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DEMOCRATIC PRINCIPLE AND ELECTORAL COLLEGE REFORM

Ethan J. Leib & Eli J. Mark^{* †}

INTRODUCTION

The Electoral College is a relic from another time and is in tension with the modern constitutional command of “one person, one vote.” But the Electoral College is, nevertheless, ensconced in our Constitution—and, as a result, we would need to amend the document to alter or abolish it from our political fabric. Still, some states are toying with state-based Electoral College reforms. Thus, irrespective of whether voters in those states favor the abolition of the Electoral College through a federal constitutional amendment, they must critically examine the democratic merits of these state-based reform options. Categorically rejecting all state-based reform is unwise, owing to obvious and substantial barriers to direct federal or constitutional action.

Although states have the flexibility and authority under Article II of the Constitution to award their electoral votes in different ways, under the current system all but two states award their electoral votes in a “winner-take-all” fashion, with no votes allocated to the statewide popular vote loser. This scheme has dominated the electoral vote landscape since the rise of political parties, and it presently enables presidential candidates to focus their campaigns on a small percentage of voters from a tiny number of swing states while disregarding the needs of the rest of the nation.

A CRITICAL ANALYSIS OF THREE STATE-BASED REFORM PROPOSALS

Recent reform proposals attempt to tap into states’ latent power to reapportion their electoral votes, with the stated hope of changing the local, state, or national dynamics of presidential elections and moving closer to the aspiration of “one person, one vote.” Although there are numerous methods a state could use to apportion its electoral votes, here we have space only to discuss very briefly three options.

The proposal that has gained the most notoriety—after a push in the fall of 2007 to get it on California’s ballot—consists of distributing most of a

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state's electoral votes according to the popular vote winners at the congressional district level while reserving some electoral votes for the statewide popular vote winner. Call this proposal, which has been adopted by Nebraska and Maine, *district-based reform*. Another proposal, similar to Colorado's failed 2004 voter initiative, would award a state's electoral votes in proportion to the popular vote at the state level. Call this *PR-based reform*. Finally, a third proposal would establish an interstate compact to implement a different kind of "winner-take-all" distribution (unlike the previous two options, which are likely to lead to "splitting" a state's electoral votes). Under this proposal, if a consortium of states representing a majority of the country's total electoral votes joins the agreement, the signatory states would assign all of their electoral votes to the *national* popular vote winner, irrespective of how the voters in the states expressed their electoral preferences. How should committed democrats (small 'd') think about these options?

Minority voters in large non-swing states—say Republicans today in California or New York, as well as Democrats in Texas—have the most reason to be upset with the current method of awarding electoral votes. It should therefore be no surprise that California, which holds a massive fifty-five electoral votes and which was largely neglected in the past three presidential races, attracted reform proposals in anticipation of the upcoming election. Of course, there is ample reason to be suspicious that the Republican sponsors of California's district-based reform initiative were not impartial to its strategic benefit in the 2008 election: district-based reform (as well as PR-based reform) would dilute California's electoral strength, advantaging the state's minority party by allowing it to capture votes that it simply couldn't (and wouldn't even try to) capture in the current winner-take-all environment.

Although the partisan arguments for or against state-based reform are easy to identify in any given context, there are also nonspecific appeals to "democratic principle," beyond the partisan hankering, that are much more difficult to analyze. To the extent that there is a democratic principle animating electoral vote reform, it must be this one: Our president should be elected by a direct popular vote, not by an Electoral College system.

Effectuating this principle without offending our written Constitution would be difficult to achieve through the interstate compact, which is essentially an end run around the one true and proper way to abolish the Electoral College once and for all: amending the Constitution. But the interstate compact has a more important deficiency from the perspective of democratic principle: it doesn't change the status quo at all. Both the constitutional status quo and the electoral status quo would remain unchanged for the foreseeable future. For instance, if California were to become the third state (after Maryland and New Jersey) to sign the compact, the state would not award its electoral votes any differently in the next presidential election—or many presidential elections thereafter. Indeed, getting a majority of electoral votes committed to the compact's method of distribution is only nominally less Herculean a task than getting the Constitution itself amended. More-

over, given the lack of congressional consent to the compact and the compact's potential unconstitutionality, the compact may not be enforceable by voters or other states. Consequently, California could plausibly pull out at any time if it later decided the compact were no longer in the state's best interest. From the perspective of the real world, California's action in signing the compact would be symbolic—and it would do next to nothing to bring the country any closer to meaningful Electoral College reform.

The best that can be said for the interstate compact is that, perhaps, it is consistent (or at least not inconsistent) with the democratic principle. Although a single state's ratification cannot directly bring about any alignment of electoral vote totals with national vote totals, neither would it cause a change that could threaten moving electoral vote totals *further away from* the ideal of the national popular vote. And there remains a glimmer of hope that enough states will sign on to the compact and that it will be held constitutional. But these are thin reeds upon which to hang a principled argument.

Maybe the Left (which generally embraces the compact and loudly rejects district-based reform in California) is onto something when it highlights just how much district-based reform violates the democratic principle. Indeed, it seems likely in the short term that any change in California to a district-based scheme of electoral vote allocation might increase the probability of an electoral vote winner who is also a popular vote loser. But there is no guarantee that this result will follow *over the long term*. Additionally, if one is entitled to have attenuated hope about the consequences of the compact, why shouldn't one also indulge in some hope about the potential long-term results of district-based reform?

The proponents of the district-based system argue that it will likely give presidential candidates more reason to go to California, to focus upon the state's citizens and to make them campaign promises, and, more generally, to attend to the needs of the most populous state in the Union. The naysayers on this point emphasize that this proposal is a naked power grab: because virtually all congressional districts are designed to give a single party dominance, no more effective competition will result from making the change.

But just because most districts are locked up for a particular party in congressional races doesn't mean that the same party's presidential candidate will win the district. After all, districts are gerrymandered to ensure the success of the congressional representatives, and different issues come into play when voters choose a national leader. Voters may judge a national leader on his or her vision for the country's domestic and foreign policy agendas while judging a local representative most centrally on his or her capacity to serve a local constituency and to "bring home the bacon." Indeed, the same Californians who gave all their electoral votes to a Democratic presidential candidate elected a Republican Governor. Thus, the context of an election matters even when the constituency remains constant. So do demographics, which change over time—California wasn't always a blue state, of course.

Nevertheless, we concede there may be something naïve about thinking that carefully gerrymandered districts can be unlocked from party dominance. Straight ticket voting under a district-based system could cause California to be ignored even more than it is now. In the right election, California could be transformed from a 55-electoral-vote behemoth that could swing for the right candidate into a state that only has one or two electoral votes up for grabs in a decreasing number of competitive districts. That would hardly create much incentive for a candidate to visit the state and make promises to its citizens.

Furthermore, while district-based reform might give constituents in a few competitive districts a greater voice in the presidential election, it would do little to get candidates to campaign for general state interests. Under district-based reform, specific local interests in the competitive districts might get increased attention, but the vast majority of voters in the remaining districts would be unlikely to garner any more attention from the candidates.

Still, opponents of district-based reform ignore some very plausible benefits. If California were to adopt district-based reform, Democrats might then actually try to do all they could to abandon the Electoral College in the one right and desirable way to achieve that change: through constitutional amendment. Destabilizing the purported “fairness” of the status quo may trigger real reform. Or consider that implementing district-based reform might stimulate meaningful reform of *districting* in California and result in more competitive districts; if the presidential election is suddenly at stake in district design, fair congressional districting reform might seem much more pressing. These are admirable goals—and they are ultimately consistent with the principle of “one person, one vote.”

Indeed, we think that there is some recent evidence to support the idea that district-based reform adopted by an important state like California could spur a real social movement to bring us closer to the “one person, one vote” ideal. To wit, as California got closer to adopting district-based reform, a very loud and public conversation resulted, forcing many to stare directly at the problems associated both with the Electoral College and with district design. As the threat ebbed, so did any meaningful public debate about the issues. As of this writing, the future of the proposal is uncertain. If the reform doesn’t make it to the ballot after all, an opportunity, of sorts, may be missed for true believers in the long-term triumph of the principle—even if the cost of such a reform would turn out to be a slightly-less-fair presidential election in 2008.

Even though district-based reform has some potential benefits, we think PR-based reform is much more likely to be true to the principles that the sponsors of district-based reform purport to advocate, all things considered. In contrast to the few potential electoral votes up for grabs and the local-interest pandering that would result under the district system, a PR system is more likely to put a greater number of electoral votes in play because individual votes would not be locked into a district that is subject to gerrymandering. In turn, PR-based reform could cause presidential candidates to appeal to statewide interests.

Still, PR-based reform is not without its own quite substantial problems from the standpoint of democratic principle. Given that third-party candidates could more easily capture electoral votes under a pure PR-based regime (not in itself a problem), electoral vote winners might have a tougher time getting a majority rather than a mere plurality of the electoral vote. The danger here is that the Constitution requires all elections that fail to produce electoral vote majority winners to be decided in the House of Representatives (where House delegations vote as state blocs). This type of voting could take us further away from the popular vote result that serves as the very basis for reform in the first place.

Nevertheless, although district- and PR-based reforms can both have suboptimal results when adopted one at a time by singular states, they do have the potential to encourage the representation of a larger number of voters' state or local interests. More importantly, they might stimulate a constitutional amendment to get rid of the Electoral College once and for all. Indeed, even signatories to the interstate compact could embrace district or PR-based reform in the interim, as they wait for the requisite number of states to sign on to the compact.

CONCLUSION

In the final analysis, we hope that we have shown that speaking in the high-minded and self-righteous discourse of democracy is somewhat inappropriate in the context of state-based Electoral College reform. One can weigh the costs and benefits of reform options; democratic principles, however, tell us only what to weigh and not what we must do at the level of state-based reform. Urging voters to reject state-based reform or merely to adopt the interstate compact only preserves the current state of affairs, which no truly democratically-principled individual should be able to advocate without feeling quite dirty. Admittedly, there is a conception of fairness that recommends against endorsing district- or PR-based reform—yet it is not a purely democratic one; rather it is one predicated on a particularized short-term vision about the upcoming 2008 election. Ultimately, the partisan nature of the discourse about electoral reform should not be surprising: we're talking about politics, after all.

Thus it is the Democrat in us speaking when we reject the current district-based reform proposal in California (if we get a chance to vote on it this November), because it is so obvious to us that we could not live with the consequences of such reform in the short term. But the democrat (small 'd') in us knows that our political preferences are not required by our democratic principles. That democrat in us thinks the decision to adopt or reject a state-based Electoral College reform proposal is guesswork when based "purely" on democratic principles, so we feel fully comfortable deferring to our partisan preferences when evaluating such proposals.