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Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way

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ABSTRACT

The electoral college is enshrined in our Constitution, yet it is widely viewed to have outlived its usefulness. Constitutional requirements and the state of national politics make it unlikely that direct popular election of the president could be achieved through amendment of the Constitution. The alternative, action at the state level, is currently a topic of discussion. However, efforts by the states are hampered by a collective action problem, i.e., a lack of incentives to act alone without a guarantee that others will follow. This article examines a set of four alternatives for electoral college reform which can be accomplished through legislation at the state level, all of which lead to national popular election of the President on a basis of "one person, one vote," and two of which provide powerful incentives for all states to join. The advocated approach is for a given state to pass legislation that appoints its electors according to the popular vote of, not only its own voters, but those of all states that pass similar legislation. This approach, explicitly allowed by the Constitution, creates a powerful voting bloc whose electoral votes will all go to one candidate. Presidential campaigns which normally ignore the citizens of a majority of states will be unable to ignore this bloc. As other states join the bloc in order to gain this increased influence, the power, and incentive to join, only grows. The result may be popular election of the President without a constitutional amendment through action by as few as eleven states. This article looks at the political viability as well as the constitutionality of such a system. It also examines in detail how such an approach would work within our current federal system of elections.

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INTRODUCTION

THE ELECTORAL COLLEGE is enshrined in our Constitution, yet it is widely viewed to have outlived its usefulness. It leaves the United States as the only modern industrial democracy having an independent executive not elected by majority or plurality popular vote.[1] However, constitutional requirements and the current state of national politics make it unlikely that a constitutional amendment instituting direct popular election, or any other meaningful presidential election reform at the federal level, could be achieved.[2] Because of this, electoral college reform at the state level is currently under discussion in academia, the media, and in statehouses across the country. However, the most straight-

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[1] There are many parliamentary systems, e.g., that of the United Kingdom, that elect a leader indirectly and not necessarily by a majority or plurality of the popular vote.
[2] Charles Babington, "Electors Reassert Their Role," Washington Post at A1, December 19, 2000.

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forward approaches to state level reform have a significant collective-action problem, i.e., a lack of incentive for states to act alone without a guarantee that others will follow. This article will examine an alternative approach that alleviates this problem.

There are several alternatives for electoral college reform which can be accomplished through legislation at the state level. All of these alternatives can lead to national popular election of the President. The first approach this article will consider is that one or more states[3] may choose to appoint their electors according to the national popular vote. This approach has the advantage of simplicity, but the disadvantage is that the first states to do it water down[4] their own residents' votes for president by a considerable factor. But if enough states follow this approach, the electoral college will be guaranteed to elect the winner of the national popular vote. The second approach is similar to the first, except that the state laws appointing electors according to the national popular vote would not take effect until enacting states held a majority of the electoral college votes. This eliminates the watering down of votes in the states that go first, but at the cost of delaying any change until a large number of states have acted. This approach is currently being widely discussed, and is under consideration in several state legislatures. The third approach is for states to appoint their electors according to the collective popular vote of only those states that reciprocate their manner of appointment, eliminating most watering down and giving other states an incentive to join the "bloc." If enough states join such a bloc, the bloc popular vote will become determinative of the election. At that point, any state refusing to join the bloc will have no say at all in electing the President. The final variation eliminates this "freeze-out" effect for holdout states. This last approach, with specific model language, is proposed in this article for enactment by the states.

This article first looks at the alternative approaches to implementing a national popular election of the President through state legislation. It will then briefly look at prospects for action at the national level. Then the motivations of states to act on the favored proposal are examined. A significant motivation is that most states are largely ignored even in close presidential races, and the ranks of these ignored states alone are more than enough to fully implement the reform. Then the bloc voting proposal is examined within the context of the historical development of the electoral college, noting that the evolution of the institution has been significantly driven by state action. Finally, various details, such as the difficulty of legally canvassing the national vote and possible constitutional challenges are evaluated.

This article strives not only to continue the dialogue on electoral reform, but to facilitate change by examining the details of drafting as well as the reasons that should encourage states to enact the proposed change.

FOUR PLANS FOR STATE-LEGISLATED ELECTORAL COLLEGE REFORM

Direct reform: States go it alone

The U.S. Constitution gives broad leeway to the states to choose how to appoint their electors to the electoral college.[5] Most states today appoint their electors according to their own state popular vote for President.[6] But a state may choose to appoint its electors according to the winner of the *national* popular vote.[7] If a

[3] This article will generally mean to include the District of Columbia whenever states are referred to, unless otherwise noted, because it is generally treated as such in the electoral college system. (See Electoral Count Act, "definitions," 3 U.S.C. § 21.) However, in the immediate context, note that the District of Columbia's method of appointing electors is determined by Congress. In this respect it is different from the states.

[4] The expression "water down" is chosen to distinguish from the legal term "vote dilution," which is properly used to refer only to unequally weighted votes within a state or other jurisdiction. Vote dilution as strictly defined is most likely not an issue with the current proposal, as all voters within any given state are treated equally.

[5] Bush v. Gore, 531 U.S. 98, 104 (2000). McPherson v. Blacker, 146 U.S. 1, 36 (1892).

[6] Lawrence D. Longley & Neal R. Peirce, The Electoral College Primer 2000, 106 (1999) [hereinafter Primer].

[7] Robert W. Bennett, *Popular Election of the President without a Constitutional Amendment*, 4 Green Bag 2d 241, 241 (2001). Akhil Reed Amar and Vikram David Amar, *How to Achieve Direct National Election of the President without Amending the Constitution*, Findlaw's Legal Commentary (Dec. 28, 2001), *at* <http://writ.findlaw.com/amar/20011228.html>.

number of states with a total of 270 or more electoral votes so choose, then the electoral college will be guaranteed to elect the winner of the national popular vote. As few as eleven states can achieve the necessary total.[8] In fact, even less than that number can have the same essential effect.[9] If only a handful of medium-to-large states which straddle the political spectrum enact, that bloc of electoral votes going to the popular vote winner would in almost all cases ensure his or her victory. For example, if only New York and Texas enacted, it would be exceedingly difficult for any popular vote loser to overcome the loss of the combined 65 electoral votes of those two states. The practical result would be that the electoral college would quietly disappear from descriptions and analyses of elections. News reports on the night of the election would focus on the national popular vote, tallying the precincts nationwide as they were reported. Scant mention would be made that a few weeks later the electoral college would mechanically ratify the national plurality. This reform option will be referred to as Plan 1.

Though simple in concept, this approach may prove difficult to achieve. The citizens of the first state (or states) choosing to implement it will find their votes for President massively watered down. In other words, its adoption of the plan would massively reduce the weight (defined here as electoral votes per resident)[10] of its own citizens' votes for President. The watering down is in proportion to the ratio of state population to national population. For small states, this effect is particularly acute, as much as a factor of about 570 in the case of Wyoming. Thus, in the unlikely event that Wyoming became the first state to make the move, its voters would suddenly have 1/570th the voting weight that they did before the change.

Politically, this would seem to be a very hard scheme to sell, or at least an easy one to attack, in the first state to consider it. The argument against it is very clear: the enactment will lead to an immediate and substantial reduction in voting power. The counterargument, that this enactment is but a first step in pursuit of a worthy eventual national goal, may have less immediate appeal. However, this massive watering down can be eliminated via alternative approaches.

Delayed reform: The national popular vote proposal

One way to eliminate the massive watering down of state residents' votes is for the reform to only take effect at the point where the enacting states collectively hold a majority of electoral votes (Plan 2). This is the proposal made by the National Popular Vote organization.[11] By this delayed activation, the problem of massive watering down is eliminated. (Of course, once the plan takes effect, some states will lose some voting weight, while others gain, but none by a massive factor such as seen by the first states under Plan 1.) The first states to act would see no disadvantage at all, and thus states may be more likely to enact the proposal.

The drawback to this approach is that while states receive no disadvantage by going first, they receive no advantage either. In fact, nothing at all happens until a large number of states enact the law.[12] If only a few states enact over a long period, then no change will occur. Some states may act out of principle in order to bring about a national popular vote, but the lack of immediate advantage may make most states less likely to pass the proposal. Additionally, the feature present under Plan 1, that a handful of states can practically ensure, if not guarantee, a popular vote winner, is lost under Plan 2. Plan 2 is an all or nothing approach.

Indirect reform: Forming a bloc

Another way to reduce or eliminate the watering down of state residents' votes, while also

[8] *Id*. at 244. Of course, this means the eleven states with the most electoral votes.

[9] *Id*.

[10] Using residents instead of eligible voters or actual voters is a choice of convenience, as population data are easier to come by than eligible voter or voter turnout figures. The ratio of eligible voters or actual voters to population varies somewhat from state to state depending on many factors. Thus, while this choice of definition of voter weight does not qualitatively affect the argument, it does somewhat affect the actual numerical results for any calculations involving voter weight.

[11] Proposal found at <http://www.nationalpopularvote.com/npv/>, last accessed June 3, 2006.

[12] John R. Koza, et al., Every Vote Equal: A State-Based Plan For Electing The President By National Popular Vote 249 (2006) This book may be downloaded from <http://www.every-vote-equal.com>, last accessed June 3, 2006.

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giving states an immediate incentive to act, is Plan 3, in which each participating state would cast its votes for the Presidential ticket that wins the total popular vote *of only the participating states*.[13] In other words, participating states would form a bloc that awards all their electoral votes to the winner of the bloc popular vote. This approach, while less idealistic than Plans 1 and 2 in that states are not moving directly to appointing electors by national popular vote but instead are seeking reciprocation from other states, could actually be more effective in achieving a popular election in the end.

The first state to enact such an approach would actually see no change in its appointment of electors because as the only participant, its popular vote total would be the only one it would consider. Thus, it would suffer no watering down of its citizens' voting power. With the second state to join, change would begin to be seen. The two states would have the advantage that their citizens' votes would count in determining not only their own electoral votes, but also those of the other state, creating a bloc of electoral votes more powerful than the individual states alone and thus more vital to the candidates to win. While some watering down of votes would occur due to variations in individual states' voting power, massive watering down as under Plan 1 would be avoided by only considering the popular vote of the states that are pooling their electoral votes. Put another way, this scheme eliminates massive watering down by allowing the vote weight denominator (population) to grow only at roughly the same pace as the numerator (electoral votes).[14]

As more states participated, other states would be motivated to join this growing voting bloc so that their popular votes could also be counted in its total. (The motives to join are explored more fully below in the section titled, "The Politics of Reform.") The last states to hold out (after the bloc grew to 270 or more electoral votes) would be completely frozen out of the presidential election. Their citizens' votes would, as a pre-ordained legal certitude, be unable to affect the outcome. By this threat, such a system could be more likely than Plans 1 and 2 to achieve participation by all states. Once all states join, the result is the supremacy of the national popular vote.

Such a system, however, could also be more likely to engender political opposition and legal challenge because of this "freeze-out" effect. By presenting the possibility that some entire state populations would be effectively disenfranchised (albeit due to their own state's refusal to join in the reform bloc), citizens of states not joining could be justifiably angry that their votes in the next presidential election would not matter. They might also be inclined to seek a legal remedy, perhaps by claiming a denial of equal protection. However, an argument along these lines is weak because the fact that one group of states can "lock up" the outcome of an election is more a product of the electoral college than of any state law or laws. Also, there is no legal precedent for inter-state equal protection claims. Successful equal protection claims have always been brought by citizens being disadvantaged vis-à-vis other citizens of their own state. The proposed reform would treat all eligible voters of any given enacting state equally.

While perhaps inviting challenge when only a few holdouts remain, such a system would be less likely to be challenged (politically or legally) while there is only one or a handful of participating states as it avoids the argument that the first participating states are disadvantaging their own citizens by massively watering down their votes. However, the freezing out of citizens because of the decision of their state not to join the bloc, for which they may bear no responsibility, does seem a patent unfairness. Fortunately, there is an easy solution that retains the essential features of this plan.

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[13] Bennett credits Dan Farber, now a Professor at Boalt Hall, with a similar idea. *Supra* note 7, at 245.

[14] Some watering down can still occur due to the variation in the weights of votes between states. To use Wyoming as an example again, if it formed a bloc with California, the weight of its votes would be reduced by a factor of more than three. This pairing of the most and least populous states shows the worst case for watering down under Plans 3 and 4. Note that this kind of watering down is inevitable for some states in order to achieve a national popular vote because those benefiting under the current system must lose their advantage.

Refinements to the bloc system: For the sake of fairness

A variation (Plan 4) that could realize the advantages of Plans 1, 2, and 3 is a bloc approach like Plan 3 except that when the electoral votes of the participating states reach 270 or more, that event triggers (as in Plan 2) the transition to use the national popular vote instead of the bloc popular vote. Thus, the first states would not suffer watering down while the last states would not be frozen out. However, the added motivation to join the reform effort that Plan 3 provides, that of joining a powerful voting bloc, would be lost in Plan 4 at the very moment when it is most needed: to achieve the 270th electoral vote. The state considering bringing in the 270th elector will not be joining the bloc so much as destroying it, by putting all states once again on the same footing. However, it seems likely that the motivation to be the "keystone" state (apologies to the Commonwealth of Pennsylvania) in this historic achievement will outweigh any other less lofty considerations.

Note that this plan has the same effect after 270 electoral votes are reached as Plan 2. Since Plan 2, the National Popular Vote plan, has no effect before that point and thus leaves undisturbed whatever state mechanism is otherwise in place, the two plans are legally compatible. Both plans could be passed into law by any given state, allowing that state both to help trigger the implementation of Plan 2 and to take advantage of the increased influence of bloc voting under Plan 4.

One further fairness-based refinement of Plan 3 should be included in Plan 4. While many states may join the bloc, one or more altruistic states may follow Plan 1 and choose to unilaterally start appointing their electors according to the national popular vote. In order to reciprocate the altruism of those states, the Plan 4 bloc voting law should include the popular vote of states already appointing according to the national popular vote. Unfortunately, the same consideration cannot be made for states passing only Plan 2, since those states have not actually implemented any real change until 270 electoral votes are reached.

With this refinement, Plan 4 is complete in concept. A draft of a model statute may be found in Appendix I. This is the baseline proposal on which the rest of this article mainly focuses. The next section considers the prospects that such a reform will actually be implemented by the states.

THE POLITICS OF REFORM

Change at the national level

The electoral college today stands widely criticized. "There have been more proposals for Constitutional amendments on changing the electoral college than on any other subject."[15] The American Bar Association has criticized the electoral college and an ABA poll once showed that a strong majority of lawyers favored abolishing it.[16] Strong majorities of public opinion are also consistently against the electoral college.[17] Yet the mechanism still persists, enshrined in the Constitution. The only way to completely abolish the electoral college and replace it with a direct popular election is through a constitutional amendment.

A constitutional amendment requires a two-thirds vote of each house of Congress as well as ratification by three-quarters of the states. It is likely that more than one quarter of the states, enough to sustain a "veto" of any amendment, are favored (or perceive themselves to be favored) by the current system and are thus unlikely to vote for dismantling the status quo. Additionally, Republicans at the national level may perceive that the electoral system favors them by favoring the smaller (less populous), predominately rural states, many of which are "red" (strongly Republican). It will be shown below that individual citizens of small states are at a disadvantage under the current system. However, the electoral college does give the red states on average a higher

[15] Web page of the U.S. National Archives, section on electoral college, frequently asked questions (FAQ), "What proposals have been made to change the electoral college system?" obtained from <http://www.archives.gov/federal-register/electoral-college/faq.html#reforms>, last accessed on June 5, 2006 [hereinafter *Archives web page*].
[16] *Id.*
[17] *Id.*

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vote weight than that of the blue states.[18] For this reason, the Republican congressional leadership may be less likely to allow passage of an amendment in either house. However, it is important to emphasize that perceived advantages under the electoral college system are usually not as straightforward or predictable as they seem, as will be further explored in the next section.

The federal courts could provide a partial solution by striking down the winner-take-all system of state appointment of electors.[19] Either the proportional or district method of appointment would then likely be used in each state instead. This change would make it very unlikely for the popular vote winner to lose the election. It would also eliminate the "cliff effect" that makes battleground states so magnetic to, and most other states so ignored by, Presidential campaigns.[20] However, the Supreme Court has given considerable deference to the states under Article II, Section 1 of the U.S. Constitution, making it unlikely that the courts will take this path.[21]

Even if this change were affected through the courts, it still does not achieve a national popular election for the President. Popular election is desirable not only because it is the only way of guaranteeing that the winner of the national plurality will attain the presidency, but also because it is a process that is deeply connected to democratic ideals, particularly the ideal that all votes will count equally and all voters will be treated equally.

For the above reasons, neither politics nor jurisprudence at the national level is likely to achieve satisfactory reform. State politics may offer a better field for action.

The state political question: Who stands to gain?

The most obvious political obstacle to instituting a national popular vote for President by state legislation is the collective action problem it presents. The states that implement any of the plans will give up their right to choose their electors solely based on the will of their own citizens. Plan 1 is especially difficult in this regard because it waters down a given state's citizens' votes by a large factor. Plans 2, 3, and 4 do not suffer from the massive watering-down problem, but they will still cause some reduction of voting weight for some states and they still take away the enacting state's ability to autonomously appoint its electors. There must be a powerful incentive if states are to overcome these deterrents.

However, leaving aside the collective action problem presented by the means, let us examine for a moment the end. Who is interested in electing the President by popular vote? The People as citizens and voters are, certainly. After that, many of the states are, both as state populations and as state governments. The most obvious group of states for whom this reform is advantageous is the large states, though small states have made a louder demand for reform.[22] However, it is possible that the states with the most to gain are the "non-battleground states," currently ignored even in close elections.

Because the electoral college gives greater weight to votes in some states and less weight to those in others, the states with less voting weight may have a motivation to change the system. Each electoral vote for President is counted equally. But while the number of electors awarded each state corresponding to its number of members of the House of Representatives is roughly based on population, the addition of the constant two "senatorial electors" serves to increase the representation per citizen for small states more than for large ones.

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[18] The ratio of electors per person in red states to electors per person in blue states is 1.078. (Red states and blue states are defined here as having had more than a 3% margin of victory for their respective candidates in the 2004 presidential election.) Thus one could argue that nationally, Republicans get an almost 8% boost from the electoral college. Of course, the history of the electoral college is a story of unpredictability. For example, if John Kerry had won the close state of Ohio in 2004, he would have won the election despite George W. Bush's majority in the national popular vote. Election results from <http://www.washingtonpost.com/wpsrv/politics/elections/2004/2000-2004_comparison.html>.

[19] Samuel Issacharoff, *Laws, Rules, and Presidential Selection*, 120 Political Science Quarterly 113, 127 (2005).

[20] *Id*. at 127.

[21] Bush v. Gore, 531 U.S. 98, 104 (2000). McPherson v. Blacker, 146 U.S. 1, 36 (1892).

[22] The small states sued the large states over the winner-take-all issue in Delaware v. New York, 385 U.S. 895 (1966).

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The addition of two senatorial electors triples Wyoming's electoral delegation from one to three, while only increasing California's from 53 to 55, an increase of less than four percent.[23] This gives Wyoming a ratio of 164,594 citizens per electoral vote[24] while the number for California is 615,848, giving Wyoming citizens a 3.74 to 1 advantage in vote weight.[25]

Taking the national population and dividing by the number of electors, the average representation is 526,022 citizens per elector. It is interesting to note that the group of states that, like California, do worse than this average have a total number of electors of 332, significantly greater than the 270 needed to elect the President. Thus, if all, or even most, states whose citizens are disadvantaged by the current system in terms of vote weight decide to opt in to the proposed alternative, they would have more than enough electoral votes to fully implement national popular vote under Plans 1, 2, or 4.

However, though they enjoy disproportionately large representation in the electoral college, the small states also have a plausible claim to an unfair disadvantage under the current system. As John Banzhaf discovered in the sixties, the winner-take-all system that almost all states use actually makes it less likely that a given voter in a small state will affect the outcome of the presidential election than a voter in a larger state.[26] One indication of the disadvantage of small states is the fact that very few Presidents have come from small states.[27]

Citing the academic research, a group of small states collectively brought suit against the larger under the original jurisdiction of the Supreme Court. They alleged that the winner-take-all rule was unconstitutional and unfairly disadvantaged their residents. The suit was not successful.[28] However, this shows that the small states themselves actually feel (or at least felt at the time of the lawsuit in 1966) that they are disadvantaged under the current system. While it is true that the real culprit as far as the small states are concerned is the use of the winner-take-all system in most states and not the electoral college per se, the choice to use winner-take-all is a natural result of the incentives provided by the electoral college. As I will show below, one way for the small states to get out of this trap is to implement the suggested reform.

How can it be that both large and small states are disadvantaged by the current system? It stems from the use of different standards in the two arguments. Large states are disadvantaged in that each citizen has less vote weight, as defined by electoral votes per citizen. Small states are disadvantaged by the subtler fact that each individual voter is less likely to influence the outcome of the election. So which is the correct standard? The debate continues on this funda-

[23] Electoral college state representation from Federal Election Commission, *Distribution of Electoral Votes*, obtained from <http://www.fec.gov/pages/elecvote.htm>, last accessed October 4, 2005.

[24] Note that this is just the inverse of vote weight.

[25] State populations were obtained from <http://www.infoplease.com/ipa/A0004986.html>, last accessed on February 7, 2005.

[26] John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 Vill. L. Rev. 304, 306 (1968).

[27] Only five presidents have been elected from states with even *below-average* populations (measured at the time of election): Zachary Taylor in 1848 from Louisiana; Franklin Pierce, 1852, New Hampshire; Herbert Hoover, 1928, Iowa; Dwight Eisenhower, 1952, Kansas; and William Clinton, 1992, Arkansas. Of these, Arkansas had by far the smallest relative population. State and national historical populations from The Bureau of the Census web site, at <http://www.census.gov/prod/www/abs/statab.html>, last accessed November 18, 2005. Presidents and their home states from <http://www.homeofheroes.com/presidents>, last accessed June 27, 2006. Note that not all Presidents have a clear home state. Taylor, Hoover, and Eisenhower all lived in multiple states and rose to national stature through public service (military or civilian) on a national level and not through state politics.

[28] Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 Green Bag 2d 141, note 8 (2001). Also Judith Best, The Case Against Direct Election of the President 23 (1975). The case is Delaware v. New York, 385 U.S. 895 (1966). The court declined to hear the case. Best at 24. Two years later, a group of Virginia voters sued in federal district court to prevent that state from continuing to use the winner-take-all system. Williams v. Virginia State Board of Elections, 288 F. Supp. 622 (1968). That suit was dismissed on summary judgment. As the court in *Williams* noted, neither the approach of making all states parties used in *Delaware* nor the single-state approach used in *Williams* will serve to constrain the states when the Constitution gives them more freedom. *Williams* at 628.

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mental question.[29] The answer may be that Banzhaf's standard is the appropriate measure of power for the individual voter, since it measures the ability of the voter to affect the outcome, while voter weight is more significant at the collective level of the state itself. Neither standard is more "correct" than the other. Because of this lack of clarity, it may be that few states see themselves as disadvantaged by the current system due to their size.

The lack of a clear objective standard isn't the only reason that the question of who benefits and who doesn't is so hard to answer. The practical effects of the electoral college are not well understood by the public, political leaders, or even academia. The fundamental reason that the effects are not understood is that the effects are not consistent.[30] The effect of filtering the vote through the electoral college is a mostly random one, driven by variations in votes in individual states that often depend more on the weather than on candidate preference.[31] Small shifts in popular votes are magnified by the near-universal use by states of the winner-take-all rule of elector appointment. Half of the elections for President have been close enough for small shifts of voters in some states to have changed the outcome of the election.[32] Because this effect is random (in that small shifts in voter turnout and opinion are uncontrollable and unpredictable), the electoral college does not favor one party or group of states over another nearly so much as it favors randomness over predictability.[33] It is when the popular vote is close that this randomness becomes acute. In the 10 presidential elections with less than 3 percent difference between the winner and the runner-up in the popular vote, four have resulted in the candidate with the plurality of the popular vote losing the electoral college.[34] A study has shown that an election as close as 1960 or 1976 has a 50% chance of resulting in a popular winner-electoral loser outcome.[35]

So if state size and political party don't really matter, what does? As we shall see in the next section, once we go beyond population and electoral vote distribution and consider actual voting patterns, the winners and losers in the distribution of electoral college power are clear.

The ignored states fight back

Perhaps the most powerful motivation of individual states to choose the proposed reform involves the phenomenon of battleground states. Though the electoral college has a mostly random effect on the election outcome, it has a very real and consistent effect on the campaign that comes before. It has been recognized in recent years that a minority of states enjoy the majority of the attention of the presidential campaigns because they are the only ones where a reasonable possibility exists of influencing the outcome of the popular vote in that state.[36] It has been argued that this takes political power away from the citizens of other

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[29] Banzhaf, *supra* note 26, at 306. Banzhaf does not set out to analyze the pragmatic effects of pre-existing voter preferences, as he explains at 307–308. Nor does he examine the relative power of the states themselves as actors. He is looking solely at the effects of the system itself on individual voting power. Banzhaf's research was originally done in support of the redistricting court cases of the 1960s, as described by Neal R. Peirce, *Comment*, 13 Vill. L. Rev. 342, 346 (1968). Carleton Sterling, in another classic paper on the electoral college, argues against this view that large states have an advantage. Carleton W. Sterling, *The Electoral College Biases Revealed*, 31 Western Political Quarterly 159 (1978).

[30] Student Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 Harvard Law Review 2526, 2540 (2001).

[31] For the most recent example, look to Ohio in 2004. Rain across much of the state may have suppressed the Democratic vote sufficiently to produce Bush's margin of victory, a scant 136,483 votes. If Kerry had won Ohio, he would have won the Presidency, while losing the national popular vote by more than three million votes. This shows both the random nature of the electoral college effect and the fact that it can benefit Democrats as well as Republicans.

[32] This calculation applies to elections for which popular vote totals are available (1828 and thereafter). PRIMER, *supra* note 6, at 37, covers the period through 1996. The subsequent elections of 2000 and 2004 follow the one-in-two ratio pattern, with one very close and the other much less so. However, one could argue that the closeness of the vote in Ohio in 2004 would qualify that election as well as a "hairbreadth election."

[33] Student Note, *supra* note 30, at 2540.

[34] PRIMER, *supra* note 6, at 143. Longley and Peirce count the 1960 election as a popular winner-electoral loser case, based on their interpretation of the Alabama vote for electors which gives the popular plurality to Nixon. I have updated the statistic to reflect the 2000 election.

[35] PRIMER, *supra* note 6, at 143.

[36] CRAIG HOLMAN & LUKE MCLOUGHLIN, BUYING TIME 2000 81 (NEW YORK: BRENNAN CENTER FOR JUSTICE, 2001).

states, while also distorting the national political dialogue to the detriment of the entire nation.[37] The states that are not battleground states thus have a motivation, be they lopsided[38] Democratic or lopsided Republican states, to undertake reform that would change this balance of power.

Table 1 in Appendix IV shows the campaign advertising expenditures from the 2000 Presidential campaign, not including the primaries.[39] The totals include spending by the Democratic and Republican candidates, their parties, and groups supporting those candidates. The data show that most states received little or no campaign advertising, while the majority of advertising money was spent in relatively few states. Indeed, 75% of the total national expenditures were spent on just over 25% of the U.S. population (representing the top 11 states in ad spending per capita).[40] These inequalities became even greater in the 2004 presidential race.[41]

While it may seem unfair for the small state voter to have 3.74 times the vote weight of the large state voter, or the large state voter to have 3.312 times the likelihood of influencing the election outcome (independent of voting patterns) as the small state voter, those ratios pale in comparison to the ratio of influence of battleground voters to lopsided state voters as indicated by campaign expenditures. The latter ratio is in many cases infinite (because many states had zero campaign expenditures). Overall, the ratio of spending in 2004 for all battleground states to all lopsided states was 13.9.[42] It is likely that the major parties' presidential campaign organizations have rigorously analyzed the best ways to apply their precious funds and that therefore their weighting of expenditures represents the best available estimates of the actual power of voters to influence the election outcome. Their conclusion is clear: voters in lopsided states have almost no power to influence the outcome of the election.

The correlation between predicted margin of victory (as measured here by available data on actual margin of victory) and campaign expenditures is easily explained as campaign strategy under the electoral college system. The national campaign organizations are not trying to exclude anyone; they are merely doing their best to win. So why should states care that they are ignored by the campaigns? Doesn't that just make for quiet autumn days and uncluttered front lawns? While some residents may be more interested in quietude than in political influence, it is doubtful that those residents will be the loudest voices in any reform debate. More significantly, the major effect of being ignored is not in the campaign itself, but in the budget appropriations and attention to issues that come between campaigns. While hard data on this effect are much harder to come by than data on campaign expenditures, it is certainly plausible that candidates for office make more campaign promises to the residents of battleground states. Once in office, elected officials in the national government, especially members of the Administration occupying the White House, may feel some obligation to keep those promises, and may pay closer attention to states whose Presidential voting decisions are in the balance in the next election. This could result in higher federal appropriations to projects in battleground states and closer alignment of national policy with battleground state

[37] Issacharoff, *supra* note 19, at 127.

[38] I follow Bennett's usage of this term. Bennett, *supra* note 28, at 143

[39] Buying Time 2000, *supra* note 36, at 85. The data are published in graphical form in this book. Unpublished numerical data courtesy of the Brennan Center for Justice at New York University School of Law [hereinafter *Brennan Center Data*].

[40] With more precision, the numbers are 74.70% and 25.59%, respectively. These statistics were calculated by totaling the ad expenditures and populations for the appropriate states and dividing the total expenditures by the total population. State populations were obtained from <http://www.infoplease.com/ipa/A0004986.html>, last accessed on February 7, 2005. Perhaps even more striking is the fact that, including the 14 states in which spending per capita was above the mean, 81% of the total campaign advertising money was spent on only 30% of the U.S. population.

[41] In 2004, 74% of the television advertising funds were spent on 17% of the population. From web site of Fair Vote, at <http://www.fairvote.org/whopicks>, last accessed on November 21, 2005.

[42] For this calculation, each state was classified either as battleground or lopsided, based on whether either candidate won that state by at least 3% in the 2004 election. The ratio of average spending per person in battleground states to that in lopsided states is 13.9.

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interests.[43] With that in mind, the lopsided states should be keenly interested in changing to a system in which they will be on a more equal footing.

Significantly, a clear majority of states with a clear majority of population and electoral votes is ignored. The 37 states that received below average spending per capita and that received collectively only 19% of the campaign advertising funds have 387 electoral votes. If those states, or even most of them, adopted the proposed reform, that would be enough to implement a national popular vote. Since these same states have 70% of the U.S. population, the "ignored states" would be hard to ignore if the popular vote mattered.

Fortuitously, the bloc voting concept embodied in Plans 3 and 4 gives the ignored states an immediate means to take back their fair share of political power. By red and blue lopsided states joining the bloc in approximately equal strengths, they create a bloc of votes that is viable for both major parties to win. The presidential campaigns would be forced to campaign throughout the bloc in order to win its popular vote and receive all its electoral votes. Thus, not only do the ignored states stand to benefit the most in the end from popular election of the President, they have the most incentive to be the first states to pass the reform bill in the form of Plan 3 or 4. The question of which particular states would actually go first is addressed below in the section titled, "The Devil is in the Details: Which states will go first?"

The other state political question: Who represents the state?

While it has been shown that a majority of states have an interest in eliminating the current system and instituting a national popular vote, there is a question of whether the elected officials in those states will indeed act in their state's interest.[44] There is an argument that the very predictability of preference that makes these states disadvantaged under the current system actually serves as an advantage to their partisan state officials. Their state officials are mostly of the dominant party and benefit at the national level from their party's ability to regularly deliver a bloc of electoral votes for the national party candidate for President. Because they control the legislative agenda in the state and benefit from the current system, they will prevent the proposed elector appointment reform from being enacted. Thus, though the state residents would benefit from reform, the state government will not enact it.

While there are merits to this argument, there are strong counterarguments as well. Firstly, the electoral votes of the lopsided states are taken for granted. This actually disadvantages the officials of these states as much as it disadvantages the voters. State officials do not "deliver" a bloc of electoral votes. They actually have very little control over them, if any. In fact, under the electoral college system, officials from the dominant party in lopsided states gain no benefit from the supermajority of votes for their preferred candidate, while in a national popular election, these officials would be able to deliver substantial "excess" votes that will help the party's candidate win the national popular vote. State party "get out the vote" efforts in lopsidedly Democratic and Republican states would become vital to the respective national party and its candidate. Conversely, the state minority party would become more important as its efforts to counter the majority party turnout become vital at the national level.

Secondly, for the reasons discussed in the previous section, the state elected officials' jobs in lopsided states are made more difficult under the current system because of lack of attention from federal elected officials. Compared to battleground state officials, the lopsided state government official has less to offer when requesting federal funding or when lobbying on issues of interest to his or her state. State officials from either party would be happy to report better success to their constituents.

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[43] For example, it is somewhat startling to look back to the 2000 campaign and see that less than a year before the events of September 11, 2001, the presidential campaign focused on whether or not there should be a social security "lockbox." This was due in large part to two of the largest swing states, Pennsylvania and Florida, having two of the largest proportions of retirees.

[44] This argument was suggested to the author by Professor Samuel Issacharoff of the New York University School of Law.

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Lastly, states are not "vertically uniform" in their voting patterns; often the parties are more closely competitive at the state level than nationally. New York State, for example, votes consistently Democratic in Presidential elections, but often has a Republican governor. Thus, the assumption that the party that dominates the Presidential vote in a state will have control of the state's legislative agenda is false.

Even if state officials are reluctant to enact the reform, citizens may be able to take matters into their own hands in some states through the ballot initiative. Twenty-four states have a ballot initiative process for either constitutional amendments, statutes, or both. The reform could be passed as either a statute or a state constitutional amendment, thus bypassing partisan elected officials with vested interests that conflict with those of the state population. While the Constitution does specify that electors be appointed by each state "in such Manner as the Legislature thereof may direct," thus apparently giving the power solely to the legislature and not to the citizens,[45] the issue has not been decided in the courts. Colorado citizens placed an initiative on the November 2004 ballot that would have enacted proportional appointment of electors, but because the initiative failed, it was not litigated.[46] The Supreme Court has ruled that citizen initiative can act as the state legislature for constitutional purposes, but the case is old.[47] More recently, the Supreme Court has seemed to move toward a stricter interpretation of "legislature."[48]

THE BLOC SYSTEM

Some implications of the bloc voting system

The bloc voting system described above as Plan 4 may be the most likely plan to attract significant interest from sufficient states to institute the popular election of the President. Though this path to a national popular vote is less direct, it may be the easier one to travel. Because it is somewhat more complex, it is worth looking at some of the implications of the plan.

One may ask, if one of the principle evils of the current system is the use of winner-take-all appointment of electors, why does the proposed reform use a winner-take-all approach to their appointment from the bloc? The answer lies in the motivation of the states to act: It is unlikely that states will enact any reform that decreases their power. Proportional appointment is a popular alternative, for example, and the reform proposal could use proportional appointment instead of winner-take-all. Proportional appointment is usually advocated as a way to reduce wasted votes at the state level. However, proportional appointment would reduce the bloc's power by producing less "swing" between a candidate winning and losing the bloc, thus decreasing the stake a given candidate has in winning the bloc. Under the bloc voting proposal, winner-take-all is preserved, but eventually it applies to the national popular vote. At that level, winner-take-all just means majority (or plurality) rule in the election of the President.

Under the proposal made herein, states could not choose whom to form a bloc with and could not exclude other states. There would simply be one bloc that any state could join. However, some states may be emboldened to try a different approach, forming exclusive blocs. If they can choose their partners without running afoul of the Interstate Compact Clause, then they may be even more eager to form blocs. Of course, the nightmare scenario from the reform point of view is that two exclusive blocs emerge, a red state bloc and a blue state bloc, forming aggregations that are formidable in their size and ability to reliably deliver guaranteed electoral votes, but that, because of their predictable election outcomes, produce even lower candidate accountability and even lower individual voting power than those states have today.

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[45] Bennett, *supra* note 28, at 144.
[46] Web site of National Conference of State Legislatures, *Database of initiatives and referenda*, at <http://www.ncsl.org/programs/legman/elect/dbintro.htm>. The initiative was Colorado Amendment 36.
[47] State of Ohio Ex Rel. Davis v. Hildebrant, 241 U.S. 565 (1916).
[48] Bush v. Gore, 531 U.S. 98, 112 (2000).

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Some states could be motivated to form such lopsided blocs by the human instinct that there is strength in banding together with others with common interests. This instinct is probably misguided in this context, and more thoughtful heads should realize that such a grouping would simply take autonomy away from each state without conferring any advantage in return. By joining such a bloc, a lopsided state would further remove itself from the national political dialogue. A lopsided bloc, like a lopsided state, can be taken for granted in electoral calculations and ignored both in the elections and in national politics in general, as discussed above in the section titled, "The Politics of Reform: The ignored states fight back." And because a large homogeneous electorate would be even more predictable and stable than several smaller ones, such a bloc would be more ignorable than its constituent states are now. Thus, any movement to create lopsided exclusive blocs would probably collapse before it really began.

Other alignments are possible if exclusivity is an option. The small states, though favored with disproportionately large electoral college delegations, perceive themselves for the reasons mentioned above to be disadvantaged by the fact that under the winner-take-all system, large states have more influence because they have large chunks of electoral votes to award. If exclusive blocs can be formed, the logical thing for small states to do is to create their own winner-take-all voting bloc. If they could choose to exclude larger states, they would be able to retain un-watered-down their disproportionate numbers of electors per resident, thus having the best of both worlds. For example, if the 15 smallest states[49] joined together, they would have 56 electoral votes, one more than California, while having less than half (48%) of California's population.[50]

Another arguable disadvantage of the bloc reform proposal is that in the intermediate stage, where more than one but less than 270 electoral votes worth of states have enacted the proposal, it could be more likely to elect a "runner-up president" than under the status quo. If the runner-up in the national popular vote happens to win the bloc vote, he or she could win the election due to the winner-take-all aggregation of states in the bloc. This is the downside of the power of the bloc. With any luck, once the bloc forms, states will quickly join it precisely because of the enhanced power to be gained, thus avoiding having a presidential election take place at the intermediate stage of bloc membership. But more to the point, this danger would not be of a new kind. Under the current system, a large state barely won by a runner-up poses a similar threat of catapulting that runner-up to electoral college victory.

A related issue is possible strategic behavior of states in joining the bloc. The premise is that states will follow their interests in joining. Why not expect them to engage in maximization of their interests by strategically timing their enactment and/or joining in strategic groups. If a lopsided state joins the bloc by surprise just before the deadline for an election, it may be able to sway the bloc to its preferred candidate in a seemingly undemocratic way. The remedy probably lies, once again, in the attractiveness of joining the bloc. If one or more states seem to be poised to join by surprise, other states of the opposing preference will likely try to counter that strategic behavior. And if a group of states of one political stripe join together in concerted fashion in order to skew the bloc in their favor, they simply invite an even greater number of opposing states to do the same. Thus, such strategic behavior will likely accelerate the growth of the bloc.

The "faithless elector" (an elector who votes against party and voter expectations) could

[49] In this instance, I do not include the District of Columbia as a state, because it cannot choose the rule of how to vote its electors. That choice has been made for it by Congress.

[50] The states are Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island, Hawaii, New Hampshire, Maine, Idaho, Nebraska, West Virginia, and New Mexico, with a total 2000 census population of 16,215,551. Census data from U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2000*, at <http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-PH1-R&-ds_name=DEC_2000_SF1_U&-format=US-9S>, last accessed on October 4, 2005. Electoral college state representation from Federal Election Commission, *Distribution of Electoral Votes*, at <http://www.fec.gov/pages/elecvote.htm>, last accessed October 4, 2005.

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be a serious problem in a future election,[51] whether under the current system or any system that continues to employ human electors. While this problem is not addressed by the bloc voting proposal, it is important to note that the bloc proposal does not present an increased risk of elector defection. Though the proposal will lead to some states appointing electors for candidates other than the state's voters' majority winner, the electors appointed would be from the party of the bloc winner or national winner (depending on whether the bloc had reached 270 electoral votes), and thus, the electors would be expected to vote for their own party's candidate. Thus, electors should be no more tempted than they are now to vote contrary to expectation.

The proposed Plan 4 bloc voting system, and indeed all of the state-level reform plans addressed in this article, would implement a simple plurality rule popular vote. In the electoral college reform efforts of the 1960s, the most widely voiced objection to the proposal for a national popular vote was the fear that it would create splinter parties and destabilize the two-party system.[52] The argument goes that simple plurality rule will, given a large field of contenders, allow a candidate to win by a low plurality and thus be seen as illegitimate. The solution is then suggested that a minimum percentage, such as 40% or 50%, be required to win. However, this then presents two new problems. One is what to do if that percentage is not reached. Solutions are awkward, such as transferring the decision to Congress, as the electoral college system does if no one candidate gets a majority of electors, or a runoff election between the two biggest vote-getters. The other problem with a minimum is that it actually encourages splinter parties by giving them the power to throw the election into the alternative process, and giving voters for minority candidates the assurance, if the alternative process is a runoff, that their votes are not wasted because they can vote again in the second round. The result could be fundamental change to the dynamics of the two-party system. Because minimum percentages and the alternative processes they require cause these complications, this proposal avoids them. Simple plurality rule, on the other hand, will preserve the two-party system because, as in the current system, minor parties are discouraged as votes for them are perceived to be wasted. However, the suggested bloc voting method of reform does not preclude direct election alternatives.

The bloc in the context of electoral college history

The history of the electoral college, from the Constitutional Convention to the present day, has two main themes. One is the trend of democratization and strengthening of voting rights, while the other is the struggle for power by individual states within the federal system. These themes have largely been developed at the state level,[53] and he proposed bloc voting system is a natural extension of both.

At the Constitutional Convention in Philadelphia in 1787, the delegates took several months in the summer of that year to hammer out the plan for representation in Congress.[54] That protracted debate, resulting in the "Connecticut Compromise" or "Great Compromise" which reconciled big state and small state interests, was so bitter a struggle that the weary delegates had little taste for continued controversy when they turned their full attention to the system for choosing the executive.

They considered election by the Congress and by popular vote. The former was considered dangerous for making the President too dependent on the legislature. The latter was rejected for several reasons: the ignorance of candidates by the people, the loss of representation for the South because slaves could not vote, the reduced representation of smaller states, the fear of focusing too much power in one popular candidate, and the fear of powerful regional candidates who could become the seeds of regional rebellion. A compromise similar to the electoral college was suggested by James Wilson[55] of Pennsylvania, and was "the

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[51] Robert W. Bennett, Taming the Electoral College 103 (Stanford University Press, 2006).
[52] Neal R. Peirce and Lawrence D. Longley, The People's President 169 (Revised Edition, Yale University Press, 1981) [hereinafter People's President].
[53] Primer, *supra* note 6, at 23.
[54] Unless otherwise indicated, this historical account is based on Primer, *supra* note 6, at 17.
[55] No known relation to this author.

second choice of many delegates though it was the first choice of few,"[56] and therefore unpopular in the convention at large.

Unable to agree, they left the issue to a "Committee of Eleven," who returned with a recommendation for a variation of Wilson's system of electors, with each state receiving electoral votes equal to its combined representation in both houses, thus preserving the hard-fought balance between big states and small states. A further concession to small states was in the secondary, or contingent, voting process, calling for the House of Representatives to decide the election on a one-state, one-vote basis if no candidate received a majority of electoral votes.[57] But in retrospect, perhaps the biggest concession in the plan was to all the states: the text explicitly gave the states the freedom to appoint electors in any way they saw fit. The delegates quickly accepted that plan with minor modifications. James Madison wrote near the end of his life that "as the final arrangement [of the Presidential selection process] took place in the latter stages of the session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such bodies. . . ."[58] The electoral college was thus a complex patchwork plan born of political exhaustion and compromise, not based on any underlying principle.

Alexander Hamilton wrote soon after the convention that "The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure."[59] Perhaps because it was not fully debated at the Constitutional Convention nor its effects well understood immediately thereafter, the real debate developed later and has lasted to this day. The debate over the electoral college is over 200 years old.[60]

Like many complex mechanisms, the electoral college has never worked as designed and has required a lot of maintenance. The rise of political parties (despite the Framers' intention to suppress them[61]) soon made the practice of electors voting for two undifferentiated candidates lead to stalemate in 1800. The 12th Amendment was quickly ratified in order to patch things up. Because the party nominating process narrowed the field to two major candidates, the electoral college almost always produced a majority and made House contingent elections the rare exception instead of the rule that the Framers had assumed.[62] The parties also quickly began to demand loyalty from their nominated electors, making electors into cogs in a machine rather than the wise deliberators that the Framers had expected them to be.[63]

The states themselves began making changes almost immediately, shifting their method of selection of electors away from the state legislatures and toward state popular vote.[64] When states first started using popular elections to choose their electors, at first they were about evenly divided as to the method of appointment, about half choosing a district system and half a winner-take-all system.[65] After 1820, most states switched to a winner-take-all approach that gave them more influence through their ability to deliver an entire bloc of votes.[66] The other states soon followed suit in order to gain the same advantage.[67] The bloc voting concept may be the natural extension of the historical trend to group both electors and popular votes into larger blocs. It is possible that once states see a clear legal way to aggregate themselves into a multi-state bloc, they will do so eagerly out of pure self-interest. One possible stumbling block here is that political parties are organized along state lines, and may

[56] People's President, *supra* note 52, at 22.
[57] Peirce, *supra* note 29, at note 2.
[58] People's President, *supra* note 52, at 30.
[59] The Federalist No. 68 (Alexander Hamilton), as quoted in People's President, *supra* note 52, at 28.
[60] Best, *supra* note 28, at 15.
[61] Samuel Issacharoff, The Law of Democracy 17 (2004).
[62] Primer, *supra* note 6, at 97.
[63] *Id*. at 23.
[64] *Id*. at 25.
[65] Issacharoff, *supra* note 61, at 244.
[66] *Id*. at 244.
[67] *Id*. at 244. See also Primer, *supra* note 6, at 25. The last changes made were by Maine (in 1969) and Nebraska (in 1992), both switching from a winner-take-all system to a hybrid district/at-large system. *Id*. at 106. The hybrid system is one in which two electors (corresponding to the state's two senators) are elected at large and the rest (corresponding to Members of the House of Representatives) are elected from Congressional districts. This change was against the general trend, but showed a renewed interest in reform.

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not benefit from forming larger blocs. However, there are mitigating factors, as discussed above in the section titled, "The Politics of Reform: The other state political question: Who represents the state?"

The other theme in the history of presidential elections is that toward more democratic systems with stronger protections of voting rights. From the initial practice of many state legislatures appointing their state's electors, to allowing ordinary citizens to vote, then to expanding the electorate to blacks, to women, and finally to nearly all those over 18, the presidential election process has kept up with the general trend in elections at all levels to be more inclusive and egalitarian. One exception to this is the electoral college's textually enshrined contradiction of the one-person, one-vote rule established by the Supreme Court.[68] Now that exception can be removed with the further evolution to popular election of the President through the intermediary of bloc voting.

THE DEVIL IS IN THE DETAILS

Certificates of ascertainment

Among the many questions arising out of the proposed reform are questions about the practical details of implementation. For example, the federal Electoral Count Act requires each state to prepare a "certificate of ascertainment" listing the winning and losing electors and the number of votes each received.[69] These must be delivered to the state's electors by the day the electors meet and to the National Archivist "as soon as practicable."[70] The law requires "a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast."[71] Note that the law does not require that the votes counted must come from the state preparing the certificate.

Under the bloc voting system proposed in this article, the "number of votes" would include all the votes in the bloc of states that the reporting state has recognized as having passed a similar law. While the listing of vote totals that include votes from other states will seem strange to state officials, that is the reality of this proposal. This is the strange "back door" through which the electoral college is actually being circumvented, and it is at this point that the proposal seems most at risk of faltering.

Appendix II presents a representative certificate of ascertainment to illustrate the current practices of one state, Maine, in reporting its votes. Also included, in Appendix III, is a model certificate of ascertainment which could be used by states enacting the reform. This model attempts to couch the effects of the reform (the popular votes of several states are being counted toward the choice of electors for the certifying state) in the language of current federal reporting. It is thus shown that producing a certificate of ascertainment for appointment of electors according to votes from multiple states is not an awkward or difficult undertaking. Nor is it in contradiction of current federal law.

What national popular vote?

Under Plan 4, while the bloc of enacting states still contains less than 270 electoral votes, it will vote according to the popular vote of the bloc. It can safely be presumed that bloc states will freely report their certified state popular votes to one another in order for the winning electors to be determined. In fact, such reporting can be written into the law enacted by those states. However, once 270 electoral votes are reached and the national popular vote provision is triggered, it becomes necessary to count

[68] Wesberry v. Sanders, 376 U.S. 1 (1964) established the one-person, one-vote principle. Reynolds v. Sims, 377 U.S. 533 (1964) applied it to federal elections. Gray v. Sanders, 372 U.S. 368 (1963) established that the electoral college's "inherent numerical inequality," while enshrined in the constitution, does not by analogy justify numerical inequality elsewhere. Thus the electoral college became an island of inequality in electoral law.

[69] 3 U.S.C. § 6. The Electoral Count Act, codified at 3 U.S.C. chapter 1 (§§ 1–21), was passed in 1887 to create a standard procedure for handling state selection and reporting of electors. ISSACHAROFF, *supra* note 61, at 245.

[70] 3 U.S.C. § 6.

[71] *Id.*

the votes of potentially unprepared or even uncooperative states. Those votes must be obtained in order to give effect to the national popular vote.

Currently, the statewide presidential election result totals are certified by each state and used to appoint electors.[72] The electors record their votes and transmit them to the federal government to be counted by Congress.[73] The state popular votes, contained in the certificates of ascertainment as described above, are not required to be transmitted to the federal government before the electors meet and vote.[74] As a result, the national popular vote is never certified as a total vote and is never certified at the national level. Though the national popular vote is calculated by and widely reported by the media as the sum of the certified state popular votes, a state's use of the national popular vote to determine its electors may be problematic and open to challenge.[75]

One approach to generating a national popular vote is for each state appointing electors according to the national popular vote to create an independent state commission charged with collecting and summing the other states' popular vote totals and certifying a national popular vote. The commission could be headed by the chief justice of the state supreme court or other such (hopefully) irreproachable figure. The commission could request transmission of certified state popular results from all the states. If some states refused to provide official transmission, the state popular vote reported to the media could be used. The commission could hold a hearing giving any interested party the chance to question whether particular state totals are actually equal to the certified state popular vote of their respective states. Parties thus could not challenge the internal election and certification processes of the other states. After the hearing, the commission would sum the state popular votes and certify the national popular vote results for purposes of appointing electors.

More efficiently, once more than one state enacted Plan 4, an interstate commission would be created that would do the required work only once. Perhaps even some non-enacting states would at least be willing to participate in such a commission in order to facilitate the certification of a national vote count. The creation of a joint body by several states raises the issue of the Compact Clause as discussed below. Ideally, the Federal Election Commission or the National Archives would be authorized by Congress to create a central repository for state certified votes as well as a certified national popular vote that could then be used by the states in implementing the proposal. Additionally, a federal law requiring all states to report certified state vote totals within a given period of time would be helpful. Such federal legislation, though, may be likely only after the states have made the national popular vote a fait accompli.

The possibility exists that some of the individual state vote totals could be challenged. Mechanisms would need to be created to deal with such challenges and the delays they would cause. These mechanisms would be analogous to those used today in statewide elections with results coming from various counties. Of course, the size and timing requirements of Presidential elections would pose particular challenges.

The ballot

The ballot itself takes different forms in different states.[76] Setting aside the various physical forms of the ballot used by states (punch cards, electronic voting machines, and even paper ballots), there are important differences in the way the voter's choices are presented. The majority of states show only the names of the presidential and vice-presidential candidates. A small minority show the candidates' and the electors' names, but require the voter to choose the electors as a slate committed to only one candidate. At least one state, Mississippi, in addition to provisions for full slates of party-nominated electors, also allows unpledged individuals to qualify for the ballot by petition.

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[72] PRIMER, *supra* note 6, at 106.
[73] 3 U.S.C. § 6.
[74] *Id*.
[75] Bennett, *supra* note 28, at 148.
[76] PRIMER, *supra* note 6, at 107. See also discussion of the Alabama Presidential ballot. *Id*. at 46.

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Mississippi's practice, and similar provisions in other states, if any, could be problematic for the proposal of a national popular vote or bloc voting. If voters are able to vote for individual electors, pledged or not, then the question arises as to whether those votes can be counted as votes for a national candidate. It is necessary to use "the discernible will of the voter" as the bright line between counting votes and not counting them. If the electors' names are not associated with candidate names on the ballot, then no will can be discerned and no vote would be counted. However, what if one or more states had ballots where electors are associated but the voter may vote for individual electors? One could take the total number of votes for all electors pledged to a candidate, and divide by the number of electors from that state, rounding to the nearest whole vote.[77] But this mechanism seems clumsy and perhaps tries too hard to accommodate states that needlessly preserve the autonomy and individuality of electors. Not allowing these votes to be counted would serve as an incentive for these states to bring their ballots in line with the vast majority of other states, in the spirit of voting directly for a presidential candidate.

Which states will go first?

The proposal will remain hypothetical unless one or more states decide to take the first step. Whether an individual state may be the very first is mostly a question of internal politics. Perhaps a state that has shown a willingness to experiment with electoral alternatives, such as Maine or Nebraska, will be the first. A number of other states have recently contemplated similar changes[78] and may be ready to try something different. Another possibility is that two states will emerge as a natural pair, with movements developing in parallel in both states to implement bloc voting. In this section I will attempt to find some pairs of states that are well-matched to make an initial bloc. Once an initial bloc is formed, then pairs may also be important in keeping the bloc balanced while it is still small.

Appendix V shows a few selected pairs and groupings of states that, when combined, form blocs in which the major parties are competitive. For example, New York and Texas make a good match. Of about equal size and lopsided to a similar degree but in opposite directions, their political leanings just about cancel each other out. As a bloc, in 2000 they would have gone for Gore, in 2004 for Bush, in both cases by around three percent. Initial discussion of joint enactment could be facilitated by the fact that both states have Republican governors. Alaska and Hawaii is another interesting pair. The last two states to join the Union happen to be two non-battleground states that together would invite a heated contest for their votes.

One nice regional pair would be Virginia and Maryland. Al Gore "won" the bloc in 2000 with less than a three percent margin, while Kerry won in 2004 with the insignificant margin of 0.1%. The combination of these two states would make the Washington, DC media market a hot market for campaign advertising, and the politically savvy residents of the DC suburbs in Maryland and Virginia would understand the importance of, and have the means to, advocate in their respective statehouses for the proposal.

One scenario for widespread enactment is that once Virginia and Maryland take the plunge, other east coast pairs may jump on the bandwagon. Heading south and north, in search of "red" and "blue" states respectively, North Carolina and New Jersey is the next good match. Connecticut and South Carolina would be next. After that, New York and Texas may decide to join. At that point, the West as a whole may start to feel excluded. (They already are, as most battleground states are in the East.) Note that the entire contiguous and compact mass of states, outlined by going from New Mexico north to Montana, then west to Washington State, south to California, and back to New Mexico, taken together form a bloc that is remarkably well balanced. Once that huge Western group of states joined, the total number of electoral votes included in the bloc would be 250. If Alaska and Hawaii then jump aboard, it will be 260. At that point, just one medium-sized state with ten or more electoral

[77] See *id*. at 135 for a discussion of this formula.
[78] *Id*. at 107.

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votes would be enough to trigger the national popular vote provision.

One may well wonder why pairs with such different politics would join forces. Besides the general desire to have their votes matter, the pairs mentioned above show another commonality: regional interests. The east coast states mentioned share some of the same issues, as do the western states. Alaska and Hawaii, for example, both have large tourism sectors of their economies. States often have common interests despite having deep political differences. In practice, this has probably led to long-term contact or even cooperation between these states on specific issues, perhaps paving the way for electoral cooperation as well.

Of course, it wouldn't be necessary for states to carefully coordinate joining in pairs. States could join the bloc in any order. There are several reasons this would probably be the case, including the unpredictable and lengthy process of legislation, as well as the difficulty of interstate coordination. So long as the bloc didn't become completely dominated by states of one political persuasion, it would still serve its members by being a "battleground" bloc of votes. Moreover, if it became somewhat "off-balance" in one direction or the other, this would provide an incentive for a state from the opposite side to join, in order to prevent that party from winning the bloc's votes. Thus, the problem of imbalance could be self-correcting.

POSSIBLE LEGAL CHALLENGES TO THE PROPOSAL

States do not have the right to appoint electors in this manner

For the simple reason that it has never been done before, it is an open question as to whether the proposed state reform would be constitutional. Article II, Section 1 of the Constitution states: "Each state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors. . . ." Thus, the Constitution seems to leave entirely up to the states the method of selecting electors. Most state statutes appoint electors who are pledged to the ticket that won the state popular vote.[79] There is wide latitude for how the states may appoint their electors.[80] For example, two states, Maine and Nebraska, have statutes which appoint two electors for the ticket that won the state popular vote and the remaining electors are each elected from one of the state's congressional districts.[81]

Additionally, because of the wording of the Constitution, it is believed by some that the state legislatures may, without gubernatorial check or any other legal challenge, appoint any electors they desire, despite existing state law. This theory was discussed in Florida in 2000 when the federal certification deadline loomed with the court-mandated recount still underway. The Supreme Court plurality in *Bush v. Gore*[82] seemed to affirm this when it said, "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. . . . This is the source for the statement in *McPherson v. Blacker*[83] that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by the state legislatures in several states for many years after the Framing of our Constitution. . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."[84]

Historically, other methods have also been used. Immediately after ratification of the constitution, many state legislatures directly appointed their electors, giving no power to the citizens to vote for president.[85] Many others used the method that Maine and Nebraska only recently switched to, while others used a system of statewide popular election.[86]

This variety of systems, historic and modern, shows a strong tradition allowing states to pick their electors in any way they see fit. In fact,

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[79] *Archives web page*, *supra* note 15.
[80] McPherson v. Blacker, 146 U.S. 1, 36 (1892).
[81] *Archives web page*, *supra* note 15.
[82] Bush v. Gore, 531 U.S. 98, 104 (2000).
[83] 146 U.S. 1, 35 (1892).
[84] 531 U.S. at 104.
[85] Kimberling, William C., *The Electoral College*, obtained from FEC Office of Election Administration at <http://www.fec.gov/pdf/eleccoll.pdf>, last accessed October 5, 2005.
[86] *Id*.

there have been no known successful legal challenges to any of the methods of appointment.[87] Therefore it seems unlikely that such a "frontal assault" on the proposed reform would be successful.

Consent of Congress is required on Interstate Compact Clause grounds

The Constitution says "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state. . . ."[88] The proposal for bloc voting could arguably be interpreted as an agreement[89] between states.[90] Because required approval by Congress puts the matter back in the federal political arena, with resistance likely from many different interests, it is important to determine whether such approval is required.

The analysis requires first the determination of whether the proposed legislation is an agreement, and second, if so, whether it is covered by the Compact Clause.[91] In Compact Clause case law, "agreement" is defined broadly. One requisite element is reference in the statute to some "consideration" from the other state for which the statute is passed.[92] That would seem to be present in the bloc proposal in that the legislating state will count votes only from another state if that state reciprocally counts votes from the legislating state. But such reciprocity is not enough, even combined with common legislative goals and legislative cooperation between two states, if mitigating factors are present.[93]

Mitigating factors in the case law include the absence of a joint regulatory body and the freedom retained by each state to modify or repeal its law unilaterally. Another mitigating factor is that the passage of the law by the legislature is not part of a "deal" or coordinated effort with another state. Also, if the reciprocity is not symmetrically exclusive, i.e., another state can qualify for inclusion under the legislating state's law while actually being more inclusive of other states than the legislating state, then this is also a mitigating factor.[94] All of these mitigating factors are present in the Plan 4 proposal for bloc voting. In its simplest form, bloc voting requires no joint body, though a single body to count and certify the bloc's popular votes would be more efficient than each state adding up all the other states' totals. The legislation could be enacted unilaterally, without cooperation or coordination, and could be modified or repealed unilaterally as well. The last mitigating factor of expanded reciprocity is also present, in that states which go directly to appointing their electors according to the national popular vote (Plan 1) will still have their votes counted by the states forming an otherwise exclusive bloc. So it would seem reasonable to hope that bloc voting does not constitute an agreement.

Even if it does, not all agreements between states necessarily require the approval of Congress.[95] Those that do are ones "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[96] The mere

[87] As evidenced by an electronic database search for cases citing *McPherson*.
[88] U.S. Const. art. I, § 10, cl. 3.
[89] "Agreement" will be used as the general term, the Supreme court having stated that there is really no distinction between "agreement" and "compact." Virginia v. Tennessee, 148 U.S. 503, 520 (U.S., 1893)
[90] Bennett (*supra* note 28, at 144) analyzes the Compact Clause issue in regard to states appointing their electors according to the national popular vote. He finds that overt agreement between states "could invite a Compact Clause challenge." *Id*. at 145. On the other hand, he says "contingent legislation seems to present no serious legal problems. . . ." *Id*. at 147. While the proposed bloc reform is not contingent legislation, it is reciprocal in effect and thus the analysis is similar in some respects.
[91] Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (U.S., 1985).
[92] *Virginia v. Tennessee*, 148 U.S. at 520.
[93] *Northeast Bancorp*, 472 U.S. at 175.
[94] The factors are paraphrased from an interstate banking case, in which the Supreme Court upheld the constitutionality of two states' statutes allowing interstate banking with other states but only within their geographic region. The original language is as follows. "The two statutes are similar in that they both require reciprocity and impose a regional limitation, both legislatures favor the establishment of regional banking in New England, and there is evidence of cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes. But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation. *Northeast Bancorp*, 472 U.S. at 175. Similar factors are also enumerated in United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978).
[95] *Virginia v. Tennessee*, 148 U.S. at 518.
[96] *Id*. at 519. This test has more recently been applied in New Hampshire v. Maine, 426 U.S. 363 (1976) and extensively supported and applied in *United States Steel*, 434 U.S. 452.

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fact that collective action in itself will tend to be more influential than individual action is not enough to trigger the Compact Clause.[97] The test is whether the agreement "enhances state power *quoad* the National Government."[98]

The language "tending to the increase of political power" seems aimed at the heart of the purpose of bloc voting: to increase the political influence of the participating states. If courts seize on this language, they could strike down the proposed legislation. However, there are at least three further arguments that bloc voting is not a Compact Clause issue. Firstly, if the power of the federal government has been renounced in a particular area, then the Compact Clause cannot apply.[99] Article II, Sec. 1, Cl. 2 explicitly puts the choice of electors in the hands of the state legislatures and outside of federal government control, so the Constitution itself renounces federal authority in the relevant area.

Secondly, the kind of power meant is the power of the government to act, not the power of the people or states to select federal government officers. The phrase "political power" could best be interpreted today as "government authority."[100] So the fact that the states are increasing their voting power relative to other states is not the same thing as the "increase of political power" referred to. However, the court has implied in a dictum that multi-state action that increases the participating states' political power "at the expense of other states" could trigger the Compact Clause.[101]

The third argument stems from the fact that approval by Congress under the Compact Clause makes an interstate compact into federal law.[102] Normally, a compact between states is enacted by all states involved as state law after negotiation and agreement. The final step is the consent of Congress.[103] Thus the Compact Clause has an enabling as well as a proscriptive function: It prohibits the states from agreeing without the approval of Congress, but given such approval, it enshrines the agreement in federal law, thus creating an enforcement mechanism that the states themselves could not provide. This makes the Compact Clause appropriate only for permanent binding agreements and not for arrangements that the states wish to leave open to later unilateral withdrawal, such as the current proposal.

The above factors diminish the likelihood bloc voting running afoul of the Compact Clause. However, once again, the lack of case law directly applicable to multi-state legislation on election issues seems to leave the issue open. The only way to find out is to try.

CONCLUSION

Those who argue against electoral college reform do so against the tide of history. Change has continued ever since the creation of the electoral college, most of it at the state level. The proposed reform would be an extension of such state-level change. There may be significant political and legal challenges to be met before the proposal could be implemented. While the concept itself raises many interesting academic issues and merits further study, this article has shown that practical change is within reach, both politically and constitutionally. The proposed bloc voting approach makes it possible for the very states most disadvantaged by the current system to strike a blow against it, while also reaping immediate benefits for themselves. If as few as two well-matched states enact the proposal, those states would begin to see results. Candidates for President would begin to pay attention to them. As the bloc grew, it would become more powerful, increasing the incentive to join, while also bringing the nation as a whole closer to popular election. When the total number of electoral votes of states enacting the proposal reached 270, then every vote for President would be equal for the first time in the nation's history, and presidential candidates would run truly national campaigns.

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[97] *United States Steel*, at 472.
[98] *Id.* at 472.
[99] *Northeast Bancorp*, 472 U.S. at 166.
[100] Bennett, *supra* note 28, at 145.
[101] *Id.* at 145, quoting *Northeast Bancorp*, 472 U.S. at 176.
[102] New Jersey v. New York, 523 U.S. 767, 805 (U.S., 1998).
[103] *Id.* at 773.

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APPENDIX I: MODEL STATUTE FOR BLOC VOTING

(a) This state and any other states, including the District of Columbia,[1] which shall have enacted a statute similar to this statute or a statute that appoints all electors based on the national popular vote, on or before the first day of October[2] of any year in which a Presidential election takes place, shall be known as "enacting states" for the purposes of this statute. The state Attorney General shall determine which are the enacting states and transmit a list of them to the Secretary of State for this state by the fifteenth day of October of any year in which a Presidential election takes place.

(b) The electors of President and Vice President of the United States shall be appointed at the time fixed by law of the United States.[3] As many electors shall be appointed as this state shall be entitled to under the United States Constitution. The electors appointed shall be the candidates for elector pledged to the President and Vice-President who receive the plurality of the votes collectively in all enacting states.

(c) The Secretary of State of this state[4] shall transmit the certified total statewide votes for each pair of candidates for President and Vice-President to the appropriate election officials of all enacting states as soon as possible after polling closes. In any case, such certified results must be transmitted no less than ten days prior to the date set by federal law for the meeting of the electors.

(d) If no certificate of candidacy has been filed for candidates for elector pledged to the candidates for President and Vice-President who receive the plurality of the votes in the enacting states, or multiple such certificates of candidacy have been filed, then the Secretary of State shall allow such candidates for President and Vice-President to file a petition listing candidates for elector, and these candidates for elector shall be appointed.[5] The certificate of candidacy must be filed no less than ten days prior to the date set by federal law for the meeting of the electors,[6] unless the Attorney General determines that this state's ability under federal law to cast its electoral votes will not be put in jeopardy by extending the time.[7]

(e) If the total number of electors entitled to be appointed by all enacting states shall be more than half the total number of all electors, then the electors appointed shall be the candidates for elector of the party supporting the candidates for President and Vice-President who receive the plurality of the votes collectively in all states and the District of Columbia, subsection (b) notwithstanding.[8] For the purposes of counting votes in states that have not enacted a similar provision, all general election votes for complete slates of candidates for elector for President and Vice-President shall be counted as votes for the corresponding candidates for President and Vice-President. Votes for incomplete slates or individual candidates for elector, if such candidates are clearly pledged on the ballot, shall be counted on a pro rata basis, with final statewide totals rounded down to the nearest whole number.[9] If any ballot shall not make the voter's choice clear

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[1] The electors for the District of Columbia are appointed as determined in the District Code enacted by Congress.
[2] In order to give the candidates at least one month to campaign with a known set of rules.
[3] Currently "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." U.S. Code Title 3, Chapter 1, Section 1.
[4] Or other appropriate official, depending on the particular state.
[5] This covers two cases: the case where a ticket that is on the ballot in one enacting state is not on the ballot in this state, and the case where this state, like New York, allows more than one party to nominate the same ticket.
[6] This deadline gives the board of elections four days to process the certificates of candidacy before the "safe harbor" date set by the Electoral Count Act, U.S. Code Title 3, Chapter 1, Section 5. After the "safe harbor" date, Congress may decide whether to accept or deny the electors' votes.
[7] I.e., the deadline can be pushed back so long as assurances are given that Congress will accept the electoral votes.
[8] This is the "kick-out" provision that is triggered when the enacting state count gets to 270. If not for this provision, all non-enacting states would be "frozen out," having no say in selecting the President whatsoever.
[9] Thus votes for individual (but explicitly pledged) electors would be counted toward the candidate's total by taking all votes for electors and dividing by the number of electors to which that state is entitled. This is the only way to count the votes without over-counting.

for candidates for President and Vice-President, then votes on such ballot shall not be counted in this total. If any state does not certify the total state votes for candidates for President and Vice-President by ten days prior to the date set by federal law for the meeting of the electors, then such state's votes shall not be counted in this total unless the Attorney General determines that this state's ability under federal law to cast its electoral votes will not be put in jeopardy by extending the time.

APPENDIX II: CERTIFICATE OF ASCERTAINMENT FOR THE STATE OF MAINE

Reproduced on page 406 is the Certificate of Ascertainment from the 2004 Presidential election for Maine. This was downloaded from the National Archives website at <http://archives.gov/federal_register/electoral_college/2004/certificates_of_ascertainment.html>.

Maine elects two electors by district and two at large. Because Maine uses this hybrid system, its Certificate of Ascertainment is more interesting than that of most states. Because it shows results for more than one jurisdiction, it may be somewhat of a model for the Certificate of Ascertainment for a state participating in the bloc voting system, which would need to show results for multiple states.

APPENDIX III: MODEL CERTIFICATE OF ASCERTAINMENT FOR BLOC VOTING

State of X

Certificate of Ascertainment of Electors

I, Jane Doe, Governor of the State of X, do hereby certify that the following persons have been duly appointed the electors for President and Vice-President for the State of X according to the manner directed by the State Legislature of X by state law.

Person 1
Person 2
Person 3
Person 4
Person 5

Such appointment is according to the election held for that purpose on the Tuesday following the first Monday in November of the year two thousand and eight.

I further certify that the votes given in the State of X for President and Vice-President are as follows:

John McCain/Colin Powell

Republican Party	2,000,001
Conservative Party[1]	1,000,000
Total	3,000,001

[1] This example assumes that State X is a state, such as New York, that allows parties to list the candidate of another party as their candidate. This allows minor parties to receive votes without the vote being "wasted" and is thus useful for party-building. Not all states allow this, but the practice is included in the example to illustrate that it does not interfere with the bloc reform proposal.

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Appendix II: Certificate of Ascertainment for the State of Maine

STATE OF MAINE

Certificate of Ascertainment of Electors

I, John Elias Baldacci, Governor of the State of Maine, *do hereby certify that Jill Duson of Portland; Samuel Shapiro of Waterville; Lu Bauer of Standish and David Garrity of Portland have been duly chosen and appointed*

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

for the State of Maine, at an election for that purpose which was held on the Tuesday following the first Monday in November, in the year two thousand and four, in accordance with the provisions of the laws of the State of Maine and in conformity with the Constitution and laws of the United States, for the purpose of giving their votes for President and Vice President of the United States for the respective terms commencing on the twentieth day of January, in the year two thousand and five; and

I further certify, that, *the votes given at said election for Electors of President and Vice President of the United States as appears by the returns from the several cities, towns and plantations in the State, which were duly received and examined by me in accordance with the laws, were as follows:*

The LIBERTARIAN PARTY Electors supporting the candidacy of Michael Badnarik for President and Richard Campagna for Vice President received the following votes:

First Congressional District *Mark Cenci, Portland*	*1,047*
Second Congressional District *Dana Snowman, Alton*	*918*
At-Large *Richard W. Eaton, Westbrook*	*1,965*
At-Large *Geoffrey H. Keller, Dayton*	*1,965*

The REPUBLICAN PARTY Electors supporting the candidacy of George W. Bush for President and Dick Cheney for Vice President received the following votes:

First Congressional District *Kenneth M. Cole, III, Falmouth*	*165,824*
Second Congressional District *Katherine L. Watson, Pittsfield*	*164,377*
At-Large *Peter E. Cianchette, South Portland*	*330,201*
At-Large *James D. Tobin, Bangor*	*330,201*

The GREEN INDEPENDENT PARTY Electors supporting the candidacy of David Cobb for President and Patricia LaMarche for Vice President received the following votes:

First Congressional District *Larry Dean Lofton-McGee, Augusta*	*1,468*
Second Congressional District *Heather E. Garrold, Brooks*	*1,468*
At-Large *Charlene Decker, Machias*	*2,936*
At-Large *Ruth Z. Gabey, West Gardiner*	*2,936*

The DEMOCRATIC PARTY Electors supporting the candidacy of John F. Kerry for President and John Edwards for Vice President received the following votes:

First Congressional District *Jill Duson, Portland*	*211,703*
Second Congressional District *Samuel Shapiro, Waterville*	*185,139*
At-Large *Lu Bauer, Standish*	*396,842*
At-Large *David Garrity, Portland*	*396,842*

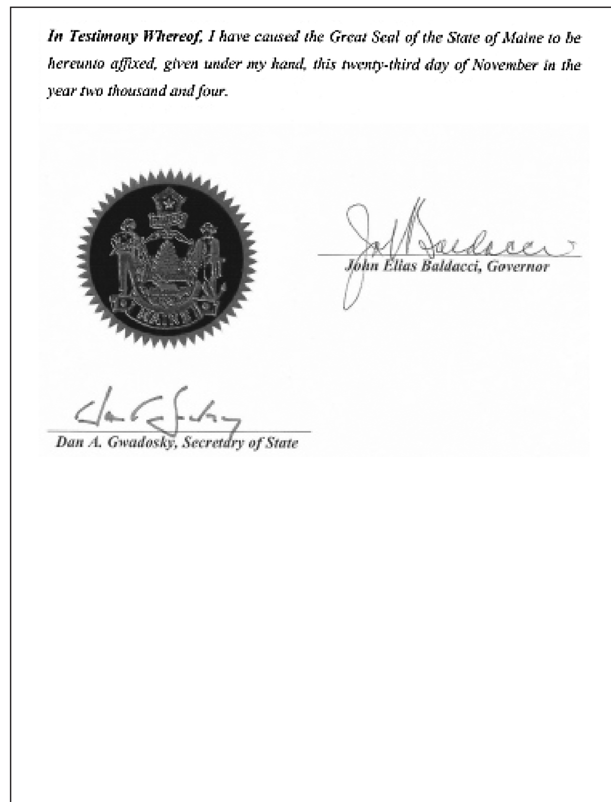
The BETTER LIFE PARTY Electors supporting the candidacy of Ralph Nader for President and Peter Miguel Camejo for Vice President received the following votes:

First Congressional District *Rosemary L. Whittaker, South Portland*	*4,004*
Second Congressional District *Christopher M. Droznick, Auburn*	*4,065*
At-Large *Nancy Oden, Jonesboro*	*8,069*
At-Large *J. Noble Snowdeal, Jonesboro*	*8,069*

The CONSTITUTION PARTY Electors supporting the candidacy of Michael Anthony Peroutka for President and Chuck Baldwin for Vice President received the following votes:

First Congressional District *Stanley Jones, Hallowell*	*346*
Second Congressional District *Harvey R. Lord, Paris*	*389*
At-Large *Mary-Ann Greiner, St. George*	*735*
At-Large *Patricia Truman, Hallowell*	*735*

In Testimony Whereof, *I have caused the Great Seal of the State of Maine to be hereunto affixed, given under my hand, this twenty-third day of November in the year two thousand and four.*



John Elias Baldacci, Governor

Dan A. Gwadosky, Secretary of State

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Appendix III (cont.)

John Kerry/John Edwards	
Democratic Party	2,000,000
Worker's Party	1,000,000
Total	3,000,000
Arnold Schwarzenegger/Jesse Ventura	
Reform Party	300,000

I further certify that, as directed by the Legislature of the State of X, the votes for President and Vice-President in all other states that have enacted certain legislation regarding Presidential and Vice-Presidential elections, have been added to the votes in this state. The states of Y and Z have been certified by the State X Attorney General to have so enacted. The votes reported to me by the responsible election officials of those states are as follows:

State Y:

John McCain/Colin Powell	
Republican Party	4,000,000
John Kerry/John Edwards	
Democratic Party	3,000,000
Arnold Schwarzenegger/Jesse Ventura	
Reform Party	1,000,000

State Z:

John McCain/Colin Powell	
Republican Party	3,000,000
John Kerry/John Edwards	
Democratic Party	4,000,000
Arnold Schwarzenegger/Jesse Ventura	
Reform Party	500,000

I further certify that the total votes for each candidate from all above states combined are as follows:

John McCain/Colin Powell	10,000,001
John Kerry/John Edwards	10,000,000
Arnold Schwarzenegger/Jesse Ventura	1,800,000

I further certify that, as directed by the Legislature of the State of X by state law, the total votes for each President and Vice-President from all the above states shall be deemed to be votes for the elector candidates from State X pledged to the respective Presidential and Vice-Presidential candidates. Because more than one party nominated John McCain and Colin Powell as their candidates in this state, the winning candidates were allowed to name their electors by petition. Accordingly, the electors listed above, who are pledged to John McCain and Colin Powell, are appointed.

____________________________ ____________________________

John Roe, Secretary of State Jane Doe, Governor

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APPENDIX IV: CAMPAIGN 2000 MEDIA EXPENDITURES

The following table shows state populations, campaign media expenditures, and election margins. Shown in bold are "battleground" states, defined here as ones where per capita spending was above the average of $0.58. Winning margin is arbitrarily shown as positive for George W. Bush and negative for Al Gore. Note that Kansas appears to be an exception: Despite heavy spending there, the winning margin was over 21%. This spending level was largely due to spending on the Kansas City media market, which also contains part of Missouri, a true battleground state.

State	*2000 Population*	*2000 Media Spending*	*Spent/ Capita*	*Winning Margin %*
Alabama	4,447,100	$1,195,045	0.27	15.17
Alaska	626,932	$0	0.00	35.87
Arizona	5,130,632	$0	0.00	6.57
Arkansas	**2,673,400**	**$2,141,372**	**0.80**	**5.60**
California	33,871,648	$11,801,480	0.35	−12.41
Colorado	4,301,261	$34,868	0.01	8.97
Connecticut	3,405,565	$240,009	0.07	−18.51
Delaware	783,600	$0	0.00	−13.50
DC	572,059	$0	0.00	−80.98
Florida	**15,982,378**	**$23,429,950**	**1.47**	**0.01**
Georgia	8,186,453	$953,579	0.12	11.97
Hawaii	1,211,537	$0	0.00	−19.65
Idaho	1,293,953	$0	0.00	41.70
Illinois	12,419,293	$6,870,777	0.55	−12.36
Indiana	6,080,485	$0	0.00	16.01
Iowa	**2,926,324**	**$1,797,417**	**0.61**	**−0.33**
Kansas	**2,688,418**	**$4,331,129**	**1.61**	**21.83**
Kentucky	4,041,769	$2,048,339	0.51	15.46
Louisiana	4,468,976	$1,649,600	0.37	7.88
Maine	**1,274,923**	**$1,909,168**	**1.50**	**−0.08**
Maryland	5,296,486	$0	0.00	−16.94
Massachusetts	6,349,097	$1,808,407	0.28	−29.58
Michigan	**9,938,444**	**$17,381,524**	**1.75**	**−5.27**
Minnesota	4,919,479	$2,110,818	0.43	−2.57
Mississippi	2,844,658	$0	0.00	17.21
Missouri	**5,595,211**	**$5,769,855**	**1.03**	**3.42**
Montana	902,195	$0	0.00	27.31
Nebraska	1,711,263	$139,632	0.08	30.36
Nevada	**1,998,257**	**$3,239,360**	**1.62**	**3.71**
New Hampshire	1,235,786	$0	0.00	1.34
New Jersey	8,414,350	$0	0.00	−16.42
New Mexico	**1,819,046**	**$3,281,437**	**1.80**	**−0.06**
New York	18,976,457	$5,909	0.00	−27.15
North Carolina	8,049,313	$267,492	0.03	12.93
North Dakota	642,200	$0	0.00	12.93
Ohio	**11,353,140**	**$18,363,325**	**1.62**	**3.64**
Oklahoma	3,450,654	$704	0.00	20.60
Oregon	**3,421,399**	**$5,465,442**	**1.60**	**−0.47**
Pennsylvania	**12,281,054**	**$28,536,412**	**2.32**	**−4.30**
Rhode Island	1,048,319	$18,752	0.02	−31.30
South Carolina	4,012,012	$0	0.00	16.31
South Dakota	754,844	$0	0.00	23.23
Tennessee	5,689,283	$2,167,421	0.38	3.93
Texas	20,851,820	$1,514	0.00	21.91
Utah	2,233,169	$0	0.00	43.45
Vermont	608,827	$0	0.00	−10.88
Virginia	7,078,515	$0	0.00	8.29
Washington	**5,894,121**	**$10,749,119**	**1.82**	**−5.89**
West Virginia	1,808,344	$854,986	0.47	6.48
Wisconsin	**5,363,675**	**$6,972,163**	**1.30**	**−0.23**
Wyoming	493,782	$0	0.00	41.96
Total U.S.	281,421,906	$165,537,005		

Data courtesy of the Brennan Center for Justice at New York University School of Law.

APPENDIX V: POSSIBLE GROUPINGS FOR JOINING THE BLOC

The following table shows the state pairs and groupings that may make logical “partners” for joining the bloc of states enacting the proposal.

PROPOSAL GROUPINGS FOR JOINING THE BLOC

Grouping	*Electoral Votes*	*2000 Margin*	*2004 Margin*	*2000 Margin %*	*2004 Margin %*
New York + Texas	65	−317,745	490,694	−2.56	3.49
Maryland + Virginia	23	−111,785	−7,116	−2.42	−0.14
Alaska + Hawaii	10	−17,269	65,312	−1.39	4.48
North Carolina + New Jersey	30	−131,206	219,799	−2.20	3.23
South Carolina + Connecticut	15	−34,545	112,727	−1.27	3.63
The West*	117	−475,403	−175,982	−2.35	−0.82

*includes all contiguous states north and/or west of New Mexico

Winning margins are arbitrarily shown as positive for Bush and negative for Gore and Kerry. Electoral college state representation from Federal Election Commission, *Distribution of Electoral Votes*, at <http://www.fec.gov/pages/elecvote.htm>, last accessed October 4, 2005. Election results from <http://www.washingtonpost.com/wp-srv/politics/elections/2004/2000-2004_comparison.html>, last accessed June 27, 2006.

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