

Popular Election of the President Without a Constitutional Amendment

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IN THE WAKE of the 2000 presidential election, it is certain that there will be debate about whether a nationwide popular vote should be substituted for the electoral college mechanism for choosing the President. But that debate may be stifled to a degree because of the widespread assumption that constitutional amendment is the only way to effect this change.¹ Amendment of the United States Constitution basically requires the agreement of two-thirds of each house of Congress and three-fourths of the states. For a variety of reasons, those hurdles are likely to prove insuperable, at least initially. But in fact a constitutional amendment may not be necessary. For it is entirely possible that just a few states – conceivably just one or two – could bring about *de facto* direct election. And if that were to occur, opposition to a constitutional amendment might just melt away.

Each state's electoral college delegation is

equal to its total representation in the House and Senate, with the District of Columbia given the state minimum of three electoral college votes by the Twenty-third Amendment. It is usually assumed that this apportionment favors the less populous states by virtue of the two electors that each state receives on account of its Senators. This assumption is, however, questionable. All states but two (Maine and Nebraska) have adopted a winner-take-all system for selecting their electors. In those 48 states, no matter how close the statewide popular vote among presidential candidates, the entire electoral college delegation goes to the winner. A voter in a populous state thus helps determine more electoral college votes than a voter in a less populous state. The net result of the two-elector "bonus" for less populous states and the winner-take-all rule is that voters in the states with very large delegations cast a mathematically weightier vote than do

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¹ For just one example, albeit from the pen of one not deterred from the fight, see Ronald Dworkin, A Badly Flawed Election, N.Y. Rev. of Books, Jan. 11, 2001, at 53, 55.

those in other states.² And of even more significance is that, holding the size of the state's electorate constant, a voter in a state that is closely divided among presidential candidates effectively casts a weightier vote than does one in a lopsided state.

Despite the complications, a substantial number of states would lose electoral clout from a move to a nationwide popular vote. And because of the complications, many more might worry that they would lose some of their electoral say. There are, in addition, less noticed stumbling blocks on the way to an amendment that would provide for a nationwide popular vote. Such a straightforward move to direct election would pose the question of how eligibility to vote in that election is defined. The original constitutional scheme gave each state the power to set voter qualifications. That discretion is now greatly hemmed in by constitutional and statutory restrictions. States cannot discriminate with regard to the vote on the basis of race or sex or against those over seventeen. They cannot impose poll taxes or English literacy tests or onerous residence requirements. But states retain the formalities of control over voter qualifications, and a number have exercised that discretion, most notoriously to withhold the vote from classes of felons and ex-felons. The ex-felon disenfranchisement in particular is inexcusable, but any move to direct election would arouse opposition from those who do not see it that way, and more generally from those who view state authority here as a principled and important part of the system.

Another eligibility question that would be hard to avoid in a straightforward move to direct popular election is that of United States

citizens in the overseas territories. At the present time this population has no vote that counts in presidential elections. The bulk of these American citizens reside in Puerto Rico, and any move that might enfranchise them would no doubt attract partisan controversy. There is also a relatively small population of United States citizens ineligible to vote for President that resides permanently in foreign countries. If those foreign residents have a substantial prior attachment to a state, they are allowed to vote in that state in federal elections. This is accomplished by a federal statute that is, in this respect, of dubious constitutionality.³ But those United States citizens who are foreign residents without prior attachment to a state are not eligible to vote in presidential (or other federal) elections. Their number is not large, and they seem less likely than the population of the territories to arouse partisan concerns, but the uncertainty they inject into a move to change presents another political obstacle to amendment.

For these various reasons, early adoption of direct election by constitutional amendment is very unlikely. But there is a simple way to skirt the necessity of amendment. Some lessons about how this might be done are provided by the history of senatorial elections.⁴

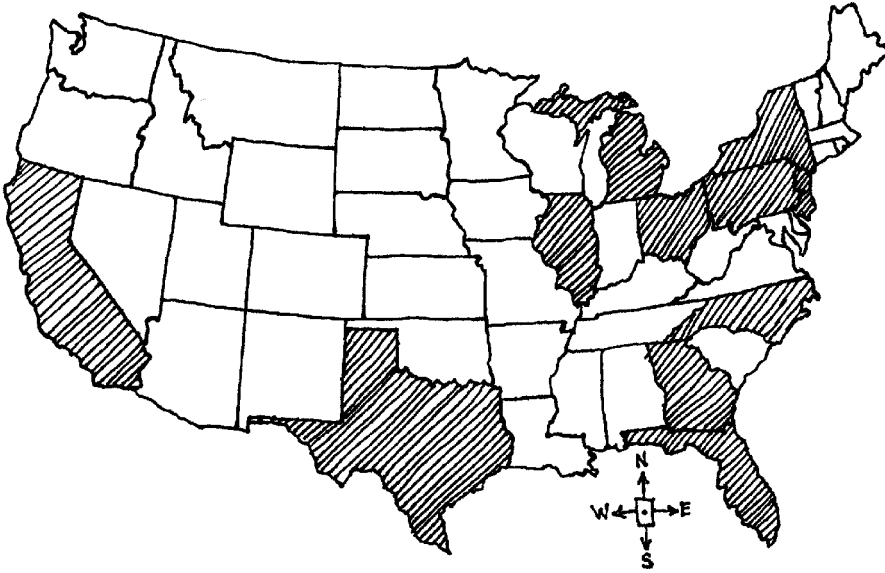
The Constitution originally provided for selection of United States Senators by state legislatures – the same bodies still charged with determining the “manner” in which presidential electors are to be chosen. The Seventeenth Amendment now provides for direct popular election of Senators, but that Amendment was not the simple result of convincing a reluctant Congress and then lining up the requisite number of states. Instead a number of states forced the issue well before

2 See Lawrence D. Longley & Neal R. Peirce, *The Electoral College Primer 2000* at 149-54 (1999) (based on 1990 census apportionment of electoral college).

3 Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§1973ff-1 to 1973ff-6 (1994).

4 The story is related in David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1496-99 (2001).

FUNCTIONAL AMENDMENT WITH AS FEW AS ELEVEN STATES



If state law committed electors from the eleven shaded states to vote for the winner of the nationwide popular vote, then the popular vote winner would perform win the presidency.

the Amendment was passed, by insinuating direct election into their own processes.

Some of the pressure built spontaneously. In the 1858 Illinois senatorial battle between Lincoln and Douglas, for instance, the two political parties had made their senatorial favorites known before the state legislative elections. The fabled statewide debates between the two took on their electoral significance as arguments for state legislative candidates who, once seated, would cast their votes for the one senatorial “candidate” or the other. As populism and the progressive movement gained steam toward the end of the century, a number of states then experimented with measures that would draw the electorate into the process in more formal ways. With Oregon often taking the lead, states experimented with non-binding senatorial primary or even

general elections and various forms of pressure on state legislators to accede to the popular choice.⁵ By one estimate, the result was that by 1910 – three years before adoption of the Seventeenth Amendment – fourteen of the thirty newly chosen senators had been the product of *de facto* popular election.⁶

Now what does this teach about the electoral college? One of the many things that the nation learned about the electoral college from the 2000 election is that state legislatures have “plenary” power in establishing the manner of appointment of electors.⁷ I seriously doubt that this means that the Florida legislature could appropriately have preempted the electoral process that it had originally chosen. But I see no obstacle to a state legislature’s providing *beforehand* that its electoral college delegation would be that pledged to the winner of

⁵ See George H. Haynes, *The Election of Senators 133-48* (Henry Holt & Co. 1906).

⁶ George H. Haynes, *The Senate of the United States 104* (Houghton Mifflin Co. 1938) (citing *Boston Herald* of December 26, 1910).

⁷ The characterization comes from *McPherson v. Blacker*, 146 U.S. 1, 7, 10 (1892).

the nationwide popular vote. If states with just 270 electoral votes adopted such an approach, the popular vote winner would perforce win the presidency. Under the electoral college allocations that were produced by the 1990 census, a mere eleven states – those with the largest populations, of course – control 270 electoral votes. Eleven states is many fewer than the three-fourths required for a constitutional amendment (to say nothing of the requirement of congressional approval).⁸

To be sure, those populous states might be reluctant. We have seen that arguably some of them have the most to lose. But *de facto* popular election could be accomplished by fewer than eleven states. If just California and Texas – the two states that starting with the next election will have the largest electoral college delegations, and which have opposed party inclinations at the present time – would adopt such a rule, the chances of a disparity between the electoral college and popular votes would be pretty close to the vanishing point.

To begin with, California and Texas had 86 electoral votes between them in the last election and seem likely to have even more after the congressional reapportionment worked by the census now being completed. There have been very few instances in our history when the popular vote winner lost outright in the electoral college. Most typically the electoral vote exaggerates the victory of the popular vote winner. If the popular vote loser started out 86 or more votes behind, he would thus be

exceedingly unlikely to win.⁹

Political dynamics would make it even less likely. At the present time, candidates employ “electoral college” strategies, targeting states with sufficient electoral college votes to win. They can do this basically without independent concern about the nationwide popular vote. With the suggested move by California and Texas, presidential candidates would be forced radically to alter that approach, devoting energy and resources to getting out the vote in all states. Deprived of the ability single mindedly to pursue an electoral college strategy, they would be even less likely than they have been historically to secure an electoral college win without winning the popular vote. There would still be a mathematical chance of their doing so, of course, but much less of a real world chance.

Indeed it seems quite likely that even states less populous than California and Texas could turn the trick. For both substantive purposes and those of political acceptability, it would probably be important that the move be made by one or more states that are closely divided politically, or by some combination across the political divide. Adoption by the swing (and occasionally adventuresome) state of Wisconsin – with eleven electoral votes in the last election – would tilt the system decidedly toward popular election. Combinations of states across the political divide, and with a larger total of electoral votes – Colorado and Oregon with a total of 15 votes, for instance, or Missouri and Minnesota with 21 – would

8 It seems likely that eleven states will still suffice to get up to the required majority under the apportionment to be dictated by the 2000 census.

9 There have been at most four instances in our history – two clear and two not so clear – where the outright winner in the electoral college lost the popular vote. In 1888, Cleveland won the popular vote but lost in the electoral college by 65 votes. The other clear case was in the disputed election of 1876, and the electoral vote margin there was one vote. The 2000 election is one of the unclear instances, and it too resulted in a razor thin electoral college margin. The final example was the 1960 election, where it is impossible to know who won the popular vote, since the Alabama ballots listed only the electors, and due to the political situation in Alabama it is by no means clear how to ascribe votes for the various Democratic electors to Kennedy. Kennedy’s margin in the electoral college was 84 votes. See Longley & Peirce, *supra* note 2, at 46-59.

increase the odds even more.

There is a large number of variations on the theme. The initial states might move more cautiously at first, by tying their electoral votes to the nationwide popular vote only if a stated number of other states (or of states with a given number of electoral votes) followed suit. Or, as suggested to me by Dan Farber of the University of Minnesota Law School, a state could assign its electoral votes on the basis of the pooled popular vote from a group of states that adopted similar pooling laws. Too much inventiveness might, however, be the enemy of success. Adoption of a variety of devices by different states might weaken the chances of any one of them catching on. Still, if a few states took the plunge in one form or another, others might well follow, just as the movement for popular senatorial elections gained momentum over time. Opposition to a constitutional amendment could then quickly dissolve, just as it did back then.

This route to change would bring a degree of an advantage often cited for direct election. The winner-take-all rule provides political parties with no incentive to increase turnout in politically lopsided states. If electoral votes that could prove decisive were dependent on the nationwide popular vote, turnout would become important in every state. This route to change also finesses – initially at least – some tricky sub-issues. It avoids the question of whether a popular vote winner need obtain a majority of the vote, or only a stated plurality instead. Each state could define its own popular vote trigger, and provide for contingencies if that trigger proved indecisive. In addition, the popular vote trigger leaves untouched state prerogatives to define eligibility to vote. And it steers clear of the overseas territory and foreign resident voter questions. But it would also be possible for aggressive states to confront at least the territory and foreign resident issues. The pioneer states might provide that their electors would go to the winner in a vote

that included citizens currently ineligible, if Congress would pass the necessary implementing legislation for tallying the votes in an effective and timely fashion.

I do not mean to suggest that this would be easy to pull off. There are important differences between the senatorial and presidential election contexts. State legislators were susceptible to popular agitation for popular involvement in senatorial selection, because they had to stand for election themselves. In the presidential elector context, in contrast, state legislators would be asked to institute a system by which the choice of their own voters would not be dispositive in directing the state's electors. It is hard to see why a state's voters would agitate in large numbers for such a move.

There are other problems. At the present time, there is relatively little pressure for states that go decisively for one candidate or another to get a precise count of the popular vote. A state that opted for a nationwide count would want some assurance that the count was accurate. The same problem would be posed by a constitutional amendment, of course, and related concerns have been advanced as reasons not to abandon the electoral college. Balloting reform could do a lot to allay this concern, but federal legislation might be necessary to assure a degree of integrity for the nationwide popular vote totals.

Despite the problems, the nationwide popular vote mechanism is actually more enticing in some ways than was the insinuation of popular voting into senatorial selection. The action of one state in moving toward popular election of senators brought no leverage on other states, save as the example might persuade on the merits. In the presidential context, on the other hand, a very few states have the capacity dramatically to tilt the entire system toward direct election. The appeal to reformist zeal could prove tempting.

None of this is to suggest that a move to a

nationwide popular vote is obviously a good thing, even in theory. The complex American system serves ends other than straight out "majoritarianism," whatever that might mean. Neither the Senate nor the House of Representatives need be representative of a nationwide majority, and it is not obvious that the

President must be. But there clearly is a good measure of dissatisfaction with the possibility of a disparity between the popular and electoral vote outcomes. A full-fledged debate on the merits of a change should not be pushed off the nation's agenda because of the difficulty of constitutional amendment. *RB*