

A Binding Agreement Reforming the Electoral College with Interstate Compacts

BY ROBERT RICHIE

The Electoral College may be the single most disliked feature of the U.S. Constitution. Not many Americans believe it makes sense to elect a candidate who receives fewer votes than an opponent or to have their votes only indirectly elect the president, mediated by typically faceless electors. But the current Electoral College system in states is more than just an antiquated anachronism that can misfire and elect the candidate that loses the national vote; it is entrenching political inequality, with disproportionately damaging impact on small states, urban America, young people, and people of color—indeed, the great majority of all Americans.

Without reform, the Electoral College system is nearly certain to relegate two-thirds of the population to the sidelines during highly contested presidential elections for years to come. Almost all of modern presidential campaigns' record-breaking resources today are targeted at people in just a handful of "battleground states" that are disproportionately white and shrinking in number. Voter mobilization money, advertising dollars, campaign energy, candidate visits, and almost certainly policy decisions are all spent to sway these voters in some dozen states. That number of battlegrounds is far smaller—and more consistent election to election—than it was just two decades ago.

Cities are particularly hard hit. Indeed, of our ten largest cities by population, only Philadelphia was in a state that garnered attention in 2006. The other nine cities were in states (Arizona, California, Illinois, New York, and Texas) that collectively had only ninety-six presidential campaign television ad buys in the 2004 campaign's peak season (ninety-five of them in Arizona), as compared to 44,131 ads in Ohio alone. This change in urban influence is far dif-

ferent from close elections in 1960 and 1976, when ten out of eleven of our largest-population states were battlegrounds; now only four of these states are a battleground, joined by only one of the thirteen smallest-population states and a minority of the ones in between.

For too many people, this kind of inequity earns only a shrug as being an immutable part of our political system. The American people certainly have been consistent in supporting a national popular vote for president by overwhelming margins for decades, but this public support has not led to change. Reform efforts have started and ended in Congress as constitutional amendments. Even in 1969, when more than 80 percent of House members voted for direct election and backers included the NAACP, AFL-CIO, chamber of commerce, Lyndon Johnson, and Richard Nixon, Senate opponents were able to kill direct election with a filibuster. Recent years have witnessed nary a single congressional hearing on reforming the Electoral College.

This pessimism about the potential to abolish the Electoral College has led to a lamentably muted debate about what the Electoral College is doing to American democracy in the twenty-first century and whether there are ways to reform it short of abolition. But the reality is that although the problems the Electoral College created in the 1960s were real, they were nothing like what it does to democracy today. It is critically important to recognize the impact the current system has on basic matters of electoral fairness, political equality, and youth civic engagement, and in turn to examine ways of improving our elections within the Electoral College framework. Such examination has a happy result: an introduction to the National Popular Vote plan, an

ingenious means emanating from the states that would use two of states' constitutionally sanctioned powers to guarantee election of the national popular winner in all fifty states and the District of Columbia in future presidential elections. Introduced publicly at a February 2006 news conference, the National Popular Plan has already passed three state legislative chambers and almost certainly will be introduced as statutory legislation in all fifty states in 2007. It is even possible that a state agreement to establish a national popular vote could be in place by the 2008 elections.

Presidential Elections and Inequality

Given the power and prestige of the presidency, it seems only logical that, in a nation founded on the principle that all of its citizens are created equal, all Americans should have the right to a cast an equally meaningful vote in presidential elections. But the current Electoral College system weights Americans' votes differently on the basis of where they live, and inequality in our presidential election system is taking on disturbing new dimensions. The combination of the Electoral College, hardening partisan voting patterns, sophisticated campaign techniques, and high-tech tools are creating a two-tier class structure in our democracy: second-class citizens disregarded as irrelevant in presidential elections and the fortunate few who receive increasing care and attention by virtue of living in one of the dwindling number of competitive battleground states such as Florida and Ohio.

In 1960, for example, when John Kennedy narrowly defeated Richard Nixon, two-thirds of states were competitive. Fully twenty-four states in 1960 were genuine political battlegrounds, together representing 327 electoral votes. Fast forward to 2004. The number of competitive races plunged to barely a third of the states, and the number of comparable battlegrounds dwindled to only thirteen, representing just 159 electoral votes. At the same time, the number of completely noncompetitive states (those where one party would win by more than 16 percent in a nationally even race) increased from nine states

representing 64 electoral votes in 1960 to twenty states with 163 electoral votes in 2004.

These changes have a direct impact on candidate behavior and voter participation, particularly with the modern era's precise methods of polling and marketing allowing campaigns to focus on narrow slices of the electorate. In August 2004, President George W. Bush's campaign strategist Matthew Dowd remarked that Bush's campaign had not polled outside of the eighteen closest states in more than two years. Despite having more resources than any campaign in history, Dowd knew his candidate did not need to waste a dime on learning the views of most Americans. A cursory look at John Kerry's campaign itinerary during the general election suggests that his campaign also focused exclusively on the same battleground states. As a result, the interests and opinions of the bulk of "second-class" Americans living in what this report terms "spectator states" were addressed only if they happened to coincide with those of the "first-class" Americans living in the states where their participation might affect the outcome of the election.

The trends behind this two-tier democracy show every indication of continuing to exacerbate these divisions. Many Americans would like to see the parties break out of their narrow focus on a handful of swing states and instead build national unity by seeking votes around the nation, in "red" and "blue" states alike. But unless we establish a national vote for president, those hopes are in vain. The partisan realignment responsible for increasing the division between first-class Americans in battleground states and second-class Americans in spectator states shows few signs of changing any time soon (note that even with the congressional shifts in 2006, 95 percent of congressional incumbents won, and since 2002 only one incumbent Democrat in the U.S. House has lost in a congressional district that had not just been made more Republican in redistricting), and the stakes in winning the presidency are seen by many as too high for major party candidates to "waste"

resources on states that are simply not going to matter in a competitive election. With voting patterns across the country showing less variation from election to election today than just twenty years ago and with majorities in most states growing more solidly partisan, the percentage of Americans likely to gain attention from presidential candidates in the competitive general election in 2008 almost certainly will be the lowest in the modern era.

Nine of our ten largest cities were in states (Arizona, California, Illinois, New York, and Texas) that collectively had only ninety-six presidential campaign television ad buys in the 2004 campaign's peak season (ninety-five of them in Arizona), as compared to 44,131 ads in Ohio alone.

As disturbing as this conclusion is in the short run, there are even more serious long-term implications of our nation's hardening partisan patterns and the decreasing number of competitive states over time. New voter turnout analyses by scholars such as Trinity College's Mark Franklin offer convincing evidence that the voting behavior of most citizens is established for life during their first three or four elections once eligible to vote. With hundreds of millions of dollars for voter registration and mobilization now targeted on battleground states and virtually nothing on spectator states, a sharp difference in turnout according to where one lives could all too easily continue for the rest of this young generation's lives, with a disproportionately adverse impact on people of color. Improving turnout in presidential elections is like changing the direction of the *Titanic*: it happens all too slowly. A clear rift is already evident in the voting patterns of citizens in battleground and spectator states, with those in the latter being much less likely to go to the polls. Without changes in this division of battleground and spectator states, the principle of equality will be undercut for decades. Second-class status will become entrenched for millions of young Ameri-

cans who have the misfortune to live in the two-thirds of states that are not battlegrounds in presidential elections.

The 2004 Presidential Elections and the Shrinking Battleground

In 2004, Republican George W. Bush won 50.7 percent of the nationwide popular vote to Democrat John Kerry's 48.3 percent. After losing the popular vote by more than a half-million votes in 2000 with 47.87 percent, Bush raised his vote share by nearly three percent in 2004 and defeated Kerry by more than three million votes in an election with the highest national election turnout since the 1960s. But just because the 2004 elections escaped sustained national attention on a state's controversial ballot count on the order of Florida in the 2000 elections should not disguise the fact that this election again was historically close, that the Ohio election process caused partisan bitterness, and that the narrow national division existing between the major parties since the end of the Cold War shows every indication of continuing. One measure of current partisan consistency was how closely the underlying partisanship of states in 2000 tracked state partisanship in 2004, measured by the two-party share of the presidential election vote in a state compared to that division nationally. Of the presidential contests in the fifty states and the District of Columbia, only two states (the low-population states of Vermont and Alaska) changed their partisanship by more than 3.9 percent. Partisanship in thirty-two states stayed nearly the same, changing by 2 percent or less.

The last five electoral cycles have also seen a deepening schism between Democratic and Republican states. This schism can be measured both by the number of states that have shifted from being relatively competitive to being safe for one party and by the number of highly partisan states that have now become extremely different from the national average. For the past four and a half decades, the difference in partisanship between the ten most Republican and the ten most Democratic states

ranged between 18 percent and 22 percent. As recently as 1988, this disparity was only 16 percent. The past two elections, however, have seen an average spread of 27.5 percent in 2000, and 26.6 percent in 2004. The rise in partisanship has been particularly pronounced for Republican states. In 1988, the ten most Republican states had an average partisan bias of 58.2 percent. By 2004, the ten most Republican states had average partisanship of 64.5 percent, with all ten of these states having partisanship scores over 60 percent.

The result of this growing division is that less and less of the population lives in competitive states in a nationally competitive election. Between 1960 and 1992 an average of twenty states could be fairly classified as likely to have been highly competitive in a nationally close election (meaning that a candidate from either major party could expect to win between 47 percent and 53 percent). Among these states typically were almost all of the nation's most populous ones and enough total states to represent a majority of American citizens. In the last three election cycles, however, there was a marked reduction in the number of competitive states, even as the national electorate as a whole has become more evenly divided. Whereas twenty-two states were competitive in the 1992 election, only thirteen states were up for grabs when Clinton ran against Bob Dole in 1996. The number of contested states rebounded somewhat to sixteen states in 2000, still well below the number common in previous close elections without an incumbent candidate, and then plunged back to thirteen in 2004. This represents the smallest number of battleground states in decades. Although no fewer than 319 of 538 electoral votes (59 percent) were located in battleground states in 1960 (more than enough to elect a president), the number dropped in half (29.5 percent) in 2004.

At the same time, the number of spectator states (where one party enjoys a partisanship advantage of at least 58 percent) has risen to an unprecedented level. Just five states with a total of twenty electoral

votes were completely out of reach in 1992. The number of uncontested electoral votes skyrocketed to twenty states with 166 electoral votes in 2000 and 163 electoral votes in 2004. From 1960 to 1996, the total number of uncompetitive electoral votes never exceeded 100. In 2004, for the first time, the number of completely uncompetitive electoral votes exceeded the number of electoral votes in competitive states.

What lies behind this growth in the number of spectator states? FairVote's research supports the common perception that our country is becoming more starkly divided along red and blue political lines, with Democrats becoming more clearly a party of the coasts and big cities and with Republicans dominating the interior. As these battle lines become increasingly well defined, the populations of rural states become less likely to vote Democrat while urban dwellers become equally less likely to vote Republican. This leaves a small minority of states, with roughly equal numbers of rural and urban voters, as the true toss-up regions of the country.

It also appears likely that the number of competitive states will stabilize at present levels for the next several electoral cycles. The exact number of battleground and spectator states varies from election to election, but it typically takes a significant change in partisan makeup of a state's population to have a substantial impact on partisanship. Major changes can happen, but almost always over time. The South, for example, has nearly completely shifted from Democratic majorities to Republican majorities over the past forty years, but there is no indication of comparable shifts currently under way. Over the coming years, we are likely to continue to see a fairly deep, regional-based partisan schism between the major parties in which few states will be truly up for grabs in any election that is close nationally.

The Impact of Presidential Election Inequality

The implications of our analysis of the shrinking battleground in American presidential elections go

beyond which party might win the 2008 election; they go to the heart of American democracy. Consider its impact on voter participation, controversies over election administration, and racial fairness.

Voter Turnout Now and Over Time

The current two-tier system of electing the president is creating a culture of political haves and have-nots that will likely affect voter participation in battleground states and spectator states for generations to come. With only a small number of battleground states, and a closely divided electorate, it becomes increasingly likely that future elections will be decided by some combination of the same states that decided the 2004 election. Thus, meaningful suffrage—the ability to go to a poll and cast a vote for a candidate without effective foreknowledge of the electoral outcome in that state—will be restricted to citizens in a small number of highly contentious states that represent perhaps a quarter of the nation’s electorate. The parties and their backers will spend hundreds of millions of dollars to register and mobilize these voters. The rest of the nation will be spectators to the election, ignored by the campaigns.

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The impact on voter turnout is already pronounced. In the twelve most competitive states in 2004, turnout was 63 percent, up 9 percent from 54 percent in 2000. In the twelve most lopsided states, turnout was 53 percent, up only 2 percent from 51 percent in 2000. The gap in turnout between these two state groupings soared from 3 percent to 10 percent. Given the financial resources certain to be tar-

geted on mobilization in 2008 battlegrounds, expect this gap to widen. Indeed, the effect on turnout will likely go beyond just one or two elections. Young Americans becoming eligible to vote will be treated quite differently depending on where they live, with far more intense efforts to register and mobilize newly eligible voters in battleground states. Mark Franklin’s recent seminal work on voter participation, *Voter Turnout and the Dynamics of Electoral Competition in Established Democracies Since 1945*, analyzes voter turnout and factors affecting it in more than two dozen nations over several generations. One of his findings is that voting behavior is often established by what a person does in the first elections after becoming eligible to vote. The “imprint” of whether one votes in these elections typically lasts a lifetime.

We can already see dramatic evidence of the impact of our two-tiered system in the youth participation rate. According to survey data (as opposed to actual turnout numbers) analyzed by the University of Maryland-based organization CIRCLE, in 2000 a slim majority (51 percent) of young voters (ages eighteen to twenty-nine) turned out in battleground states, while only 38 percent of young voters in the rest of the country went to the polls. In 2004, the gap between youth turnout in battleground and noncompetitive states widened. CIRCLE found that 64.4 percent of young people voted in ten battleground states. Their turnout was only slightly less than the average swing state turnout of 66.1 percent, showing that young adults were mobilized to vote where their votes clearly mattered.

The story was very different in the rest of the country. Only 47.6 percent of eighteen-to-twenty-nine-year-olds voted in the other forty states and the District of Columbia. This is fully 17 percent below the turnout rate of youth voters in battleground states and much farther below the average turnout for older voters (58.9 percent) in these nonbattleground states. CIRCLE also offers information on the change in young voter turnout in

each state since eighteen-year-olds were first allowed to vote in 1972. Overall there was a 5 percent decrease in young voter (age eighteen to twenty-four) participation between 1972 and 2004 (despite an upward blip in 2004), but every single one of the ten states with the sharpest decrease is a solid spectator state, with five firmly Republican and five firmly Democrat in presidential elections. Looking forward, another election or two with this disparity will make it very likely for turnout in current nonbattleground states to stay below turnout in current battleground states for decades, even if by 2016 we were to reform the current Electoral College system by providing a fair, one-person, one-vote presidential election.

Election Administration

The 2000 presidential elections exposed just how antiquated and underfunded our system of registering voters, counting ballots, and running elections has become in most states. In our excessively decentralized system of protecting the right to vote, states typically delegate the conduct of elections to localities, meaning most important decisions about presidential elections are made separately by more than twelve thousand local governments. In the wake of Florida's election fiasco, the U.S. Congress, for the first time in history, helped fund elections and established a national commission to set some national standards. But the United States still falls short of establishing the kind of predictable election administration found in most democracies.

In an era of close presidential elections with continued use of the Electoral College, this kind of election administration is highly problematic. A national election would almost never be so close that the results would not be definitive. But with fifty-one separate contests deciding the presidency, the odds are increased that in every close election there will be narrow votes in enough states that the conduct of the election will be controversial—and end up in the courts. Even in 2004, in an election where George Bush won the popular vote by more than three mil-

lion votes, the serious problems with Ohio's elections (including battles over voter registration, provisional ballots, partisan observers in polling places, and the shockingly long lines experienced by many voters) led to expensive litigation and suspicions that the election was not decided fairly. Given today's hardening partisan divisions, expect even more controversy and litigation in our elections until we take the right to vote more seriously, increase funding for elections, and establish stronger national standards and clearer preelection and postelection accountability.

Racial Fairness

The United States has a disturbing history of policy on race relations, from slavery to Jim Crow laws to instituting an Electoral College system that boosted southern states. Race remains a powder keg, regularly ignited in political battles and policy debates. With that history, it is essential we have a presidential election system that encourages fairness and does away with discrimination at the polls.

Unfortunately, the current breakdown of battlegrounds and spectator states does the opposite. Consider that 27 percent of the nation's population lives in the twelve closest battleground states in the 2004 elections. If all racial groups were distributed evenly throughout the country, therefore, 27 percent of each of the nation's racial and ethnic groups would live in these states. The reality is far different. Racial minorities are far more likely to live in spectator states than white voters. Whereas more than 30 percent of the nation's white population lives in the battleground states, just 21 percent of African Americans and Native Americans, 18 percent of Latinos, and 14 percent of Asian Americans live in these states. In other words, three out of every ten white Americans live in a battleground state, but less than two of every ten people of color share this opportunity.

The evolving Electoral College landscape represents a particularly dramatic shift for African American voters. In the 1976 presidential election, 73 percent of African Americans were in a classic swing voter

position, living in highly competitive states (won by less than 5 percent) in which African Americans made up at least 5 percent of the population. By 2000, that percentage of potential swing voters declined to 24 percent. In 2004, it was just 17 percent, with little suggesting an increase any time soon. One could argue that the Electoral College once created influence for African Americans, but that clearly is not the case today.

A Road Map for a National Popular Vote

The United States calls for spreading democracy throughout the world, yet our presidential system at home is terribly flawed. It undercuts basic democratic principles and entrenches a two-tier democracy with a minority of first-class citizens and a majority of second-class citizens. It leaves a majority of our young adults and a disproportionate share of our people of color shut out of opportunities to meaningfully engage in electing their national leader—a dangerous and divisive precedent for the future. Indeed, we are the only major democracy to allow a presidential candidate to win a general election with fewer votes than an opponent.

Defenders of the status quo often lead with three arguments. They allege that the Electoral College benefits small states, that it forces presidential candidates to seek votes across the country, and that the founding fathers designed it as it operates today. None of these claims is even remotely accurate.

First, in today's presidential contests, nearly all small states are ignored. In 2004, of the thirteen smallest-population states, only New Hampshire was in play. Because small states swing far fewer electoral votes than big states, competitive big states such as Florida and Ohio get far more attention than competitive small states. In fact, a majority of small states did not have a single presidential candidate visit or a single presidential campaign ad air during 2004's peak campaign season, while Florida experienced more than sixty-one major-party candidate visits and more than fifty-five thousand campaign ads.

Second, candidates focus exclusively on a shrinking number of battleground states rather than campaign nationally. George Bush's 2004 campaign, the richest in history, did not poll a single person outside of eighteen battlegrounds in the last two and half years of his reelection bid. By the final six weeks of 2004, both major campaigns focused primarily on just five states.

Third, our founders did not expect the Electoral College to operate as it does today. Nearly all states now allocate their electoral votes to the winner of the state's popular vote, but this rule was far from the norm during the lifetime of the founders. In Thomas Jefferson's first election in 1800, for example, only two states used this "unit rule." States eventually adopted the unit rule by the mid-1830s to maximize the boost it gave to their majority party; however, the framers did not plan for the rise of political parties. We certainly live in a different world. Now, all states provide nearly universal suffrage, and all Americans can learn about candidates through the media and the Internet. Certainly, one of the influential original purposes of the Electoral College—to protect the interests of low-turnout slave states to ensure they ratified the Constitution—is no longer relevant.

Other reform options will not work. Allocating electoral votes by congressional district is a nonstarter because it tilts the playing field. The Republican vote is more evenly dispersed across the nation, meaning that George Bush in 2000 would have won the presidency by some fifty electoral votes in 2000 even while losing the national vote. Proportional allocation of electoral votes—quite different in its impact from proportional voting for legislatures, which some advocates of a national popular vote (like me) support—creates arguably even worse problems. Campaigns will continue to skip most states, on the basis of the murky math of where campaigning might swing a single electoral vote. Certainly any effort to adopt it in a state will be prone to charges (likely accurate) of partisan manipulation, as a

“fair” allocation of electoral votes in one state typically by one major party would be a gift of electoral votes to the other major party.

The current state of presidential elections demands renewal of efforts to adopt a national popular vote, a cause that a generation ago won the support of the likes of presidents Lyndon Johnson, Richard Nixon, Gerald Ford, and Jimmy Carter. But rather than establish a national popular vote through a constitutional amendment to abolish the Electoral College, we can use the powers already granted to states under the Constitution to fix a broken system.

Developed by Stanford consulting professor John Koza, the National Popular Vote proposal turns conventional wisdom about the difficulty of reforming presidential elections on its head. Backed by FairVote, Common Cause, state legislators, and former members of Congress from across the political spectrum, the National Popular Vote plan does not call for abolishing the Electoral College. On the contrary, it recognizes that the Constitution already grants states the power to make the Electoral College work for all Americans.

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States already have exclusive power over how to choose their electors. Maine and Nebraska currently allocate electoral votes to the candidate who wins each congressional district, for example, while in the nineteenth century many legislatures simply appointed electors without holding elections. Today most states allocate electoral votes to the statewide vote winner, but they could just as easily allocate them to the national vote winner. One state on its own is unlikely to make this choice, but if a group

of states representing a majority of Americans and a majority of the Electoral College did so, then the nationwide popular vote winner would achieve an Electoral College victory every time.

To ensure the agreement stays in place through an election, the National Popular Vote plan suggests states enter into a binding agreement called an interstate compact. In early 2006, one such compact made the news when several northeastern states joined together to limit their carbon emissions to combat global warming. There are hundreds of similar agreements, including the Port Authority, which joins together New York and New Jersey in control of waterways.

States would join the agreement one by one by passing a simple statute. It would become active only when it became decisive in electing the president, that is, when joined by states representing at least a majority of electoral votes. Legislation to enter into the agreement will almost certainly be introduced in all fifty states in 2007. If by July 2008 the number of states in the agreement represents a majority of Americans, the November 2008 election will be effectively a national popular vote, with the winner guaranteed an Electoral College majority. States could choose to withdraw from the compact in 2009, but we suspect their number will only increase in the wake of our first truly national election.

With a national popular vote, presidential campaigns would seek votes everywhere in a true fifty-state effort. Every vote in every part of every state would be equal. Americans could get involved in presidential campaigns in their own cities, suburbs, and small towns. The bottom line is that candidates for our one national office should have incentives to speak to everyone, and all Americans should have the power to hold their president accountable. Only a national popular vote will do. Now, with the National Popular Vote campaign, we have a sensible road map for change.

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