pennsylvania's House of Representatives as *the Agreement Among the States to Elect the President by National Popular Vote* and referred to committee (H. 1270, 2011). As proposed by Representative Creighton, the reason for this bill would be to elect the president through an indirect reflection of the national popular vote. The Chief Election Official of each affiliated state "shall designate the presidential slate with the largest national popular vote total as the 'national popular vote winner'" (H. 1270, 2011). A state's allocation of electoral votes to the national popular vote winner must be announced as an official statement to the other state's officials in the compact within 24 hours of the presidential electors casting their ballots (H. 1270, 2011).

Questions have been raised about the viability of the National Popular Vote Interstate Compact in the occurrence of a tie; however, in the event of a tie, the bill contains specific legislation that proscribes the reversion of each state to the presently functioning form of electoral vote allocation (the winner-take-all method) (H. 1270, 2011). The withdrawal from the compact requires a state to repeal the bill at least six months prior to the end of a president's term, and the entire bill shall be deemed invalid if the Electoral College is abolished (H. 1270, 2011). In order for this bill to be implemented, the accumulation of the states within said compact must possess a majority of the electoral votes (H. 1270, 2011).

Prior to this bill, Pennsylvania attempted to reform their method of allocation multiple times. These attempts have included both a multitude of

initiatives to implement the National Popular Vote Interstate Compact and an effort to allocate Pennsylvania's electoral votes by means of congressional districts (Pennsylvania General Assembly). The former of these efforts for reform was proposed as House Bill 1028 (05 April 2007), House Bill 841 (10 March 2009), and Senate Bill 1116 (17 June 2011) (Pennsylvania General Assembly). Representative Cohen, one of two sponsors of the most current reform proposal (House Bill 1270), coincidentally sponsored both House Bill 1028 and 841 (Pennsylvania General Assembly). Like House Bill 1270, no other bill proposed in either House has made it to the floor for a vote (Pennsylvania General Assembly).

Although these bills have lacked any genuine sense of viability, the recent movement to adopt the district method of allocating electoral votes in the Pennsylvania state legislature has received much attention from both advocates and adversaries. Then-Senate Majority Leader, Senator Dominic Pileggi (R-Delaware) "proposed that Pennsylvania's electoral votes be allocated by congressional district" on 12 September 2011 (Pennsylvania General Assembly). For Senator Pileggi, the goal of such a reformation is to not only redefine the method through which Pennsylvania allocates its electoral votes, but also to proscribe said votes in a manner that more closely reflects the state's popular vote (Greenblatt 2013). Similar to Senator Pileggi's original plan, an amendment to P.L. 1333, No. 320 has been introduced by Representative Robert Godshall (H. 94, 2013). This plan would not only delegate the responsibility of allocating Pennsylvania's electoral votes to each congressional district, but also grant an additional two electoral votes to the presidential nominee who received the greatest number of votes statewide (H. 94, 2013).

Senator Pileggi rescinded his support of this reform proposal in order to appease criticism from his constituents and peers (Greenblatt 2013). Objections to Senator Pileggi's proposal often embodied the sentiments of corrupt gerrymandering practices (Greenblatt 2013). If this bill were to be ratified and enacted, the Executive Branch would be subjected to the same practices that have historically disenfranchised voters through means of packing and cracking.

More recently, Senator Pileggi introduced Senate Bill 538 to the Pennsylvania state legislature, which has been referred to the Senate Government Committee (Lynch 2013). Senate Bill 538 would allocate Pennsylvania's electoral votes proportionally, rather than the current winner-take-all system (Lynch 2013). As proposed, this amendment to P.L. 1333, No. 320 would modify the current system by means of the following criteria (Skelley 2013). The nominee for the Office of President of the United States who wins the plurality of the Statewide popular vote shall be awarded two presidential electors (S. 538, 2013). The remaining electors shall be divided between presidential nominees proportionally to the statewide popular vote,



with the electoral vote total rounded up to the nearest whole number (S. 538, 2013; Skelley 2013). If the total number of electoral votes required to properly allocate them proportionally exceeds the amount available, the candidate who received the smallest percentage of the popular vote shall be denied one electoral vote; this process continues for each candidate in chronological succession (excluding the recipient of the plurality) until the required amount of electoral votes is achieved (S. 538, 2013). This bill, along with the others introduced, has failed to reach floor of either chamber. Consequently, within each committee, the bills are motionless and progress is stationary. Such proposals do not seem to be gaining much attention beyond the minimal press coverage expected from a revolutionary bill.

The presidential electoral reforms proposed in Pennsylvania and explained above may in fact improve the ways by which Americans select their president. However, Pennsylvania legislators and political activists who have the best interest of the state in mind should abandon all attempts to reform the method by which our state allocates electoral votes and realize that the current winner-take-all system benefits our state. Because Pennsylvania is considered to be a swing state<sup>3</sup>, we benefit more from the *status quo*.

Because the proposal in the Pennsylvania General Assembly to adopt the district method for allocating electoral votes was ultimately brief and unsuccessful regardless of the press attention received by the proposal, we begin with the argument that this reform method would disadvantage our state. Pennsylvania should reject the district method of allocating electoral votes because the state would “lose attention and clout if fewer of its electoral votes were in play” (Thomas et al. 2012: 2). Under the winner-take-all system, Pennsylvania’s electoral votes are a huge prize for presidential candidates. Changing to a district method like Maine and Nebraska would merely result in presidential candidates ignoring Pennsylvania voters and the issues of interest to Pennsylvanians. Also, “there was the possibility that the change of focus to the Congressional district level for president would similarly affect other elections down the ticket, putting once-safe state-level seats into play again” (Thomas et al. 2012: 2).

Yet again, the district method does not solve the problem of not counting citizens’ votes at the national level. If Pennsylvania under the winner-take-all system provides all of its electoral votes to the Democratic presidential candidate, the votes of Republicans in the state have not been counted at the national level. Transforming our method of allocating votes to a district plan merely reduces the same problem to a congressional district level rather than a statewide level. For example, if the Third Congressional District of Pennsylvania awarded a plurality of its votes to the Republican presidential candidate, thereby providing that candidate with one electoral vote, the Democratic voters in that district would not have the benefit of



having their votes counted at the national *or* state level. The same problem of uncounted votes exists, just on a smaller platform.

Perhaps the greatest danger of instituting the district method of allocating electoral votes is the potential for more serious gerrymandering problems within the state (Thomas et al. 2012: 12). Indeed, since minority districts are more likely to be packed districts (and packed tightly), the district method may be unconstitutional too because it disenfranchises minority voters and violates the Voting Rights Act.

A far more likely scenario in Pennsylvania is that we would seriously consider entering the National Popular Vote Act. This reform, like the district method, would be detrimental to the importance of Pennsylvania in presidential politics. The Compact would cause Pennsylvania as a swing state to lose its importance because

the overall national vote total will matter, and proponents of the Compact believe that this will lead politicians to more equally value votes across all fifty states. On the other hand, a national popular vote system could lead presidential candidates to focus on states or cities that are highly populated because those areas would have the most possible votes (Patel 2012: 6).

In essence, not only would Pennsylvania lose its importance as a battleground state during presidential elections, millions of rural Pennsylvanians would also be ignored so that presidential candidates could focus on the heavily populated areas of the state and the country. It is, however, worth noting that the current electoral system is often seen as neglectful of rural voters and states. Under the National Popular Vote Act, the importance shifts from winning states to winning individual votes. So while rural voters and rural states might be ignored in the current state-centered electoral model because of their sparse numbers and limited effect on state-by-state outcomes, the National Popular Vote Act would actually benefit these rural voters and states by allowing their aggregate national power to be felt.

The next criticism of the Compact reform for Pennsylvania is that the Guarantee Clause of the Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” Kristen Feeley

argues that the Guarantee Clause prohibits the Compact because the Compact undermines process federalism in presidential elections. Ms. Feeley reasons that, by mandating that member states allot their electoral votes for the national popular vote winner, the Compact not only silences the voice of the nonmember states, but also prohibits member states from making their own decisions (Patel 2012: 8).

This silencing of nonmember states is a serious concern. There is potential under the National Popular Vote Act for only 11 states to fundamentally restructure the selection process of the President of the United States regardless of the desires of the citizens in the other 39 states (Johnson 2012: 67; Ross 2004). It is worth noting, however, that the interests of voters in nonmember states would not be ignored. Under the National Popular Vote Act, these voters in nonmember states would still be courted for their votes. The Constitution empowers states to determine the time and method of elections; the Compact would necessitate the federal government enacting election laws to ensure uniformity throughout the compacting states. This would include “the manner in which elections are orchestrated, ballots are counted, and recounts are instituted” (Johnson 2012: 78). A problem such as the recount during the 2000 presidential election in Florida, under the National Popular Vote Act, would require a recount of every vote in the country.

The implementation of the interstate compact reform would also require the federal government to enact legislation dealing with voter eligibility. This reform is proposed due to the improbability of passing a constitutional amendment; therefore, the states would continue to have the power to decide which of their people are eligible to vote. If the winner of the presidency were predicated on the winner of the national popular vote, states could attempt to increase their influence in the election by broadening their definition of who is eligible to vote—“including definitions based on age, felon status, alien status, and mental incapacity” (Muller 2012: 1241). If states attempted to “cheat the system” by changing their voter eligibility laws, then a uniform federal law would be necessary to determine who is permitted to vote.

However, creating a federal standard to determine voter eligibility would present its own problems by disenfranchising voters in certain states. If, for example, the federal government

decided to disenfranchise a set of ex-felons, it would need to define felony by referring to the different crimes in the fifty states, and it would disenfranchise individuals in one jurisdiction for conduct that would not disenfranchise them in another. A federal standard would almost certainly disenfranchise individuals currently given the right to vote, as the varying eligibility standards would find a political compromise in the center, enfranchising voters in some states while disenfranchising them in others (Muller 2012: 1242).

Therefore, it is clear that enacting the National Popular Vote Act would create serious problems in terms of voter eligibility, constitutional powers, and our federal system of government.

The final reason why neither Pennsylvania nor any state should entertain adoption of the National Popular Vote Act is that the reform ultimately

subverts the United States Constitution. Changing the Electoral College through an interstate compact rather than through the formal amendment process of the Constitution undermines our entire system of government. The Founders created a difficult but not impossible method for amending the Constitution: a proposal by two-thirds of both houses of Congress and ratification in three-fourths of the states. States adopting this reform are attempting to change through an interstate compact what they are unable to change through the supermajority required of a constitutional amendment. Certainly, this was not what the Framers intended when including the Compact Clause in the Constitution.

There are inherent issues with the wholesale elimination of the Electoral College. Opponents of reform argue that Americans would essentially be “trading an institution whose pluses and minuses we know for one whose evils are yet to be determined” (Grofman and Feld 2005: 12). It would be difficult to determine exactly what issues would arise from reform. We could be replacing the Electoral College with a system even more difficult to understand, predict, or deem as fair.

Despite many attempts and plans to reform the way America chooses its president, none of the proposals has been adopted thus far. The fact remains, however, that most Americans feel that the current Electoral College system presents problems of unfairness and inequality. Critics continue to argue that the Electoral College violates the constitutional principle of “one-person, one-vote” instilled by the Supreme Court’s interpretation of the 14th Amendment’s Equal Protection Clause (Muller 2012: 1241). This objection, however, cannot be sustained due to the fact that the United States Constitution does not provide American citizens with the right to vote for president. Rather, the Constitution empowers state legislatures to determine how electors are chosen.

The inherent problems with the current method by which most states allocate their electoral votes are undeniable. However, the winner-take-all method confines any necessary recounts to one state or one county within a state and creates clear winners and losers by exaggerating the margin of victory. The Electoral College “promotes stability in the election of the President by providing a clear and official winner for America. The Electoral College increases the spread in the election results signaling a clear winner” (Johnson 2012: 30).

The benefits of the current winner-take-all system of allocating votes in the Electoral College for the country and especially for Pennsylvania far outweigh the potential benefits and virtually certain disadvantages of adopting Electoral College reform through proportional methods, district methods, or an interstate compact. In order for Pennsylvania to maintain its importance in presidential electoral politics as well as its support for and endorsement of our federal system of government and the Constitution,

Pennsylvania citizens, activists, and legislators are encouraged to think about the ramifications of reform when the current system, while not perfect, is clearly most advantageous.

### Notes

1 The constitutional language governing the Electoral College has not changed since the 12th Amendment was ratified in 1804. However, states continued to experiment with different methods of awarding electoral votes, with the winner-take-all system achieving universal use by the 1830s (Richie and Levien 2013:). Maine and Nebraska switched to the Congressional District Method in 1972 and 1996, respectively (The Center for Voting and Democracy 2009).

2 Nebraska and Maine are the only states that allocate their electoral votes by congressional district, rewarding the two “bonus” electoral votes to the overall winner of the state.

3 Pennsylvania has been considered a battleground, swing, or “purple” state for many years. Although the state was considered a weak Democratic state in the 2012 presidential election, we maintain that our Republican controlled state legislature as well as the slight margin of victory for presidential candidates in Pennsylvania through several election cycles ensures our continuation as a swing state.

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