COMPLICATIONS WITH THE POLITICAL DEVELOPMENT OF THE ELECTORAL COLLEGE: EXAMINATION OF ELECTORAL COLLEGE ELECTORS, SWING STATE BIAS, AND THE NATIONAL POPULAR VOTE INITIATIVE

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A thesis submitted to Johns Hopkins University in conformity with the requirements for the degree of Master of Arts

Baltimore, Maryland
December, 2019

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Abstract

In 1787, the framers of the Constitution compromised in choosing the Electoral College as the method to select the President of the United States. Over the years, the choice of this unique and untested method has led to many unintended consequence, growing pains, and structural problems for presidential elections. This paper examines three of these problems that stem directly from poorly drafted language found in Article II of the Constitution. This includes: 1) undefined roles for Electoral College electors; 2) swing state bias; and 3) the National Popular Vote Interstate Compact. Specifically, this paper discusses why these issues are problematic and offers a solution to solve them.

By examining secondary and primary sources, this paper concludes that Electoral College electors were intended to act as trustees with free will, that presidential candidates overwhelmingly focus their time and attention on swing states, and the National Popular Vote Interstate Compact is constitutionally suspect. To solve these problems as well as uphold democratic ideals, constitutional democracy, and smooth functioning presidential elections, the Electoral College—and constitutional language that caused these issues—must be replaced with the direct popular vote via constitutional amendment.

Thesis Reviewed By Johns Hopkins Professors Douglas Harris and Richard Skinner
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Introduction: The Untested Presidential Election Method Born From Compromise

In 1787, the framers of the Constitution developed a unique way to select a head of state for a national government. Unable to come to terms on whether to elect the president by legislative appointment or by a national popular vote, the framers compromised and implemented an untested system known as the Electoral College.¹ Under this system, each state selects electors—in a manner they so choose—to participate in a national electing body that then chooses the president.²

Like many other sections of the Constitution, the Electoral College was founded based on compromise. For instance, many worried that a national popular vote to elect the president would lead to large states drowning out the voices of small states.³ Alternatively, many disliked an undemocratic system where the population of large states were ignored in presidential elections.⁴ Still some feared the influence that Congress would have over the president if he must rely on members of Congress for reelection.⁵ Finally, others questioned if the people were qualified to choose the chief executive.⁶

As such, the compromise of the Electoral College was born where state legislatures select the method for choosing their electors and each state receives an elector for every member of Congress—House and Senate—representing them in Washington.⁷ Under this original Electoral College system before the 12th Amendment, each elector cast two electoral votes for president, one of which could not be for a

² US Constitution, art. 2, sec, 1.
⁴ Ibid., p. 307.
⁵ Ibid., p. 306.
⁶ Ibid., p. 327.
⁷ US Constitution, art. 2, sec, 1.
candidate from the same state as the elector. To win the presidency, the candidate needed to win a plurality of electoral votes and a majority of electors. If a majority of electors did not vote for the candidate who received the most votes, the House of Representatives would select the president with each state getting one vote.8

Under this system, most federal stakeholders secured a favorable provision that helped make the Electoral College more palatable for them. Large states were able to have a larger influence based on their population since more House members meant more electors. Small states received a heightened voice through receiving electors for each of their senators, who are allocated based on statehood rather than population.9 Small states also received an equal voice in any election in the House of Representatives.10 State government received a check on the national government by receiving the power to choose the method of selecting presidential electors in their respective states.11 Finally, the people received the opportunity to select electors directly if their respective state legislature so chose, which many of them did from the very start.12

Even so, while the Electoral College largely removed the fears that accompany an executive elected directly by the people or by Congress, its unprecedented, untested, and unique nature left the Electoral College vulnerable to unforeseen consequences and confusion. In fact, broad grants of power and missing language in the Constitution—regarding how the Electoral College is intended to operate—has exacerbated such

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8 US Constitution, art. 2, sec. 1.
9 US Constitution, art. 1, sec. 3.
10 US Constitution, art. 2, sec. 1.
11 Ibid.
problems. These structural issues started as early as 1789, and despite some repairs, they continue to this day.

**Immediate Unintended Consequences**

To set the scene for the many problems faced by the Electoral College today, it must be highlighted that these unforeseen consequences began in the very first presidential election. For instance, in 1789 the Constitution awarded the presidency to the candidate with the most electoral votes and a majority of electors.\textsuperscript{13} The vice presidency went to the candidate with the second most electoral votes.\textsuperscript{14} However, under Electoral College rules where electors cast two ballots, it was possible that George Washington and his intended vice president—John Adams—could receive an equal amount of electoral votes. If these men tied in the Electoral College, the election would be sent to the House of Representatives to elect the President.\textsuperscript{15} In preparation for this, Alexander Hamilton had electors across the country withhold electoral votes from John Adams.\textsuperscript{16} As such, a tie in the Electoral College was avoided.

Unfortunately, the country was not as lucky in 1800 when the Democratic-Republican electors failed to withhold an electoral vote from their vice presidential candidate Aaron Burr. As such, Burr and Thomas Jefferson tied for first place in the Electoral College and each received votes from a majority of electors.\textsuperscript{17} The Constitution then sent the election to the House of Representatives to decide whether Jefferson or Burr

\textsuperscript{13} US Constitution, art. 2, sec. 1.
\textsuperscript{14} Ibid.
\textsuperscript{16} Ibid.
would be President.\textsuperscript{18} In somewhat predictable fashion, Aaron Burr sought the presidency in the election before the Federalist controlled House of Representatives.\textsuperscript{19} Nearly causing a constitutional crisis, Federalist members of Congress offered to throw their support behind candidates who offered them the most concessions and benefits for voting for them.\textsuperscript{20} Eventually, on the 36th ballot a member switched his vote and provided the presidency to Jefferson and the vice presidency to Burr.\textsuperscript{21}

As is well known today, these early problems within the Electoral College brought on the passage of the 12th Amendment to the Constitution, allowing the president and vice president to be elected separately by the Electoral College.\textsuperscript{22} While the 12\textsuperscript{th} Amendment prevented future ties between presidential and vice presidential candidates, it did not fix every issue and—as we will discuss below—others have developed since its passage. Rather than serving as an early save for the Electoral College, the 12\textsuperscript{th} Amendment simply underscores the deep structural problems faced by the institution from the founding until the present.

**Upcoming Chapters**

In the following three chapters, this paper will discuss how creating an electoral system from scratch opened the Electoral College up to development by trial and error, partisan manipulation, and unintended consequences. It will also discuss how the Electoral College has been plagued by broad constitutional language or missing

\textsuperscript{18} Pierce and Longley, *The People’s President: The Electoral College in American History and the Direct Vote Alternative*, p. 39.
\textsuperscript{19} Ibid., pp. 40 – 41.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid., p. 41.
\textsuperscript{22} Ibid., p. 44.
constitutional language in some cases. In doing so, we will discuss three contemporary problems—one per chapter—that the Electoral College faces today. These three chapters will support the main arguments of this paper that these problems stem directly from constitutional language—or a lack of it—which cannot be fixed without a constitutional amendment. In addition, we will discuss how the preferred presidential election method to replace the Electoral College is the national popular vote.

In Chapter One we will discuss how the framers did not outline the specific role that electors would play when casting their electoral votes. To be more specific, nowhere does the Constitution discuss whether electors are intended to vote with freewill as trustee electors or whether they are intended to vote as directed by those who elected them as delegate electors. Unfortunately, this lack of language has led states throughout the union to pass laws that bind electors to vote for the candidate who wins the popular vote in the state. It has also led many scholars of the Electoral College to disagree whether electors are intended to act as delegates or trustees. As such, Chapter One will examine the issues this lack of constitutional language has caused. It will also examine founding documents to show that electors are intended to act as trustees and laws binding how they vote are unconstitutional. Specifically, Chapter One will conduct an in depth analysis of the Constitution, James Madison’s notes at the Constitutional Convention of

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1787, notes from the subsequent state ratifying conventions, the *Federalist Papers*, and other founding documents.

While scholars of the Electoral College have analyzed these documents to argue whether electors are intended to be delegates or trustees, no full analysis of this subject exists. In fact, Electoral College scholars do not fully consider discussions of the framers and other resources that provide important context to this debate. This includes the votes of framers in the Constitutional Convention who signed the Constitution but voted against direct election of the president and against electors selected by the people. It seems unlikely that framers who voted against this participation of the people in selecting the president would support the Electoral College if it allowed delegate electors bound—in many instances—to the wishes of the people. Other resources not fully considered include statements made by the framers highlighting that electors were intended to be insulated from cabal and be selected from the most dignified and qualified citizens in the country. It is unclear why these conversations would have happened if electors are bound to vote as directed by others. Discussions over cabal and qualifications seem irrelevant for electors that must parrot the wishes of others. Still other resources that provide valuable insights include current state laws stipulating that electors must act as delegates and the significant number of electors who have acted as trustees since the ratification of the Constitution. Overall, this chapter will add to the work of other Electoral College scholars by fully analyzing all of these resources to show that electors are intended to act as trustees and by arguing that the effects of trustee electors must be neutralized via constitutional amendment.
In Chapter Two, we will address broad language in the Constitution that grants states the power to arguably choose any method their legislature stipulates to select their electors. Throughout the years this has led to many unfortunate consequences including laws in nearly every state that award the entirety of a state’s electoral votes to the winner of the state popular vote.\(^{26}\) Meaning, a candidate can win 49.9% of the state popular vote and still receive no electoral votes for this effort. Not only has this drowned out minority party votes in these states during the electoral contest, it has also created an environment where candidates do not need to contest states where there will be a clear majority winner given the state’s partisan makeup. For instance, today very few candidates consider campaigning in Alabama or California given their strong partisan makeup.\(^ {27}\) This in turn pushes candidates to focus all their attention on competitive states,\(^ {28}\) creating modern day swing states and negatively impacting democracy. Chapter Two will take a closer look at the negative impact that such broad constitutional language is having on presidential elections.

Additionally, Chapter Two will add to the literature on this subject by directly contesting arguments made by defenders of the Electoral College that down play the existence of swing states. Defenders argue that swing states change so often that swing state bias is not a problem. They also argue that swing states include small states, large states, eastern states, western states, northern states, and so on. As such, they claim that the existence of swing states does not disadvantage anyone. By analyzing which states

\(^{26}\) Williams, “Why the National Popular Vote Compact is Unconstitutional,” p. 1563.


\(^{28}\) Ibid.
were swing states in 2008, 2012, and 2016, we will show that swing states do not change in a significant way. In addition, by analyzing the number of presidential and vice presidential candidate campaign visits to states in 2008, 2012, and 2016, we will show that candidates are ignoring large swaths of the country during presidential elections even if candidates visit diverse areas. As such, Chapter Two will argue that undemocratic problems presented by swing states—and the constitutional language that has led to swing states—must be addressed.

In Chapter Three, we will discuss how vague language in the Constitution that grants states the power to arguably choose any method they want to select their electors has also led to the creation of the National Popular Vote (NPV) Interstate Compact. In the NPV, participating states have agreed to cast their electoral votes for the winner of the national popular vote, no matter who wins the popular vote in the state. The compact will only go into effect when 270 electoral votes worth of states join the compact. In other words, the NPV interstate compact is a clever way to implement a direct popular vote without amending the Constitution to get rid of the Electoral College. As such, this chapter will examine how such vague language allowing a potential loophole to get around the Electoral College and the Constitution is not only constitutionally suspect but extremely dangerous to the wellbeing of constitutional democracy.

To date, very few Electoral College scholars have taken an in depth look at whether the NPV violates Article II of the Constitution. While some scholars have, they fail to fully consider clauses of Article II that are intended to shield electors from federal

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30 Ibid.
and national influences, including coordinated efforts from political parties. As such, Chapter Three will add to Electoral College literature by discussing how Article II Section I Clauses II, III, and IV conflict with a national coordinated effort like the NPV that is intended to sway electors. The chapter will also outline how original statements by the framers in the Constitutional Convention, state ratifying convention, and Federalist Papers support these arguments. Additionally, this chapter will argue that since the NPV has only been passed by Democratic state legislatures and governors, NPV violates the intent of the framers who wanted to protect electors from such powerful cabals. Finally, we will discuss how such arguments are complimented by precedent set in the Supreme Court cases U.S. Term Limits, Inc. v. Thornton and Cook v. Gralike. In conclusion, this paper will chart out a path forward in dealing with these flaws in the Electoral College. This includes the passage of a constitutional amendment abolishing the Electoral College and implementing a direct popular vote.
Bibliography


“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, or which has received the slightest mark of approbation from its opponents…I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent.”

Alexander Hamilton wrote these words in support of the Electoral College in *Federalist 68*. Hamilton wasn’t the only framer of the Constitution to speak in support of this mode of election for the President of the United States. Others include James Madison, Oliver Ellsworth, Rufus King, Elbridge Gerry, James Wilson, Gouverneur Morris, and many others.

Even so, with the passage of over two-hundred years, would these men even recognize the Electoral College today? Unfortunately, this question can be difficult to answer. Many scholars disagree about how certain aspects of the Electoral College were intended to function. One of the most hotly contested issues in this field is whether Electoral College electors were intended to vote as trustees with free will or as delegates expressing the will of others. Unfortunately, the Constitution is completely silent when it comes to the role of electors. Given this silence, critics and defenders of the Electoral College alike can be found in the delegate camp, others in the trustee camp. To this day, the debate continues.

Noting these disagreements, the purpose of this chapter is to outline the framers’ intent for the role of electors, whether the Electoral College still meets this intent, and the

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negative impact that a lack of clear constitutional language regarding the role of electors has on the operation of the Electoral College. To find the intent for the role of electors and outline the negative impact of the lack of constitutional language on this subject, this chapter will analyze numerous secondary sources that discuss this issue. We will also discuss primary sources—such as James Madison’s notes on the Constitutional Convention, transcripts from the state constitutional ratifying conventions, and the *Federalist Papers*—which provide valuable insights on the intended role for electors. Additionally, to highlight the intended role of electors—and the negative consequences regarding constitutional silence on this issue—we will examine electoral votes cast from 1789 through 2016 to see whether electors vote as delegates or trustees. Finally, we will assess modern day state election laws that stipulate how electors must vote, which also provide important insights for this subject. In conclusion, the reader will be left with the understanding that electors were intended to act as trustee electors voting with free will. Further, the reader will understand that the lack of constitutional language defining the role of electors has negatively impacted the intended operation of the Electoral College.

**Literature Review: Delegate or Trustee Electors?**

In the world of political science, there is a debate between scholars whether Electoral College electors are bound to vote how directed by those who select them or whether they are free to vote their conscience and best judgement. Though many scholars deeply disagree on this issue, there is one important area in which they agree that greatly shapes this debate: there was no discussion in the Constitutional Convention about
whether electors were to vote as delegates or trustees. For instance, defender of the Electoral College Robert Hardaway notes, “…the specific role of the electors was never discussed at the Convention.” Similarly, Electoral College critic George Edwards states, “[u]nfortunately, there seems to have been no debate in the Constitutional Convention on what role electors should play…”

Even so, most critics of the Electoral College argue that electors were intended to be independent and exercise their free will in voting for presidential candidates. For instance, Lawrence Longley argues, “the Electoral College, made up of preeminent individuals from each state, would act independently and with deliberation in electing the president.” They offer different evidence to support this argument. For instance, Edwards cites arguments made by framers in the Federalist Papers. This includes Alexander Hamilton in Federalist 68 where he argued that “although the people had a role in choosing the president, they would actually exercise influence only indirectly, through a body of ‘men’ chosen for this purpose. These men would ‘possess the information and discernment’ for such an important decision and would be those ‘most capable of analyzing the qualities’ required in a chief executive.” Edwards also cites

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38 Edwards, *Why the Electoral College is Bad for America*, p. 103.
Federalist 64 written by John Jay. “John Jay in Federalist 64, echoed Hamilton’s views, ‘As the select assemblies for choosing the President...will in general be composed of the most enlightened and respectable citizens, there is a reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue.’”\(^{39}\)

Other than citing arguments by such well known Americans following the drafting of the Constitution, Robert Bennet argues that the Electoral College would serve little real purpose if it did not have an independent voice. “The most fundamental problem with this view that electors were ‘intended to be dependent recorders of decisions made by the electorate...is that it makes nonsense of the office of elector. For with that conception of the office, it simply served no purpose.”\(^{40}\) Bennet continues “it should suffice simply to note the improbability that any of the actors involved would have thought that the elaborate electoral college process was erected simply to record decisions made elsewhere.”\(^{41}\) Of note, there are defenders of the Electoral College who agree that electors were intended to vote their own conscience when selecting the president. For instance, Judith Best notes, “[t]he electors...would be distinguished citizens who would, in fact as well as in form, nominate and then elect a president and vice president.”\(^{42}\) She continues, “in theory and constitutional law, the states are free to

\(^{39}\) Edwards, *Why the Electoral College is Bad for America*, p. 103.
\(^{41}\) Ibid., p. 17.
choose presidential electors by whatever means they wish.”

Further, some defenders are uncertain of electors’ true intent. For instance, Tara Ross argues:

[J]ust because the Founders thought that the electors might occasionally exercise discretion, it doesn’t necessarily follow that they thought electors would act entirely independently all of the time. They could just as easily have expected some combination: electors acting partly in reliance on the people’s judgement and partly on their own initiative.

Alternatively, most defenders of the Electoral College argue that whether appointed by state legislatures or elected by the people, electors were meant to follow the wishes of those who appointed them. For example, Lucius Wilmerding argues, “[i]t is clear…that the framers wanted and expected the popular principle to operate in the election of the President.” He continues, “[a]s for the Electors themselves it is surely wrong to suppose that they were expected to act in complete independence of the persons who appointed them.” Additionally, Hardaway questions the arguments made by critics of the Electoral College directly. “The argument that the framers intended that electors be independent of the will of the people is based on statements made after the Convention by delegates trying to persuade the state legislatures to adopt the Constitution.”

Hardaway implies that while trying to secure ratification, supporters of the Constitution could be guilty of misleading others about the true intent of the Constitution to ensure its success. This brings the objectivity and value of these documents into question.

Hardaway continues, “[d]epending upon the audience that was trying to be persuaded,

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46 Ibid, p. 22.
many statements were made after the Convention purporting to explain why one provision or another of the Constitution would be for the good of the nation.”

Relatively, defenders offer their own sources from the constitutional ratifying conventions and after in support of the arguments that electors were intended to support the will of the people. For instance Hardaway argues, “Madison described the Electoral College provision of the Constitution as providing that ‘the President is now to be elected by the people.'” He continues with other quotes, “[e]ven Hamilton later expressed the view that ‘[i]t was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was confided’” Finally, Martin Diamond argues, “the Electoral College never functioned in the archaically undemocratic manner we assume had been intended... In 1796, every single elector cast a basically mandated ballot for either Adams or Jefferson, the two recognized choices of the electorate. And from that time on, electors have functioned for all practical purposes as the mandated agents of popular choice.” Diamond continues, “first, and above all, the electors were not devised as an undemocratic substitute for the popular will, but rather a nationalizing substitute for the state legislatures.”

Of note, some critics of the Electoral College like Edwards partially agree with these points, “there was a contradiction in the way Madison, Hamilton, and others explained the electoral college system. Although they suggested that the president would be a man of the people and spring almost directly from them, they also suggested either

48 Hardaway, _The Electoral College and the Constitution: The Case for Preserving Federalism_, p. 85.
49 Ibid., p. 86.
50 Ibid.
52 Ibid., p. 3.
that electors would make independent decisions regarding presidential selection or that the real power would lie in the hands of the state legislatures."\textsuperscript{53} However, Bennet questions reliance on such quotes about “the people” because “[r]efERENCE TO THE ‘PEOPLE’ was frequently employed at the time not to characterize direct popular choice—or even indirect—but rather for all manner of decision-making outlets in the new stream, where ultimate sovereignty was presumed to reside with the ‘people.’”\textsuperscript{54}

**Analysis of Secondary Sources**

As we have seen from the discussion above, the original intent when it comes to the role of electors is still open for debate. There are some defenders of the Electoral College who have conceded the argument entirely or are unsure of the true intent. There are some critics of the Electoral College who have ceded ground on the reliability of the debates at the state ratifying conventions and those surrounding them. The debate is muddled to say the least. Additionally, the limited number of resources that these scholars have tapped into is surprising. Although the role of electors was not specifically discussed, there were debates at the Constitutional Convention that provide amazing insight on this question. Interestingly, many scholars of the Electoral College discuss these areas without tying them into this conversation.

For instance, although there was no direct discussion of the role of electors in the Constitutional Convention, there was ample debate on the direct election of the president. This includes two votes on whether to implement the direct election of the president and

\textsuperscript{53} Edwards, *Why the Electoral College is Bad for America*, pp. 102 – 103.
\textsuperscript{54} Bennet, *Taming the Electoral College*, p. 16.
one vote on whether to implement an election of the president via electors chosen directly by the people.\textsuperscript{55} Additionally, many of the delegates spoke out strongly against the direct election of the president.\textsuperscript{56} While it is not ignored by scholars that these votes and discussions happened, the number of delegates against the popular vote, against popularly selected electors, and the likelihood that a critical mass would support delegate electors has not been discussed. It is certainly worth exploring whether such anti-popular vote delegates ended up signing the Constitution with the Electoral College as the final method for electing the president.

Theoretically, if outspoken anti-popular vote delegates ended up signing the document, this may be a good indication of the role of electors. Hypothetically, would it not be telling if there was a delegate from North Carolina who was outspoken against the popular vote, is from a delegation that voted against the popular vote and popular electors, but voted for the Electoral College plan or signed the Constitution? Of course, there will be other factors that would have led to delegates’ decision to support the plan or sign the document. However, weighed with additional evidence, such an examination may tip the scales towards one point of view rather than another. We will explore this topic in the next sections.

Additionally, many scholars discuss one of the most important goals for creating the Electoral College: avoiding cabal, intrigue, and corruption.\textsuperscript{57} However, they do not adequately tie this to the role of electors. Electoral College scholar Thomas Neale notes,

\textsuperscript{56} Ibid., pp. 306, 309.
“[a] temporary body such as this made it less likely that electoral process could be tampered with and that some preexisting body could choose, and thereby control, the chief executive.”\textsuperscript{58} Gary Gregg continues, “[t]he electors met in their respective states, safe from interference by Congress and national cabals, and each elector nominated two persons, one of whom was not to be from their state. The intent was for the electors to deliberate free from interference in their search for ‘worthy candidates.’”\textsuperscript{59} These passages beg the question, if electors were meant to simply parrot the voice of those who elected them, why is there so much concern about persuasion, intrigue and other methods being used on electors? If they are merely casting a ballot for someone else as required, why is there fear that they may change their vote?

Of note, Electoral College defender Tara Ross does briefly discuss this issue in regard to statements made by James Wilson and Gouverneur Morris at the Constitutional Convention. “Wilson’s statement also reflects his assumption that the electors could act with some degree of independence. After all, if they could not act independently, the possibility of corrupting their votes would not be an issue.”\textsuperscript{60} She continues, “Morris noted that the new system would allow ‘the great evil of cabal [to be] avoided. It would be impossible to corrupt them.’”\textsuperscript{61} Even so, Ross discusses these matters in passing and fails to discuss many more conversations among Constitutional Convention and state convention delegates on the matter. We will examine these primary sources in greater detail later in the chapter.

\textsuperscript{58} Gregg, “The Origins and Meaning of the Electoral College,” p. 25.
\textsuperscript{59} Lutz, et al., “The Electoral College in Historical and Philosophical Perspective,” p. 34.
\textsuperscript{60} Ross, The Indispensable Electoral College: How the Founders’ Plan Saves Our Country from Mob Rule, p. 113.
\textsuperscript{61} Ibid.
Similarly, another area barely hinted at by scholars that is related to the issue is the debate surrounding the qualifications of electors. For instance, Bennet notes, “[i]f it all worked, highly distinguished electors would be able to operate largely free not only of legislative interference or fealty on both the state and the federal level, but of interest group pressure.”62 Other passages already mentioned above have described electors as “preeminent”,63 “distinguished”,64 and “the most enlightened and respectable citizens.”65 In the Constitutional Convention, one area of concern about electors was ensuring that they were the highest rank of citizens.66 Again, if electors were merely meant to parrot the votes of others, why the concern for recruiting the best men for the post?

Again, Tara Ross briefly touches on this subject. She notes, “[a]t one point, Pinckney expressed his concern that the ‘Electors will be strangers to the several candidates and of course unable to decide on their comparative merits.’” She continues:

[T]hese statements reflect an assumption that the electors might be required to deliberate independently, but it is even clearer in a statement James Wilson made toward the end of the day. He predicted that the electors’ jobs would become easier with time: ‘Continental Characters will multiply as we more & more coalesce, so as to enable the electors in every part of the Union to know & judge of them.’67

Again, Ross only touches on this subject briefly. Additional primary sources relating to this topic are worth exploring in greater detail and will be addressed later in the chapter.

Further, there are other historical and contemporary sources—that provide wonderful insight into the intended role of electors—that scholars do not

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63 Longley, “Should the Electoral College be Abolished?,” p. 204.
64 Edwards, Why the Electoral College is Bad for America, p. 103.
65 Ibid.
comprehensively address. This includes over 200 years of presidential election results and current state election laws. While many scholars above discuss elections where electors have acted as either delegates or trustees, none provide the total number of delegate or trustee electors throughout the years.\textsuperscript{68} Relatedly, many scholars discuss state level election laws that require electors to vote a certain way.\textsuperscript{69} However, none discuss the total number of states with such laws. Most importantly, none of these scholars discuss what these election results and state election laws imply about the intended role of electors. The implications of such elections and laws will be discussed further below.

Finally, very few scholars fully discuss the danger of not knowing for sure whether electors are intended to act like trustees or delegates. In addition, even fewer discuss the fallout that would take place if an elector swayed an election. For instance, Electoral College critic George Edwards simply notes that it is possible for faithless electors to swing an election.\textsuperscript{70} Electoral College defender, Tara Ross discusses that it is possible but unlikely for faithless electors to swing an election since they have not done so in close elections in the past.\textsuperscript{71} She notes, “these historical election results provide good anecdotal evidence that the supposed ‘danger’ of faithless electors is not great.” Judith Best echoes the thoughts of Ross regarding the unlikelihood of an election being swung. However, she adds that the possibility of faithless electors being able to swing an

\textsuperscript{68} Bennet, \textit{Taming the Electoral College}, pp. 95-96; Edwards, \textit{Why the Electoral College is Bad for America}, pp. 53-58; Ross, \textit{The Indispensable Electoral College: How the Founders’ Plan Saves Our Country from Mob Rule}, pp. 116-119.


\textsuperscript{70} Edwards, \textit{Why the Electoral College is Bad for America}, p. 59.

\textsuperscript{71} Ross, \textit{The Indispensable Electoral College: How the Founders’ Plan Saves Our Country from Mob Rule}, p. 119.
election is still worrisome. “Nonetheless it is possible for an elector...to [swing an
election], and there is no good reason for taking even this slight risk. The Supreme Court
has not ruled on the question of whether or not the electors can be compelled to honor
their pledges.”

However, only Robert Bennet outlines the severe consequences of this
question being undecided by the Supreme Court and the possibility of an election being
swung by a faithless elector.

Elector faithlessness that changes an election outcome could thus pose a serious threat to the
perception, and indeed the reality, of election’s legitimacy. Widespread social turmoil, even
widespread violence, could well result. The validity of the defection would, no doubt, be
challenged, and the legitimacy of that challenge would be challenged as well. The outcome of the
struggle could remain uncertain for a long time, with unforeseeable results...And even if some
settlement of the election outcome were reached with reasonable expedition, there would likely be
bitterness and dissension in many quarters.

These points should not be taken lightly when considering other passages written
by Tara Ross. When discussing electors pledged to candidate Donald Trump who
considered being faithless in 2016, Ross writes that electors “Sisneros and Suprun
received threats—even death threats. ‘There were several nasty ones,’ Sisneros told a
Texas Monthly reporter, ‘to vote for Trump, or else.’”

We will further discuss the
importance of this issue being undecided by the Supreme Court below.

**Primary Source Analysis: What Did the Framers Think?**

Beginning our analysis of primary sources, we will start with votes taken in the
Constitutional Convention that shed light on whether electors were intended to be
deleagtes or trustees. Of great significance, the Constitutional Convention voted against

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72 Best, *The Choice of the People: Debating the Electoral College*, p. 46.
73 Bennet, *Taming the Electoral College*, pp. 103-104.
74 Ross, *The Indispensable Electoral College*, p. 110.
the people’s involvement in the election of the president three times. For instance on July 17 and August 24, 1787 the convention voted against the popular election of the president by the people. On July 17, only Pennsylvania voted in favor of direct election. On August 24, only Pennsylvania and Delaware voted in favor of direct election. Additionally, on August 24 the convention voted against electors chosen by the people appointing the president. Connecticut, New Jersey, Pennsylvania, Delaware, and Virginia voted in favor of this proposal. New Hampshire, Massachusetts, Maryland, North Carolina, South Carolina, and Georgia voted against it. With these three votes against the involvement of the people in the election of the president, it seems unlikely that the founders intended electors to act as delegates bound to vote the wishes of the people.

When examining Madison’s notes on the Constitutional Convention, there are many statements made that support these arguments that many of the framers did not want the people involved in the election of the president. For instance, on June 2, 1787, Elbridge Gerry of Massachusetts noted that “he was not clear that the people ought to act directly even in the choice of electors, being too little informed of personal characters on large districts, and liable to deceptions.” Mr. Gerry was far from the last to voice his concerns. On July 17, Roger Sherman of Connecticut stated “that the sense of the Nation would be better expressed by the Legislature, than by the people at large. The latter will never be sufficiently informed of characters, and besides will never give a majority of votes to any one man. They will generally vote for some man in their own State who will

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76 Ibid., p. 524.
77 Ibid., p. 526.
78 Ibid., p. 51.
have the best chance for appointment.”  

Worries of the people not being informed about candidates and only voting for their states’ favorite sons became a common theme. Charles Pinckney of South Carolina, George Mason of Virginia, and Hugh Williamson of North Carolina all expressed similar doubts that same day. Mr. Pinckney stated that he “did not expect this question would again have been brought forward; an Election by the people being liable to the most obvious & striking objections.”  

George Mason continued “that it would be as unnatural to refer the choice of a proper character for Chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”  

Mr. Williamson concluded, “[t]here are at present distinguished characters, who are known perhaps to almost every man. This will not always be the case. The people will be sure to vote for some man in their own State, and the largest State will be sure to succeed…”  

Finally, on July 26 George Mason expanded on a point earlier expressed by Elbridge Gerry that citizens would easily be manipulated and influenced by powerful men. Mr. Mason noted, “[a] popular election in any form, as Mr. Gerry has observed, would throw the appointment into the hands of the Cincinnati, a Society for the members of which he had a great respect; but which he never wished to have a preponderating influence in the Govt.”  

With direct election by the people or electors voting the wishes
of the people, it is clear that these delegates’ concerns would not be satisfied under either system.

Of note, many of these men went on to sign the Constitution, which included the Electoral College as the mode for electing the president. Signers who also voiced concerns over the people playing a prominent role in electing the president included Roger Sherman of Connecticut, Charles Pinckney of South Carolina, and Hugh Williamson of North Carolina.\textsuperscript{84} Noting the strength of their objections to the direct involvement of the people in the election of the president, it is hard to imagine they would lend their endorsement to a document where electors were required to parrot the wishes of the people. This point is further supported noting that the state delegations to which these delegates respectively belonged—Connecticut, South Carolina, and North Carolina—voted against the popular election of the president twice.

In addition, the states of South Carolina and North Carolina also voted against electors chosen by the people appointing the president. As such, in the case of Charles Pinckney and Hugh Williamson—who spoke out against popular involvement in selection of the president and came from delegations that voted against involvement of the people in the presidential election three times—it seems unlikely that these men would have endorsed the Constitution with the people playing a major role in the selection of the president. As such, these men signing the document implies that electors were likely not intended to follow the wishes of those who elected them.

Additionally, there are many signers of the Constitution who discuss the Constitutional Convention’s choice not to rely on the people to select the president. For instance, in the Pennsylvania Ratifying Convention, James Wilson—a major proponent of the popular vote—noted that:

I think the most unexceptionable mode, next after the one prescribed in this Constitution, would be that practiced by the Eastern States and the state of New York [direct election]; yet, if gentlemen object that an eighth part of our country forms a district too large for election, how much more would they object, if it was extended to the whole Union! On this subject, it was the opinion of a great majority in Convention, that the thing was impracticable; other embarrassments presented themselves.\(^85\)

He continued, “[t]he President of the United States is to be chosen by electors appointed in the different states, in such manner as the legislature shall direct.”\(^86\) Another supporter of the popular vote, James Madison, noted in the Virginia Ratifying Convention that, “[p]erhaps it will be found impracticable to elect him by the immediate suffrages of the people. Difficulties would arise from the extent and population of the states. Instead of this, the people choose the electors.”\(^87\) Other signers of the Constitution echoed these points. In the North Carolina Ratifying Convention, Richard Dobbs Spaight stated that, “[t]he President is elected for four years. By whom? By those who are elected in such manner as the state legislatures think proper. I hope the gentleman will not pretend to call this an aristocratical feature.”\(^88\) In addition, as discussed above, in *Federalist 68* Alexander Hamilton noted, “[i]t was desirable that the sense of the people

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86 Ibid.


should operate in the choice of the person to whom so important a trust was to be
confided. This end will be answered by committing the right of making it, not to any
preestablished body, but to men chosen by the people for the special purpose, and at the
particular conjuncture.”

As discussed by defenders and critics of the Electoral College alike, there are
quotes made by framers in the state constitutional conventions and other places that can
be used to suggest that the framers intended the people to select electors who then parrot
the wishes of the people. For instance, in the Virginia Ratifying Convention, James
Madison stated that during the election of the president, “[t]he choice of the people ought
to be attended to. I have found no better way of selecting the man in whom they place the
highest confidence, than that delineated in the plan of the Convention...” Further, in the
Pennsylvania ratifying convention, James Wilson noted, “[t]he choice of this officer is
brought as nearly home to the people as is practicable. With the approbation of the state
legislatures, the people may elect with only one remove...”

Both of these quotes could be used to imply that Madison and Wilson believed
electors were meant to parrot the voice of the people. However, when comparing these
quotes to those of Madison and Wilson above, it seems much more likely that both men
were merely noting that people can play a role in the election of the president if their state
allows them to select electors. There are no conclusive statements—that this author has
uncovered—made by signers of the Constitution during the drafting and ratification

process that electors were intended to act as delegates. This includes all statements made at the Constitutional Convention, the state ratifying conventions, and in *the Federalist Papers*.

Another important conversation from the Constitutional Convention of 1787—that sheds light on whether electors were to be delegates or trustees—is discussion of the need to limit elector intrigue and corruption. For instance, when the nearly final Electoral College framework was presented to the full convention on September 4, 1787—by a committee assigned to tackle the issue—Gouverneur Morris of Pennsylvania outlined the reasons why the committee recommended the plan. One reason was that, “[a]s the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible also to corrupt them.”92 James Wilson of Pennsylvania and George Mason agreed that the plan does indeed limit such issues. Mason “confessed that the plan of the Committee had removed some capital objections, particularly the danger of cabal and corruption.”93 Wilson noted that the plan, “gets rid of one great evil, that of cabal [and] corruption.”94 Speaking at the Pennsylvania Ratifying Convention, James Wilson furthered these arguments:

To have the executive officers dependent upon the legislative, would certainly be a violation of that principle, so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent. Would it have been proper that he should be appointed by the Senate? I apprehend that still stronger objections could be urged against that: cabal — intrigue — corruption — everything bad, would have been the necessary concomitant of every election. To avoid the inconveniences already enumerated, and many others that might be suggested, the mode before us was adopted. By it we avoid corruption; and we are little exposed to the lesser evils of party intrigue…95

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93 Ibid.
94 Ibid.
Further, in the Virginia Ratifying Convention, Governor Edmund Randolph noted, “[a]nd there can be no combination between the electors, as they elect him on the same day in every state. When this is the case, how can foreign influence or intrigue enter?” Additionally, in the South Carolina Ratifying Convention Charles Cotesworth Pinckney continued:

In all elections of a chief magistrate, foreign influence is to be guarded against. Here it is very carefully so; and it is almost impossible for any foreign power to influence thirteen different sets of electors, distributed throughout the states, from New Hampshire to Georgia. By this mode, also, and for the same reason, the dangers of intrigue and corruption are avoided, and a variety of other inconveniences, which must have arisen if the electors from the different states had been directed to assemble at one place…

Finally, Alexander Hamilton in Federalist 68 argued, “[n]or would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.”

Clearly, the framers were concerned that powerful cabals would attempt to influence or corrupt Electoral College electors. As such, they made it so the full body of electors would never meet in one place, ensuring that the entire group could not be corrupted or influenced at once. This is very telling. Why would the framers of the Constitution create these safeguards if electors were intended to act as delegates? A delegate by definition cannot change their vote. Since framers were concerned that electors’ votes could be swayed by powerful influences—as discussed by six

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Constitutional Convention delegates—it logically follows that electors were intended to act as trustees and vote their conscience.

These arguments are further supported by conversations in the Constitutional Convention about the need for electors to be highly qualified. For instance, on July 19, Hugh Williamson of North Carolina stated that “[h]e had no great confidence in the Electors to be chosen for the special purpose. They would not be the most respectable citizens; but persons not occupied in the high offices of [government].”99 Additionally, on July 24, William Houston of New Jersey, “moved that [the president] be appointed by the ‘[National] Legislature,’ instead of ‘Electors appointed by the State Legislatures’ according to the last decision of the mode. He dwelt chiefly on the improbability, that capable men would undertake the service of Electors from the more distant States.”100 To this Elbridge Gerry of Massachusetts disagreed with Mr. Houston and responded, “[t]he election of the Executive Magistrate will be considered as of vast importance and will excite great earnestness. The best men, the Governours of the States will not hold it derogatory from their character to be the electors.”101 Caleb Strong of Massachusetts agreed with Mr. Houston however and stated that, “[h]e thought also that the first characters in the States would not feel sufficient motives to undertake the office of Electors.”102 Further, on September 5, Charles Pinckney of South Carolina echoed similar concerns stating that, “the electors will not have sufficient knowledge of the fittest men, [and] will be swayed by an attachment to the eminent men of their respective States.”103

100 Ibid., p. 356.
101 Ibid.
102 Ibid.
103 Ibid., p. 582.
Finally, Alexander Hamilton argued in *Federalist 68*, “[i]t was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation…”\textsuperscript{104}

Such statements are also very telling in helping us better understand whether electors were intended to be delegates or trustees. For instance, if electors were intended to be delegates, why would they need to “the most respectable citizens”, “the best men”, and the “fittest men” that includes “Governours of the States”? Additionally, if electors were meant to act as delegates, why would Charles Pinckney be concerned that electors would not know the fittest candidates for president or that they may only vote for citizens from their home state? It seems unlikely that these concerns would have been raised in the Constitutional Convention—by no less than five delegates—if electors were simply meant to parrot the vote of someone else. Under a delegate system, the electors don’t need to know the most qualified men to be president and they don’t have the capability to change their vote to their state’s favorite son.

**Election and Election Law Analysis**

In addition to the primary source materials that point towards trustee electors, elections throughout the history of the United States point in this direction as well. According to FairVote—a non-profit organization that focuses on election reform\textsuperscript{105}—since the ratification of the Constitution, 167 electors acted as trustees and did not vote

\textsuperscript{104} Hamilton, “No. 68: The Mode of Electing the President,” p. 410.
for the presidential candidate that they were directed to vote for.\textsuperscript{106} In fact, twenty presidential elections experienced at least one such ‘faithless elector.’\textsuperscript{107} The election of 1872 alone had sixty-three faithless electors.\textsuperscript{108} Of note, the first faithless elector occurred in 1796 and the most recent occurred in 2016.\textsuperscript{109} Table 1 below offers a full breakdown of the number of faithless electors by election from 1789 through 2016.

**Table 1: Number of Faithless Electors by Party and Election**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Faithless Electors</th>
<th>Faithless Electors by Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>10</td>
<td>8 Democrats; 2 Republicans</td>
</tr>
<tr>
<td>2004</td>
<td>1</td>
<td>1 Democrat</td>
</tr>
<tr>
<td>2000</td>
<td>1</td>
<td>1 Democrat</td>
</tr>
<tr>
<td>1988</td>
<td>1</td>
<td>1 Democrat</td>
</tr>
<tr>
<td>1976</td>
<td>1</td>
<td>1 Republican</td>
</tr>
<tr>
<td>1972</td>
<td>1</td>
<td>1 Republican</td>
</tr>
<tr>
<td>1968</td>
<td>1</td>
<td>1 Republican</td>
</tr>
<tr>
<td>1960</td>
<td>1</td>
<td>1 Republican</td>
</tr>
<tr>
<td>1956</td>
<td>1</td>
<td>1 Democrat</td>
</tr>
<tr>
<td>1948</td>
<td>1</td>
<td>1 Democrat</td>
</tr>
<tr>
<td>1912</td>
<td>8</td>
<td>8 Republicans</td>
</tr>
<tr>
<td>1896</td>
<td>4</td>
<td>4 People's Party</td>
</tr>
<tr>
<td>1872</td>
<td>63</td>
<td>63 Democrats</td>
</tr>
<tr>
<td>1836</td>
<td>23</td>
<td>23 Democrats</td>
</tr>
<tr>
<td>1832</td>
<td>32</td>
<td>30 Democrats; 2 Republicans</td>
</tr>
<tr>
<td>1828</td>
<td>7</td>
<td>7 Democrats</td>
</tr>
<tr>
<td>1820</td>
<td>1</td>
<td>1 Democratic-Republican</td>
</tr>
<tr>
<td>1812</td>
<td>3</td>
<td>3 Federalists</td>
</tr>
<tr>
<td>1808</td>
<td>6</td>
<td>6 Democratic-Republicans</td>
</tr>
<tr>
<td>1796</td>
<td>1</td>
<td>1 Federalist</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>167</strong></td>
<td><strong>136 Democrats; 7 Democratic Republicans; 4 Federalist; 16 Republicans; 4 People's Party.</strong></td>
</tr>
</tbody>
</table>

*Source: FairVote\textsuperscript{110}*

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
With this number of faithless electors, in twenty different elections across American history, it is close to undeniable that electors were intended to act as trustees. While 167 electors across fifty-six presidential elections since 1789 may not seem like many in the grand scheme of things—especially with the 538 total electoral votes in 2016 alone\(^{111}\)—it does show that electors have always had the ability to act as trustees. If electors were intended to act as delegates, how have so many electors across twenty elections gotten away with acting as trustees? If electors acting as trustees is unconstitutional, wouldn’t affected parties have taken action to halt such practices?

Relatedly, according to FairVote data from April 2018, thirty-one states and the District of Columbia acknowledge that electors may constitutionally act as trustees. These states have done so through the passage of laws banning electors from voting for someone other than the choice of the people.\(^{112}\) For instance, two states penalize faithless electors, annul their electoral votes, and replace the elector.\(^{113}\) Three states penalize faithless electors without annulling the vote, seven states annul the vote and replace the elector without penalizing the elector, and nineteen states and the District of Columbia count the vote without taking any action against the elector.\(^{114}\) Table 2 below provides a full breakdown of this information. This data begs the question, if electors were truly intended to act as delegates, why do these states need laws on the books to help ensure

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\(^{113}\) Ibid.

\(^{114}\) Ibid.
that electors act as delegates? Why pass a law banning something that is unconstitutional?

**Table 2: Effect of State Laws Outlawing Faithless Electors**

<table>
<thead>
<tr>
<th>State</th>
<th>Penalty for Faithless Vote?</th>
<th>Action Taken When Faithless Vote Cast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Alaska</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>California</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Colorado</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Connecticut</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Delaware</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>DC</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Florida</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Hawaii</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Indiana</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Maine</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Maryland</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Michigan</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Minnesota</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Mississippi</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Montana</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Nebraska</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Nevada</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Ohio</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Oregon</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Tennessee</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
</tbody>
</table>
While helpful to explaining the intent of the framers of the Constitution, this number of faithless electors and the number of laws to prevent them offers some interesting insight into why the framers leaving out the role of electors from the Constitution is such a problem. This data alone tells us that many electors believe they are trustees and many states think they can bind them to be delegates. As such, in the event that a faithless elector swayed an election to another candidate or one of these laws prevented that from happening, there would undoubtedly be a lawsuit and a constitutional crises. While this has never happened, it is not out of the realm of possibility. The United States has seen its fair share of close presidential elections.

In 2000, George W. Bush received 271 electoral votes while Al Gore won 266 electoral votes. In 1916, Woodrow Wilson won 277 electoral votes while Charles E. Hughes won 254. In 1876 Rutherford B. Hayes won 185 electoral votes while Samuel Tilden won 184. While 2000 and 1876 were already contested elections for different

<table>
<thead>
<tr>
<th>State</th>
<th>Penalty</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah</td>
<td>No Penalty</td>
<td>Faithless Vote Cancelled; Elector Replaced</td>
</tr>
<tr>
<td>Vermont</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Virginia</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Washington</td>
<td>Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
<tr>
<td>Wyoming</td>
<td>No Penalty</td>
<td>Faithless Vote Counted</td>
</tr>
</tbody>
</table>

*Source: FairVote*115

reasons, the United States should consider itself lucky that faithless electors did not play a bigger role in these contests. In 1872—one election before 1876—the United States saw sixty-three faithless electors after Democratic candidate Hoorace Greeley died following Election Day and before electoral votes were officially counted. Faithless electors appearing just one cycle after the election that saw the largest number of faithless electors is not out of the realm of possibility. In 2000, Al Gore actually lost one electoral vote because of a faithless elector, meaning the election should have been closer than it actually was. Additionally, with Al Gore winning the popular vote, a handful of faithless electors moving to his camp would not have been an unlikely scenario. Throughout history we have seen enough faithless electors in single elections that could have swung such close elections: six faithless electors in 1808, three in 1812, seven in 1828, thirty-two in 1832, twenty-three in 1836, sixty-three in 1872, four in 1896, eight in 1912, and ten in 2016. The constitutionally undecided question of the role of electors is a crises waiting to happen.

**Conclusion**

Following this analysis, the evidence is overwhelming that framers intended electors to act as trustees and not delegates. First, the Constitutional Convention voted three times against the direct involvement of the people in the selection of the president. As such, it is unlikely that the convention would subsequently give the people a direct voice via delegate electors. Second, Convention delegates such as Elbridge Gerry, Roger

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120 Ibid.
Sherman, Charles Pinckney, George Mason, and Hugh Williamson all openly opposed an active role for the people in selecting the president. Of note, Roger Sherman, Charles Pinckney, and Hugh Williamson—who are from states that voted against direct involvement of the people in the selection of the president at least twice at the Constitutional Convention—signed the Constitution with the Electoral College as the method for electing the president. Given the strength of the objections of these three delegates and the votes of their delegations, it seems unlikely that all three of these men would have endorsed the Constitution with the people playing a strong role in the presidential election process.

Third, in statements made in state ratifying conventions or in the Federalist Papers, four signers of the Constitution stated that the people do not play a direct role in electing the president. This includes James Wilson, James Madison, Richard Dobbs Spaigt, and Alexander Hamilton. Importantly, both Wilson and Madison preferred the popular election of the president. It is unlikely that these four delegates would have made such statements if the Electoral College featured delegate electors. Additionally—to address defenders’ concerns about the reliability of statements made following the Constitutional Convention—it seems highly unlikely that all or any of these post-Constitutional Convention statements were made as a ruse to convince state conventions to ratify the document. There are simply too many likeminded statements made in the Constitutional Convention, state ratifying conventions, and Federalist Papers regarding trustee electors for this to be possible. Fourth, six Constitutional Convention delegates discussed how the system insulates electors from intrigue and corruption. This includes Gouverneur Morris, James Wilson, George Mason, Edmund Randolph, Charles
Cotesworth Pinckney, and Alexander Hamilton. If electors were intended to be delegates, these six men likely would not have discussed this feature of the Electoral College since delegates by definition can’t change their vote. Fears of intrigue and corruption would not have been a major fear under a delegate elector system.

Fifth, six delegates to the Constitutional Convention discussed the importance of having highly qualified electors. This included Hugh Williamson, William Houston, Elbridge Gerry, Caleb Strong, Charles Pinckney, and Alexander Hamilton. If electors were intended to be delegates, these conversations likely would not have taken place. The need to have the best men would not be a concern since delegate electors would merely be parroting the votes of others. Sixth and lastly, since 1789 167 electors have acted as trustees and thirty-one states have laws on the books as of April 2018 to stop electors from acting as trustees. These examples of trustee electors and actions taken to stop trustee electors show that electors have always had the ability to act as trustees which strongly implies the intended role of electors.

On their own, these six pieces of evidence may not be enough to show that electors were intended to act as trustees. However, when we combine all six, it is highly likely that framers intended for electors to act as trustees. Even so, as we have discussed above, only 167 electors since 1789 has acted as trustees. As such, the vast majority of electors act as delegates today and violate the original intent of the Constitution. At this moment, some may be asking, is this a bad thing? From 1789 to today, the United States has seen a steady movement to the more direct involvement of the people in the electoral process. This includes—but is certainly not limited to—the passage of the 15th, 17th, 19th, 24th, and 26th amendments to the United States Constitution. These amendments
respectively expanded voting rights to all races, stipulated the direct election of U.S. Senators, expanded voting rights to all genders, outlawed poll taxes, and expanded voting rights to those eighteen years of age and older.\textsuperscript{122} Noting this expansion of suffrage throughout the history of the United States, doesn’t it make sense that the people would play a greater role in their government by the near disappearance of trustee electors? The answer to this question for many is undoubtedly yes.

Even so, we must ask ourselves, why keep the Electoral College framework in place today if the overwhelming majority of electors are simply parroting the voices of the people and violating the institution’s original intent? In the mind of this author, there is no good reason. In fact, the number of faithless electors and laws preventing them show the potential volatility in a system where the Constitution does not define the role of electors. If faithless electors or laws preventing them ever swing an election, the United States will be faced with a difficult constitutional question. As such, the United States should retire the Electoral College and move to the direct election of the president via constitutional amendment. This will ensure that the voice of the people is adhered to, remove the possibility of faithless trustee electors voting against the will of the people, and avoid faithless electors swinging an election and causing a constitutional crisis.

Bibliography


CHAPTER TWO: THE POLITICAL DEVELOPMENT OF
THE ELECTORAL COLLEGE & SWING STATE BIAS
Every four years swing states dominate the minds of American voters. There are the endless town halls in Des Moines, speeches in Concord, and stops at every village from Philadelphia to Pittsburgh. It is easy to understand why this is the case. With many states safely in the Democratic camp and others entrenched in the Republican fold, the electoral votes of competitive states are crucial to winning 270 electoral votes and the presidency.

Though swing states are vital for any candidate seeking to capture the presidency, some political scientists view them as one of the many undemocratic side-effects of the Electoral College. For instance, Electoral College critics argue that the need to capture swing states’ electoral votes causes candidates to spend the vast majority of their time and money in these states, minimizing the voices of safe states in the electoral process and amplifying the voices of swing states.123

Defenders of the Electoral College, however, do not agree with these arguments. Defenders argue that under the Electoral College candidates must seek broad support across the country in order to win the presidency.124 Candidates who focus only on one section of the country or ignore safe states do so at their own peril. They further argue that since every state has a chance of being a swing state there is no bias. They

support this point by arguing that swing states change so often that there is no favoritism towards specific states.\textsuperscript{125} For instance, they point to stats like between 1960 and 1980, every state except Arizona voted for presidential candidates of both parties.\textsuperscript{126}

To give the reader a better understanding of this debate, this chapter will evaluate the political science literature surrounding the Electoral College and swing state bias. Next, this study will outline which states were considered swing states in the last three presidential elections—2008, 2012, and 2016—to show that swing states change slowly and minimally over time. In addition, we will show that candidates do not seek broad based support and overwhelmingly visit swing states over safe states. We will do this by measuring the location of presidential and vice presidential campaign visits during the 2008, 2012, and 2016 elections. We will also quantify how many citizens presidential candidates are ignoring by focusing on swing states and largely ignoring safe states. Finally, we will argue that swing states are the result of constitutional language that gives states broad power to choose how they will select their electors, which cannot be fixed without a constitutional amendment. In conclusion, we will argue that given the undemocratic nature of focusing on swing states—and entrenched constitutional language being the major cause of swing states—the Electoral College should be replaced via constitutional amendment with the direct popular vote. This will give all state voters an equally impactful vote in presidential elections.

Literature Review: Does Swing State Bias Exist?

Scholarship on the Electoral College can generally be divided into two distinct camps: those who believe the Electoral College is a dated institution, and those who defend it as a democratic institution. Specifically, within those camps, the literature generally focuses on “swing states.” Swing states are “those [states] that are closely competitive and that have large blocs of electoral votes.”\(^{127}\) To put it another way, many of the states focused on by candidates in the election cycles discussed below are considered swing states because the outcome of the states’ Electoral College votes are generally competitive, have switched from supporting one party to another, and potentially switched back over recent election cycles. As a result, candidates spend more time in these states as they focus on winning the 270 electoral votes necessary to secure the presidency.

For example, regarding concentrated visits to swing states, critics of the Electoral College note that in 2012, “President Obama made post-convention campaign visits to only eight states, while Mitt Romney in the post-nomination period campaigned in only ten.”\(^{128}\) Further, in the 2008 election, “Barack Obama campaigned in only fourteen states, representing only 33 percent of the American people, during the entire general election. John McCain campaigned in nineteen, representing 50 percent of the public.”\(^{129}\)

Similarly, in the 2000 election scholars note that:

> [a]ctive campaigning in 2000 was confined to the ‘battleground’ states where the outcome was uncertain. In terms of receiving active interest and attention from the major candidates, entire

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\(^{129}\) Edwards, *Why the Electoral College is Bad for America*, pp. 3-5.
states and regions basically sat the election out until November 7, because both sides knew from the outset which way their voters would go… Bush had no incentive to campaign in the Mountain West or the old Confederacy, nor did Gore have any reason to try and turn out the Democratic vote in the Black Belt….

Other scholars have also looked at campaign expenditures in safe versus swing states to demonstrate how biased presidential campaigns are towards swing states. For example, “in the 2004 election: of the $237 million spent on advertising during the last month of the Presidential campaign, 72% was spent in five states (Florida, Ohio, Iowa, Wisconsin, and Pennsylvania.) The candidates spent nothing at all in twenty-three states. Furthermore, sixteen states received 92% of the Presidential and Vice Presidential appearances…”

Some scholars have looked directly at television air time purchased by candidates in swing and safe states, as measured in gross rating points (GRPs). For the 2000 election, “Gore and the DNC purchased an average of 7 times as many GRPs in the battleground states, whereas Bush and the RNC had a 5:1 ratio. Overall, the average expenditure of GRP was 6 times larger in the battleground states.” They continue, “[o]n average, battleground states received 305 more GRPs than non-battleground states. Clearly, the two campaigns concentrated the bulk of their media spending in battleground states.”

Finally, critics of the Electoral College also note that many states have been non-competitive for decades and are therefore ignored by presidential candidates. For instance, “[i]n this era of highly partisan voting behavior, the identity of these spectator

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133 Ibid., pp. 711 – 712.
states has become increasingly predetermined by recent electoral outcomes. Of the nine states that received campaign attention in 2012 beyond the national norm, every single one had also been among the 13 battleground states in the 2008 election.”

Even farther back, “[s]ince 1992, for six straight elections, the same party has won in 32 states. Nineteen of these 32 states are Democratic strongholds, with a total of 242 electoral votes. Republicans have won 22 states with a total of 179 electoral votes in all four elections in 2000 to 2012 - including 13 states won in all nine elections since 1980.”

Defenders of the Electoral College disagree with these arguments. They contend that the Electoral College forces candidates to seek broad support across the nation to win 270 electoral votes. For instance, defenders note “[b]y rewarding candidates who win more states than their competitors, the Electoral College promotes the election of Presidents who have support across a broad geographic swath of America.”

Defenders cite seeking such broad support as an important reason why candidates may focus on some states rather than others. “As it stands today, presidential candidates have no incentive to run up a large margin of victory in any one state…Candidates therefore tour the nation, campaigning in all states and seeking to build a coalition of voters that will enable them to win in the most states.” They continue, “Presidential candidates do not focus as much of their efforts on the safe states that they already feel certain of winning. This is, after all one of the major goals of the Electoral College.”

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135 Ibid., p. 366.
136 Williams, "Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change," p. 188.
137 Best, The Case Against Direct Election of the President: A Defense of the Electoral College., p. 58.
Even so, defenders argue that safe states aren’t taken for granted. “Both of the major parties find their chances of winning the presidency to be considerably enhanced if they have a safe base to count on…Because of this, voters in safe states cannot be said to be ignored by the party winners who enjoy their support.”

Electoral College opponents pretend that only swing states are relevant in presidential elections, but that’s simply not true. Safe states are vitally important. Democrats do not want to go into an election without California’s electors in their back pocket, just as Republicans do not want to lose Texas. Hillary Clinton (2016) and Al Gore (2000) both lost their elections because they could not hang on to blue states…Safe states must never be taken for granted. They are bound to exact a price for such dismissiveness.

Regarding critics’ arguments that safe state voters are disenfranchised because they receive less campaign attention than swing states, defenders contend that “[t]his is a rather cavalier use of the terms ‘disenfranchised’ and ‘excluded’ because no voter is prevented from voting simply by where candidates campaign. Nor is a voter injured merely because an election is uncompetitive.”

Defenders of the Electoral College also argue that swing states change so often that there is no bias. “The point is not whether one group or state might, at one period in time, have a theoretical voting advantage. Nor should arguments for or against the Electoral College rest on the validity of such claims. Groups, voting patterns, and demographics change over time.” They provide examples of changing voting patterns, the “[f]inal results in 2016 showed that Republicans had flipped three states that had been

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140 Ross, The Indispensable Electoral College: How the Founders’ Plan Saves Our Country from Mob Rule, p. 36.
voting blue for decades: Wisconsin, Pennsylvania, and Michigan. The results mimicked a similar result in 2000 when George W. Bush flipped then safely blue West Virginia.\textsuperscript{143} They continue, “California was competitive for decades, only becoming a Democratic presidential bastion in the last 15 years, Florida was considered a safe Republican seat as late as 1996, Minnesota, battleground state today, was the only state to go Democratic during the Reagan landslide of 1984.”\textsuperscript{144} Defenders claim that safe states today could be swing states tomorrow, therefor there is no bias.

Finally, defenders argue that there are many swing states, they are diverse, and can be found all over the country:

> [E]ven in recent presidential elections, which supposedly have seen a shrinking number of ‘battleground’ states, there have been approximately twenty such states in play. Those states form a diverse group indeed, including New Hampshire, New Mexico, Pennsylvania, Michigan, Ohio, Florida, Washington, Wisconsin, Iowa, and West Virginia, to name a few. Even this short list includes small states and large, east and west, north and south, agricultural and industrial, urban and rural, and states with large minority populations.\textsuperscript{145}

Noting the hotly contested debate between critics and defenders whether the Electoral College leads to bias towards swing states, this chapter will now look at swing states from 2008, 2012, and 2016 to test the conflicting viewpoints of critics and defenders of whether swing states change over time. If they do not change significantly from election to election, we will outline any potential bias towards swing states connected to their unchanging nature. First, we will do this by comparing campaign events by presidential and vice presidential candidates in swing versus safe states in the 2008, 2012, and 2016 presidential elections. The purpose of this is to show if campaigns

\textsuperscript{143} Ross, \textit{The Indispensable Electoral College: How the Founders’ Plan Saves Our Country from Mob Rule}, p. 35.


\textsuperscript{145} Ibid., pp. 203-204.
were indeed biased towards swing states with their time and resources. If they are indeed biased with their resources, we will then map out the geographic location of swing states to see whether candidates seek broad based support or ignore large sections of the country when visiting swing states. Finally, we will outline the populations of states that are hosting campaign events and those who are not to show any additional bias. The purpose of this is to outline how many millions of Americans are being ignored by swing state bias.

**Methodology**

First, this research focuses specifically on the last three presidential elections (2008, 2012, and 2016) to give the most up-to-date information and comparison on whether swing state bias exists. As we have discussed, critics and defenders disagree over whether swing states receive a disproportionate amount of attention from candidates, whether candidates seek broad based geographic support when campaigning, and whether swing states change often. With the 2016 election decided recently, this research looks to provide an updated and comprehensive understanding of the accuracy of these claims.

To determine swing states for each election, this research relies on CNN classifications of swing states. This is a common method for determining swing states in political science literature as noted by other scholars. “CNN classifications are commonly used in literature to designate battleground status…and generally overlap considerably with other indicators.”

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found in election results following the election. Using classifications found in election results ensures that these states were considered swing states when voters actually went to the polls. This is crucial because a swing state in August before a presidential election may be a safe state by the end of the election in November. While defining swing or battleground states, in 2008 CNN highlights the changing nature of swing states and described battleground states in the following way:

What is a Battleground State? The battle for the White House is waged most fiercely in just a handful of competitive states. The ‘battleground states’ change from year to year and even over the course of the campaign, and they come in all shapes and sizes. But they have one thing in common: They could go either way on Election Day. 147

Once we determine the swing states in 2008, 2012, and 2016, we then compare the three elections to determine if there are swing states constant across the elections, whether there are new swing states from election to election, and whether the number of swing states is rising or declining. Given the significant amount of literature pointing towards the limited number of swing states, we predict that swing and safe states will not change often between these three elections and that swing states are declining in number.

Following this comparative analysis, we then turn to whether candidates disproportionately visit swing states as opposed to safe states for “campaign events” in the 2008, 2012, and 2016 presidential elections. To measure “campaign events” in each state, this research provides data from FairVote, a non-profit organization that focuses on election reform. 148 How FairVote defines “campaign events” for each election will be discussed in later sections of this chapter. Overall, we predict that candidates will host the

vast majority of their campaign events in swing states as compared to safe states. We base these predictions on the statistics provided by Electoral College critics showing significant numbers of swing state campaign events.

Noting these predictions, we also graphically map out the geographic location of swing states to provide the reader with visuals of whether swing state bias exists, whether candidates seek broad based support, and whether any geographic locations are favored. Finally, using U.S. Census data this chapter also quantifies and compares the populations of swing states, safe states, states that are hosting campaign events, and those that are not to show any additional bias.


For the 2008 presidential election, CNN classified seven states as swing states or “battleground states” in election results. In 2012, they classified eight states as swing or battleground states in election results. Finally, in 2016 they classified fourteen states as swing or battleground states in election results. Table 1 lists swing states, as defined by CNN in the 2008, 2012, and 2016 elections.

<table>
<thead>
<tr>
<th>2008</th>
<th>2012</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>Colorado</td>
<td>Arizona</td>
</tr>
<tr>
<td>Indiana</td>
<td>Florida</td>
<td>Colorado</td>
</tr>
<tr>
<td>Missouri</td>
<td>Iowa</td>
<td>Florida</td>
</tr>
<tr>
<td>Montana</td>
<td>Nevada</td>
<td>Georgia</td>
</tr>
<tr>
<td>North Carolina</td>
<td>New Hampshire</td>
<td>Iowa</td>
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</table>

As shown in Table 1, over the three elections the number of swing states have increased. This supports arguments of Electoral College defenders that swing states change and that states do have the ability to go from safe states to swing states. It also disproves this chapter’s prediction that swing states are decreasing. Further, of 2012 swing states, only Florida and Ohio were swing states in 2008. This also demonstrates that swing states have the ability change from election to election. Additionally, although all the swing states in 2012 were also swing states in 2016, 2016 had an additional six swing states (Arizona, Georgia, Michigan, North Carolina, Pennsylvania, and Utah).\footnote{\textquoteleft\textquoteleft Two-thirds of Presidential Campaign Is in Just 6 States,	extquoteright\textquoteright National Popular Vote Inc., accessed July 24, 2018, https://www.nationalpopularvote.com/campaign-events-2016.} This further portrays the changing nature of swing states. Of the eighteen states that were swing states in either 2008, 2012, or 2016, only two were swing states all three elections, seven were swing states in two of the elections, and nine were swing states in only one election. The breakdown of these results can be seen in Table 2. Noting the changing nature of swing states and that only two states were swing states across all three elections, it appears true that swing states do change from election to election and safe states today...
do have the opportunity to be swing states tomorrow. This supports the defenders’ argument that swing state bias does not exist because a safe state can be a swing state tomorrow. It also disproves this chapter’s prediction that swing states change infrequently.

Table 2: CNN Swing States Across 2008, 2012, and 2016 Presidential Elections

<table>
<thead>
<tr>
<th>Swing States in Three Elections</th>
<th>Swing States in Two Elections</th>
<th>Swing States in One Election</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Pennsylvania (2016)</td>
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<tr>
<td></td>
<td></td>
<td>Utah (2016)</td>
</tr>
<tr>
<td><strong>Total = 2</strong></td>
<td><strong>Total = 7</strong></td>
<td><strong>Total = 9</strong></td>
</tr>
</tbody>
</table>

Even so, the same thirty-two states and the District of Columbia were not considered swing states in 2008, 2012, or 2016 (To see the list of thirty-two states, please see Table 3 below). Meaning, nearly 65% of states were considered safe states for all three elections. In 2016, the election with the most swing states out of the three, nearly 73% of states were considered safe states. In 2008, the election with the lowest amount of swing states of the three, over 86% of states were considered safe states. So while states do have the ability to become swing states, it appears that very few of them change from election to election and many have been stuck as safe states for years.

When we breakdown the thirty-two safe states and the District of Columbia in all three elections, except Maine and Nebraska who award their electoral votes based on the winner of congressional districts, all of these states have awarded all their electoral votes
to the same political party over the course of these three elections. Please see Table 3 for a breakdown. Although swing states have the ability to change, supporting the arguments of defenders, it appears that they don’t change very often, which supports the arguments of critics.

**Table 3: Winning Party in States that Were Safe States in 2008, 2012, and 2016**

<table>
<thead>
<tr>
<th>State Name</th>
<th>2008</th>
<th>2012</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Alaska</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>California</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>Delaware</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>Idaho</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Illinois</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>Kansas</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
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<tr>
<td>Louisiana</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Maine</td>
<td>Democratic</td>
<td>Democrat</td>
<td>3 Dem; 1 Rep*</td>
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<tr>
<td>Maryland</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
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<tr>
<td>Massachusetts</td>
<td>Democrat</td>
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<tr>
<td>Minnesota</td>
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<td>Democrat</td>
<td>Democrat</td>
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<tr>
<td>Mississippi</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1 Dem; 4 Rep*</td>
<td>Republican</td>
<td>Republican</td>
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<tr>
<td>New Jersey</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
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<tr>
<td>New Mexico</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
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<tr>
<td>New York</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
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<tr>
<td>Oklahoma</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
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<tr>
<td>Oregon</td>
<td>Democrat</td>
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<td>South Dakota</td>
<td>Republican</td>
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<td>Tennessee</td>
<td>Republican</td>
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<tr>
<td>Texas</td>
<td>Republican</td>
<td>Republican</td>
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<tr>
<td>Vermont</td>
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<td>Washington</td>
<td>Democrat</td>
<td>Democrat</td>
<td>Democrat</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Republican</td>
<td>Republican</td>
<td>Republican</td>
</tr>
</tbody>
</table>
Above we have portrayed that swing states change over time and that all states have the opportunity to become swing states, however swing states don’t change frequently (noting the thirty-two states and the District of Columbia that have been safe states the last three elections). As such, we now turn to defenders’ arguments that swing states are diverse. As discussed above, defenders claim that swing states are made up of states that are small and large, eastern and western, northern and southern, agricultural and industrial, urban and rural, and states with large minority populations. Defenders make this point to portray that no groups are disadvantaged by the Electoral College even if some states may be. If defenders’ claims are not validated, it will serve as a blow to an important defense made in support of the Electoral College.

To test their claim, we have created a map of the United States where swing states are color coded. States that were swing states in all three of the last elections are color coded orange. States that were swing states in two of the last three elections are color coded purple. Finally, states that were swing states in at least one of the last three elections are color coded green. The purpose of the map is to provide the reader with a visual of whether these states are diverse in the way that defenders suggest. When looking at the map (Figure 1), defenders are correct. One could make a case that small states, large states, eastern states, western states, northern states, southern states,

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agricultural states, industrial states, urban states, rural states, and states with large minority populations are all represented.

**Figure 1: CNN Swing States Across 2008, 2012, and 2016 Presidential Elections**

Even so, one can look at the map and see that for each of these types of states discussed from small states to states with large minority populations, each of these types of states are also found among safe states. So while swing states are diverse in many ways and do support the argument that candidates are seeking broad based support when they chase swing state electoral votes, the same is true of safe state diversity. Candidates seek diverse broad base support when they focus on swing states, but at the same time they ignore states in the same diverse and broad manner. What is most striking about the map above (Figure 1) is the vast amount of states that have never been considered swing
states in 2008, 2012, and 2016, of which there are thirty-two and the District of Columbia.

Of note, one could make the case that swing states are mostly made up of highly populated states. For instance, in 2008, 2012, and 2016 the vast majority of swing states were among the top twenty-five most populated states. In 2008, five of seven swing states were among the top twenty-five most populated states.\textsuperscript{154} Five of eight swing states in 2012 were among the top twenty-five most populated states as were ten of fourteen swing states in 2016.\textsuperscript{155} Please see Table 4 for a breakdown of these results. Even so, of the five most populated states in the union in 2008, 2012, and 2016—California, Texas, New York, Florida, and Illinois\textsuperscript{156}—only Florida is considered a swing state in any of these elections. It is hard to argue that highly populated states are over represented among swing states when four of the top five populated states are considered safe states. Given this, it is clear that the population of a state will not determine whether a state is a swing state or not.

\begin{enumerate}
\end{enumerate}
Table 4: Population Rank of Swing States in 2008, 2012, and 2016\(^{157}\)

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Florida</td>
<td>4</td>
<td>22</td>
<td>Arizona</td>
</tr>
<tr>
<td>Indiana</td>
<td>16</td>
<td>Florida</td>
<td>Colorado</td>
</tr>
<tr>
<td>Missouri</td>
<td>18</td>
<td>Iowa</td>
<td>Florida</td>
</tr>
<tr>
<td>Montana</td>
<td>44</td>
<td>Nevada</td>
<td>Georgia</td>
</tr>
<tr>
<td>North Carolina</td>
<td>10</td>
<td>New Hampshire</td>
<td>Iowa</td>
</tr>
<tr>
<td>North Dakota</td>
<td>48</td>
<td>Ohio</td>
<td>Michigan</td>
</tr>
<tr>
<td>Ohio</td>
<td>7</td>
<td>Virginia</td>
<td>Nevada</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wisconsin</td>
<td>New Hampshire</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total Swing States = 7</td>
<td>States 1-25 = 5</td>
<td>Total Swing States = 8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total Swing States = 8</td>
<td>States 1-25 = 5</td>
<td>Total Swing States = 14</td>
</tr>
</tbody>
</table>

*The state with highest population will receive the population rank of 1. Florida had the fourth highest population in 2008 and received the population rank of 4.*

While we will discuss potential bias towards highly populated states later in the chapter, it is also important to ask whether candidates are campaigning equally in safe versus swing states. It is hard to imply bias unless being a swing state buys their residents additional attention from candidates. As such, we now turn to whether candidates spend more time and resources in swing states than safe states during the last three presidential elections. Campaign events is an important variable to measure potential swing state bias because it allows us to test critics’ claim that candidates are ignoring a significant amount of the country while running for president. Noting that each campaign only has a

presidential and vice presidential candidate to hold candidate events in fifty states over
the course of the few months following the major party national conventions, where the
next potential leaders of the country spend their limited time emphasizes the importance
of the states they are holding campaign events in during the election. In turn, it also
emphasizes which states are not as important in the election.

**Data Presentation: Candidate Event Locations in 2008, 2012, and 2016**

When looking at FairVote data on campaign appearances in states as reported by
National Popular Vote Inc., the vast majority of campaign events are taking place in
swing states.\(^{158}\) Starting with 2016 (since 2008 will prove to be an outlier from 2012 and
2016 in many ways which we will discuss further below) of the 399 campaign events of
both parties’ presidential and vice presidential candidates following the 2016 Democratic
and Republican National Conventions, 379 of them were in swing states.\(^{159}\) To put it
another way, 95% of campaign events in 2016 were in swing states. Of note, 2016 swing
states only account for 112.6 million people of the 323.1 million people in the United
States in 2016, or 34.8% of the U.S. population.\(^{160}\) Meaning, 95% of campaign events in
2016 were held in states where only 34.8% of the population lives. In regards to safe
states, 5% of all campaign events in 2016 were held in states where 65.2% of the
population lives. Please see Figure Two and Figure Three below for a breakdown of these
results.

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\(^{158}\) “Two-thirds of Presidential Campaign Is in Just 6 States,” *National Popular Vote Inc.*,

\(^{159}\) Ibid.

\(^{160}\) “Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and
Puerto Rico: April 1, 2010 to July 1, 2018,” U.S. Census Bureau, https://www.census.gov/newsroom/press-
Of the remaining twenty events not in swing states, five were strategically in Nebraska and Maine where electoral votes are awarded based on the popular vote in congressional districts.\textsuperscript{161} In 2016 all Nebraska electoral votes went to Donald Trump, however, Maine split their electoral votes between the Republican and Democratic candidates.\textsuperscript{162} Of interest, Florida, North Carolina, Pennsylvania, and Ohio received 228 of the 399 candidate events, or 57\% of campaign events.\textsuperscript{163} Table 5 shows a breakdown of 2016 campaign events by state.

\textbf{Table 5: 2016 Presidential and Vice Presidential Campaign Events by State*}

<table>
<thead>
<tr>
<th>State (Swing State)</th>
<th>Campaign Events 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida (Swing State)</td>
<td>71</td>
</tr>
<tr>
<td>North Carolina (Swing State)</td>
<td>55</td>
</tr>
<tr>
<td>Pennsylvania (Swing State)</td>
<td>54</td>
</tr>
<tr>
<td>Ohio (Swing State)</td>
<td>48</td>
</tr>
<tr>
<td>Virginia (Swing State)</td>
<td>23</td>
</tr>
<tr>
<td>Michigan (Swing State)</td>
<td>22</td>
</tr>
<tr>
<td>Iowa (Swing State)</td>
<td>21</td>
</tr>
<tr>
<td>New Hampshire (Swing State)</td>
<td>21</td>
</tr>
<tr>
<td>Colorado (Swing State)</td>
<td>19</td>
</tr>
<tr>
<td>Nevada (Swing State)</td>
<td>17</td>
</tr>
<tr>
<td>Wisconsin (Swing State)</td>
<td>14</td>
</tr>
<tr>
<td>Arizona (Swing State)</td>
<td>10</td>
</tr>
<tr>
<td>Georgia (Swing State)</td>
<td>3</td>
</tr>
<tr>
<td>Maine</td>
<td>3</td>
</tr>
<tr>
<td>New Mexico</td>
<td>3</td>
</tr>
<tr>
<td>Indiana</td>
<td>2</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2</td>
</tr>
<tr>
<td>Missouri</td>
<td>2</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2</td>
</tr>
<tr>
<td>California</td>
<td>1</td>
</tr>
</tbody>
</table>


\textsuperscript{162} Ibid.

<table>
<thead>
<tr>
<th>State</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>1</td>
</tr>
<tr>
<td>Illinois</td>
<td>1</td>
</tr>
<tr>
<td>Mississippi</td>
<td>1</td>
</tr>
<tr>
<td>Texas</td>
<td>1</td>
</tr>
<tr>
<td>Utah (Swing State)</td>
<td>1</td>
</tr>
<tr>
<td>Washington</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total Safe State Events</strong></td>
<td>20</td>
</tr>
<tr>
<td><strong>Total Swing State Events</strong></td>
<td>379</td>
</tr>
<tr>
<td><strong>Total Campaign Events</strong></td>
<td>399</td>
</tr>
</tbody>
</table>

*In 2016, *'Campaign events’ are defined here as public events in which a candidate is soliciting the state’s voters (e.g., rallies, speeches, fairs, town hall meetings). This count of "campaign events” does not include visits to a state for the sole purpose of conducting a private fund-raising event, participating in a presidential debate or media interview in a studio, giving a speech to an organization’s national convention, attending a non-campaign event (e.g., the Al Smith Dinner in New York City), visiting the campaign’s own offices in a state, or attending a private meeting.*'*164

These trends continue for the 2012 presidential election. According to FairVote, 243 of the 253 campaign events held by the two parties’ presidential and vice presidential candidates following the Democratic National Convention were held in swing states (the Democratic National Convention closely followed the Republican Convention).165 This represents 96% of campaign events. Of concern, the combined population of 2012 swing states amounts to 57.5 million people of 313.9 million people, or 18.3% of the U.S. population in 2012.166 As such, states with 18.3% of the population received 96% of campaign events. In regards to safe states, 4% of all campaign events in 2012 were held

in states where 81.7% of the populations lives. Please see Figure Two and Figure Three below for a breakdown of these results.

The top three swing states, Ohio, Florida, and Virginia received 149 events or 59% percent of the campaign events. Please see Table 6 below for a breakdown of the 2012 campaign events (Table 9 below compares campaign events across the 2008, 2012, and 2016 elections).

Table 6: 2012 Presidential and Vice Presidential Candidate Events by State*

<table>
<thead>
<tr>
<th>State</th>
<th>Campaign Events 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio (Swing State)</td>
<td>73</td>
</tr>
<tr>
<td>Florida (Swing State)</td>
<td>40</td>
</tr>
<tr>
<td>Virginia (Swing State)</td>
<td>36</td>
</tr>
<tr>
<td>Iowa (Swing State)</td>
<td>27</td>
</tr>
<tr>
<td>Colorado (Swing State)</td>
<td>23</td>
</tr>
<tr>
<td>Wisconsin (Swing State)</td>
<td>18</td>
</tr>
<tr>
<td>Nevada (Swing State)</td>
<td>13</td>
</tr>
<tr>
<td>New Hampshire (Swing State)</td>
<td>13</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>5</td>
</tr>
<tr>
<td>North Carolina</td>
<td>3</td>
</tr>
<tr>
<td>Michigan</td>
<td>1</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
</tr>
<tr>
<td>Total Safe State Events</td>
<td>10</td>
</tr>
<tr>
<td>Total Swing State Events</td>
<td>243</td>
</tr>
<tr>
<td><strong>Total Campaign Events</strong></td>
<td><strong>253</strong></td>
</tr>
</tbody>
</table>

*For 2012, “A campaign event is an event that is meant to woo voters in the location of the event in particular. For example, a rally or town hall is a campaign event, but a national television appearance or fundraiser is not.” 167 “The Presidential Tracker provides information on where the candidates have been holding campaign events since the end of the Democratic National Convention.” 168

The 2008 presidential election also fits this pattern, however to a significantly lesser extent. Of the 249 campaign events held by the presidential and vice presidential

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168 Ibid.
candidates following the Republican National Convention (which followed the Democratic Convention), 104 or nearly 42% were held in swing states.\textsuperscript{169} Please see Table 7 below for a breakdown of the 2012 campaign.

\textbf{Table 7: 2008 Presidential and Vice Presidential Candidate Events by State*}

<table>
<thead>
<tr>
<th>State</th>
<th>Campaign Events 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio (Swing State)</td>
<td>35</td>
</tr>
<tr>
<td>Florida (Swing State)</td>
<td>30</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>29</td>
</tr>
<tr>
<td>Virginia</td>
<td>21</td>
</tr>
<tr>
<td>Colorado</td>
<td>17</td>
</tr>
<tr>
<td>Missouri (Swing State)</td>
<td>16</td>
</tr>
<tr>
<td>North Carolina (Swing State)</td>
<td>13</td>
</tr>
<tr>
<td>Michigan</td>
<td>12</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>11</td>
</tr>
<tr>
<td>Indiana (Swing State)</td>
<td>10</td>
</tr>
<tr>
<td>New York</td>
<td>10</td>
</tr>
<tr>
<td>Nevada</td>
<td>9</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>9</td>
</tr>
<tr>
<td>New Mexico</td>
<td>9</td>
</tr>
<tr>
<td>Iowa</td>
<td>8</td>
</tr>
<tr>
<td>Arizona</td>
<td>2</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>1</td>
</tr>
<tr>
<td>Illinois</td>
<td>1</td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
</tr>
<tr>
<td>Maryland</td>
<td>1</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
</tr>
<tr>
<td>Tennessee</td>
<td>1</td>
</tr>
<tr>
<td>Texas</td>
<td>1</td>
</tr>
<tr>
<td>West Virginia</td>
<td>1</td>
</tr>
<tr>
<td>Montana (Swing State)</td>
<td>0</td>
</tr>
<tr>
<td>North Dakota (Swing State)</td>
<td>0</td>
</tr>
<tr>
<td>Total Safe State Events</td>
<td>145</td>
</tr>
<tr>
<td>Total Swing State Events</td>
<td>104</td>
</tr>
<tr>
<td>Total Campaign Events</td>
<td>\textbf{249}</td>
</tr>
</tbody>
</table>

*Above “is a listing of the times the major party nominees for president and vice president visited each state from September 5, the day after the Republican presidential convention, to November 4...Some events--particularly fundraisers--may not be included in the data, as they are often unannounced. Visits to states not included in the chart include Sarah Palin's two visits to her home state of Alaska, Joe Biden's four visits to his home state of Delaware, and the visits by each candidate corresponding to the debates in Mississippi, Missouri, Tennessee, and New York.”

Of note, the combined population of 2008 swing states amounts to 52.9 million people of the 304 million people in the United States, or 17.4% of the U.S. population in 2008. As such, 42% of candidate events were held in states that represent just 17.4% of the U.S. population. In regards to safe states, 58% of all campaign events in 2008 were held in states where 82.6% of the populations lives. Please see Figure Two and Figure Three below for a breakdown of these results.

Figure 2: Percentage of Candidate Events Held in Swing States Compared to Percentage of U.S. Population Living in Swing States in 2008, 2012, and 2016

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Figure 3: Percentage of Candidate Events Held in Safe States Compared to Percentage of U.S. Population Living in Safe States in 2008, 2012, and 2016


<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>18,328,000</td>
<td>Colorado</td>
<td>5,540,921</td>
<td>Arizona</td>
<td>6,945,452</td>
</tr>
<tr>
<td>Indiana</td>
<td>6,377,000</td>
<td>Florida</td>
<td>19,326,230</td>
<td>Colorado</td>
<td>5,540,921</td>
</tr>
<tr>
<td>Missouri</td>
<td>5,912,000</td>
<td>Iowa</td>
<td>3,076,097</td>
<td>Florida</td>
<td>20,629,982</td>
</tr>
<tr>
<td>Montana</td>
<td>967,000</td>
<td>Nebraska</td>
<td>2,744,566</td>
<td>Georgia</td>
<td>10,304,763</td>
</tr>
<tr>
<td>North Carolina</td>
<td>9,222,000</td>
<td>New Hampshire</td>
<td>1,323,962</td>
<td>Iowa</td>
<td>3,131,785</td>
</tr>
<tr>
<td>North Dakota</td>
<td>641,000</td>
<td>Ohio</td>
<td>11,548,369</td>
<td>Michigan</td>
<td>9,951,890</td>
</tr>
<tr>
<td>Ohio</td>
<td>11,486,000</td>
<td>Virginia</td>
<td>8,185,229</td>
<td>Nevada</td>
<td>2,919,772</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>5,719,855</td>
<td>North Carolina</td>
<td>10,156,679</td>
<td>Ohio</td>
<td>11,635,003</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>12,783,538</td>
<td>Utah</td>
<td>3,042,613</td>
<td>Virginia</td>
<td>8,410,946</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>5,772,958</td>
<td>Combined Swing States = 7</td>
<td>Combined Population = 57.5 out</td>
<td>Combined Swing States = 14</td>
<td>Combined Population = 112.6 out</td>
</tr>
</tbody>
</table>

*Source: FairVote and U.S. Census Bureau*
<table>
<thead>
<tr>
<th>Source: U.S. Census Bureau</th>
</tr>
</thead>
<tbody>
<tr>
<td>While 42% of events being held in seven states in 2008 is significant (though much less so than 96% in 2012 and 95% in 2016), it appears that candidates and their campaigns may have thought some states with high event amounts were more competitive than CNN believed and results eventually indicated. It is also possible that competitive states became less competitive as the campaign moved closer to Election Day. For instance, the Democratic candidates had nine events in Pennsylvania while the Republican candidates had twenty. Despite the high number of campaign events, Barack Obama won the state by 11%. In Colorado where Barack Obama won by 9%, the parties nearly evenly split the seventeen events (nine Republican events and eight Democratic events). Michigan falls into the same category with twelve events nearly evenly split between the candidates (seven Republican events and five Democratic events) yet Barack Obama won the state by 16%. For Wisconsin, Republicans had nine out of eleven events although Barack Obama won the state by 13%. It’s also</td>
</tr>
</tbody>
</table>

---

176 Ibid.  
very interesting that ten events were held in New York (six by the McCain campaign), yet Barack Obama won the state by 27%.

These campaign events are unlike what we have seen and discussed so far for the 2012 and 2016 elections. However, it is beyond the scope of this study to judge campaign decisions. The campaigns had their reasons for such resource allocation. They do not display the same level of swing state bias as 2012 and 2016, however, 104 campaign events out of 249 to seven swing states is significant. Further, when we add the number of campaign events in states over the three elections, it is clear that swing states were significantly focused on. Of the 901 campaign events of the presidential and vice presidential candidates following both the major party conventions in the three elections, 726 events were held in swing states. This represents over 80% of campaign events over three elections in swing states only. Please see Table 9 for a breakdown of these results. Further, of these 901 campaign events, only forty-four were made to states that were safe states in 2008, 2012, and 2016. That represents a little less than 5% of the campaign events across three elections. Please see Table 10 for a breakdown of these results. Such results contradict defenders’ arguments that, “[s]afe states must never be taken for granted. They are bound to exact a price for such dismissiveness.” They also confirm this chapter’s prediction that the vast majority of campaign events are held in swing states. Given these numbers, it appears that candidates have taken and can take safe states for granted when it comes to campaign events. For at least 2008, 2012, and 2016, they

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have been getting away with near dismissiveness of these states without losing electoral votes.

Table 9: 2008, 2012, and 2016 Presidential and Vice Presidential Candidate Events by State

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>OH (SS)</td>
<td>35</td>
<td>OH (SS)</td>
<td>73</td>
<td>FL (SS)</td>
<td>71</td>
</tr>
<tr>
<td>FL (SS)</td>
<td>30</td>
<td>FL (SS)</td>
<td>40</td>
<td>NC (SS)</td>
<td>55</td>
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<tr>
<td>PA</td>
<td>29</td>
<td>VA (SS)</td>
<td>36</td>
<td>PA (SS)</td>
<td>54</td>
</tr>
<tr>
<td>VA</td>
<td>21</td>
<td>IA (SS)</td>
<td>27</td>
<td>OH (SS)</td>
<td>48</td>
</tr>
<tr>
<td>CO</td>
<td>17</td>
<td>CO (SS)</td>
<td>23</td>
<td>VA (SS)</td>
<td>23</td>
</tr>
<tr>
<td>MO (SS)</td>
<td>16</td>
<td>WI (SS)</td>
<td>18</td>
<td>MI (SS)</td>
<td>22</td>
</tr>
<tr>
<td>NC (SS)</td>
<td>13</td>
<td>NV (SS)</td>
<td>13</td>
<td>IA (SS)</td>
<td>21</td>
</tr>
<tr>
<td>MI</td>
<td>12</td>
<td>NH (SS)</td>
<td>13</td>
<td>NH (SS)</td>
<td>21</td>
</tr>
<tr>
<td>WI</td>
<td>11</td>
<td>PA</td>
<td>5</td>
<td>CO (SS)</td>
<td>19</td>
</tr>
<tr>
<td>IN (SS)</td>
<td>10</td>
<td>NC</td>
<td>3</td>
<td>NV (SS)</td>
<td>17</td>
</tr>
<tr>
<td>NY</td>
<td>10</td>
<td>MI</td>
<td>1</td>
<td>WI (SS)</td>
<td>14</td>
</tr>
<tr>
<td>NV</td>
<td>9</td>
<td>MN</td>
<td>1</td>
<td>AZ (SS)</td>
<td>10</td>
</tr>
<tr>
<td>NH</td>
<td>9</td>
<td></td>
<td></td>
<td>GA (SS)</td>
<td>3</td>
</tr>
<tr>
<td>NM</td>
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<td></td>
<td>ME</td>
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<td>IA</td>
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<td>AZ</td>
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<tr>
<td>ME</td>
<td>1</td>
<td></td>
<td></td>
<td>NE</td>
<td>2</td>
</tr>
</tbody>
</table>
### Table 10: Campaign Events by Presidential and Vice Presidential Candidates in States that were Safe States in 2008, 2012, and 2016

<table>
<thead>
<tr>
<th>State Name</th>
<th>2008</th>
<th>2012</th>
<th>2016</th>
<th>Total Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Delaware</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>1</td>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
<td></td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Maryland</td>
<td></td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Massachusetts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>
What is even more compelling, is the number of states that have received no-campaign events, one campaign event, or two campaign events total across three elections. The map below portrays exactly this (Figure 4). States that have been color coded brown have received no campaign events from candidates following the major party conventions in the 2008, 2012, or 2016 presidential elections. States color coded green received only one campaign event total across the three elections. States that are color coded purple received only two candidate events total across the three elections. Finally, states that are color coded gray received three or more campaign events across the three elections.

Of note, according to United States Census data, states that received no candidate events in these elections (brown states) had a combined population of 58.8 million people
in July 2018.\textsuperscript{183} States with only candidate event (green states) had a combined population of 72.1 million people in July 2018. Finally, states with two candidate events in these election years had 43.4 million people as of July 2018. Among states with zero, one, or two candidate events (brown, green, and purple states) across these elections, their combined populations equaled 174.3 million people as of July 2018.\textsuperscript{184} While population numbers would have been slightly different in each state in 2008, 2012, and 2016, these July 2018 numbers still display how significant this issue is. Roughly 174.3 million out of over 327 million people were ignored by presidential and vice presidential candidates in each of these three elections.\textsuperscript{185}

**Figure 4: Campaign Events by Presidential and Vice Presidential Candidates in 2008, 2012, and 2016 Elections**


\textsuperscript{184} Ibid.

\textsuperscript{185} Ibid.
When looking at the map, the significant amount of gray shows that candidates across three elections have indeed collectively focused at least some attention on a broad swath of the country. This supports the argument of defenders of the Electoral College that candidates seek broad based support under the Electoral College. However, the significant amount of brown, green, and purple again shows that candidates are also ignoring or nearly ignoring a broad portion of the country when they campaign for president. Twenty states have never hosted an event for a presidential or vice presidential candidate in all three elections, nine states have hosted one event across all three elections, and three states have hosted two events across all three elections. Other than Nebraska, for every state that has received either zero, one, or two events across the three elections, such states awarded all their electoral votes to the same political party for those three elections. This supports critics’ arguments that candidates ignore many states and can get away with it without fear of losing electoral votes. Further, this contradicts the arguments of defenders of the Electoral College that safe states must never be taken for granted or they will exact a price for such dismissiveness.

Additionally, when looking at the location of campaign events across these three elections, one could make the case that large swing states are focused on more heavily than small swing states. This is a logical assumption. Swing states are competitive by definition and it would make sense for candidates to focus their time on competitive states with the most electoral votes to help them get closer to 270 electoral votes and the presidency. Even so, there is not a perfect correlation on this subject. Across the three elections, the candidates did not always visit the most populated swing states the most. For instance, in 2016 Georgia had the fourth highest population and the eleventh most
candidate events. Additionally, Iowa had the ninth most people among 2016 swing states but received the sixth most visits from candidates. This same issue applies for 2012 and 2008. In 2012 Wisconsin had the fourth highest population among swing states but received the sixth most campaign events. Iowa also received the fourth most events despite having the sixth highest population among swing states. In 2008, Missouri had the fifth highest population among swing states but had the third most events. This strongly shows that candidates are focusing on more than highly populated swing states. They are focusing on states that they think they can win.

Table 11: 2016 Swing State Population Rank Compared to Campaign Event Rank

<table>
<thead>
<tr>
<th>2016</th>
<th>Population Rank</th>
<th>Population</th>
<th>Events Ranks</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>1</td>
<td>20,629,982</td>
<td>1</td>
<td>71</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2</td>
<td>12,783,538</td>
<td>3</td>
<td>54</td>
</tr>
<tr>
<td>Ohio</td>
<td>3</td>
<td>11,635,003</td>
<td>4</td>
<td>48</td>
</tr>
<tr>
<td>Georgia</td>
<td>4</td>
<td>10,304,763</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>North Carolina</td>
<td>5</td>
<td>10,156,679</td>
<td>2</td>
<td>55</td>
</tr>
<tr>
<td>Michigan</td>
<td>6</td>
<td>9,951,890</td>
<td>5</td>
<td>22</td>
</tr>
<tr>
<td>Arizona</td>
<td>7</td>
<td>6,945,452</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Colorado</td>
<td>8</td>
<td>5,540,921</td>
<td>8</td>
<td>19</td>
</tr>
<tr>
<td>Iowa</td>
<td>9</td>
<td>3,131,785</td>
<td>6</td>
<td>21</td>
</tr>
<tr>
<td>Nevada</td>
<td>10</td>
<td>2,919,772</td>
<td>9</td>
<td>17</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>11</td>
<td>1,342,373</td>
<td>7</td>
<td>21</td>
</tr>
</tbody>
</table>

*Source: Fairvote and U.S. Census Bureau
*The state with the highest population received a population rank of 1
*The state with the most events received a events rank of 1

187 Ibid.
188 Ibid.
189 Ibid.
Table 12: 2012 Swing State Population Rank Compared to Campaign Event Rank

<table>
<thead>
<tr>
<th>2012</th>
<th>Population Rank</th>
<th>Population</th>
<th>Events Ranks</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>1</td>
<td>19,326,230</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>Ohio</td>
<td>2</td>
<td>11,548,369</td>
<td>1</td>
<td>73</td>
</tr>
<tr>
<td>Virginia</td>
<td>3</td>
<td>8,185,229</td>
<td>3</td>
<td>36</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>4</td>
<td>5,719,855</td>
<td>6</td>
<td>18</td>
</tr>
<tr>
<td>Colorado</td>
<td>5</td>
<td>5,540,921</td>
<td>5</td>
<td>23</td>
</tr>
<tr>
<td>Iowa</td>
<td>6</td>
<td>3,076,097</td>
<td>4</td>
<td>27</td>
</tr>
<tr>
<td>Nevada</td>
<td>7</td>
<td>2,744,566</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>8</td>
<td>1,323,962</td>
<td>8</td>
<td>13</td>
</tr>
</tbody>
</table>

*Source: Fairvote and U.S. Census Bureau

Table 13: 2012 Swing State Population Rank Compared to Campaign Event Rank

<table>
<thead>
<tr>
<th>2008</th>
<th>Population Rank</th>
<th>Population</th>
<th>Events Ranks</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>1</td>
<td>18,328,000</td>
<td>2</td>
<td>30</td>
</tr>
<tr>
<td>Ohio</td>
<td>2</td>
<td>11,486,000</td>
<td>1</td>
<td>35</td>
</tr>
<tr>
<td>North Carolina</td>
<td>3</td>
<td>9,222,000</td>
<td>4</td>
<td>13</td>
</tr>
<tr>
<td>Indiana</td>
<td>4</td>
<td>6,377,000</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>Missouri</td>
<td>5</td>
<td>5,912,000</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>Montana</td>
<td>6</td>
<td>967,000</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>North Dakota</td>
<td>7</td>
<td>641,000</td>
<td>7</td>
<td>0</td>
</tr>
</tbody>
</table>

*Source: Fairvote and U.S. Census Bureau

Development of Swing States

Unfortunately, the path to fixing such significant swing state bias is difficult because swing states are the direct result of language found in the Constitution. Article II Section 1 Clause II reads that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...”

Since the implementation of the Constitution, the states have interpreted this clause to

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191 US Constitution, art. 2, sec, 1, cl. 2.
mean that they can use any method they like to select their electors. The state legislatures believed that they could allow their governor, the people, their supreme court, or even themselves to select members of the Electoral College. This point has later been supported in *McPherson v. Blacker*—and later affirmed in *Bush v. Gore*—that state legislatures have plenary power when it comes to choosing how they will select their electors.  

As such, in the first presidential elections, the states used many different methods to select their electors. In 1788, four state legislatures chose electors themselves, three state legislatures allowed the people to vote for every elector seat in the state through general ticket popular elections where all electors run on a statewide basis, and the state of Virginia popularly elected electors in districts. It addition to these methods, Delaware allowed voters to choose “one elector, who had to reside in his county, but the top three vote recipients statewide (not the top recipient from each county) became the state’s electors.” In Massachusetts, the state legislature would select the electors from the top two vote getters in House of Representatives districts. They would also simply appoint an elector for each Senate district. This diversity of methods for selecting electors continued for a number of presidential elections. 

In 1792, nine state legislatures selected their electors themselves, three awarded their electors through general ticket elections, three held popular elections by congressional district, and Massachusetts continued using a combination of these

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195 Ibid. 1563-1564.
methods to select their electors.\textsuperscript{196} By 1824, six state legislatures selected their electors themselves, twelve used general ticket popular elections, five used popular elections by congressional district, and two used a combination of these methods.\textsuperscript{197} However, by the 1830s the political parties widely moved to choosing electors via state wide general ticket popular vote.\textsuperscript{198}

In 1832, twenty-two out of twenty-four states relied on general ticket direct election of electors and only Maryland was utilizing district based popular elections to choose electors.\textsuperscript{199} Additionally, only the South Carolina legislature was appointing their electors in 1832 while all other states relied on popular election of some kind.\textsuperscript{200} There are a few reasons for this shift. First as the democratization of America intensified in the Jacksonian era, it became a political liability to not select electors via the popular vote. As noted by Pierce and Longley, “By the 1820s, democratic ideals had advanced so far in the United States that the people of most states were simply unwilling to leave the crucial choice of presidential electoral in the hands of state legislatures.” \textsuperscript{201}

In addition, the general ticket popular vote offered similar benefits to that of legislative appointment of electors to the dominant party in a state. Elections for all electors on a statewide basis in a solidly Democratic or Republican state will ensure all the electoral votes go to the dominant party, with the exception of major swing elections. Pierce and Langley continue that, “The adoption of the general ticket in some states,

\textsuperscript{196} Pierce and Longley, The People’s President: The Electoral College in American History and the Direct Vote Alternative, pp. 248 - 249.
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid.
\textsuperscript{199} Williams, "Why the National Popular Vote Compact is Unconstitutional," p. 1571.
\textsuperscript{200} Ibid., p. 1570.
\textsuperscript{201} Pierce and Longley, The People’s President: The Electoral College in American History and the Direct Vote Alternative, p. 46.
moreover, virtually compelled the others to follow suit so that their strength in the Electoral College would not be diluted.”

As such, with the need for democratization but also to heighten the number of electoral votes that a state is providing their dominant party, the state wide general ticket became the common practice.

As such, the general language in Article II Section I Clause II has allowed political parties to utilize it in such a way that benefits the dominant parties of states but does not benefit voters of the state or democracy. In state elections thousands to millions of voters go to the polls, but voters who vote for the electors of the other party are left unrepresented. As such, presidential candidates do not need to campaign heavily in extremely partisan states with general ticket electors since the odds of the minority party winning a statewide election are minimal. This in turn has caused candidates to focus significantly on competitive swing states. Unfortunately, since swing states are a direct result of language found in the Constitution, there is not an easy fix for swing state bias.

**Conclusion**

Following our analysis of the arguments of critics and defenders of the Electoral College and whether swing state bias exists in American presidential elections, it is clear that swing state bias does exist to a certain extent. While examining the 2008, 2012, and 2016 presidential elections, we have shown that all states theoretically have the opportunity to become swing states. Further, we have shown that over the last three elections swing states are increasing, disproving this chapter’s prediction that swing

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states are decreasing and that they do not change often over time. Noting that eighteen states were swing states in at least one of the three elections examined, though only two were swing states in all three elections, defenders are correct that swing states do indeed change over time. Conversely, thirty-two states and the District of Columbia were not considered swing states in 2008, 2012, or 2016, which makes defenders’ assertion that ‘a safe state today could be a swing state tomorrow’ seem unlikely. It also supports the arguments of critics that many states have been stuck as safe states for the last few elections at least.

Further, supporting the arguments of defenders, we portrayed that swing states are geographically diverse and are made up of small states, large states, eastern states, western states, northern states, southern states, agricultural states, industrial states, urban states, rural states, and states with large minority populations. Additionally, swing states do not overwhelmingly appear to be made up of large states. Even so, we have also displayed that safe states are equally diverse and largely ignored by presidential candidates, which lessens defenders’ arguments.

Finally, we have shown that candidates are indeed hosting the vast majority of their campaign events in swing states with over 80% of post-convention campaign events across 2008, 2012, and 2016 taking place in swing states. This also confirms this chapter’s prediction that the vast majority of campaign events are being held in swing states. All is not lost for defenders on this front however. Despite 96% and 95% of campaign events in 2012 and 2016 respectively taking place in swing states, in 2008 only 42% of campaign events were held in swing states. While 2008 is an outlier compared to 2012 and 2016, it is certainly possible that swing state bias could drop to 2008 levels
again. Even so, noting the number of states that have not had the opportunity to be swing states in the last three elections and that these states and millions of citizens are largely ignored by presidential and vice presidential candidate events, government stakeholders should be open minded about Electoral College reform proposals. However, given that swing state bias is directly tied to constitutional language, a constitutional fix to the issue is necessary.

Of note, this chapter did not address the amount of advertising money candidates and campaigns spent in swing versus safe states in 2008, 2012, 2016. As candidates are currently changing how they spend their advertisement dollars to focus on more online content, an in depth analysis should be done to see how the move towards more online adds is impacting swing state bias. Unfortunately, such an analysis was beyond the scope and bandwidth of this chapter. Even so, the results of this chapter clearly show the need for reform to remove swing state bias.

One popular proposal among critics of the Electoral College that would require a constitutional amendment in transitioning to the direct popular election of the president. While it is beyond the scope of this study to examine this proposal in depth, noting that it would take another full length paper to discuss the proposal’s merits and short comings, critics of the Electoral College argue that every individual’s vote counting toward a national popular vote total would force candidates to focus on capturing votes in every state of the union. Conversely, defenders of the Electoral College argue that candidates under direct election would disproportionately focus their attention on turning out the

base in deeply partisan areas while ignoring others.\textsuperscript{204} Noting this contention, it is clear that addressing the issue of swing state bias will not be easy in the years to come. Even so, this chapter has shown that swing state bias exists and should be addressed.

Bibliography


CHAPTER THREE: THE POLITICAL DEVELOPMENT OF THE ELECTORAL COLLEGE & THE NATIONAL POPULAR VOTE INITIATIVE
In 2007, states began individually passing a piece of legislation that has the opportunity to change how the Electoral College operates without the adoption of a constitutional amendment.\textsuperscript{205} This piece of legislation—known as the National Popular Vote (NPV) legislation—would create an interstate compact where participating states agree to award their electoral votes to the winner of the national popular vote. The compact will only go into effect when states representing 270 electoral votes—the number needed to win the presidency—agree to join the compact, guaranteeing that the winner of the national popular vote would win the Electoral College and the presidency.\textsuperscript{206} To date, fifteen states and the District of Columbia have signed the legislation into law.\textsuperscript{207} However, since these fifteen states and the District of Columbia only represent 196 electoral votes,\textsuperscript{208} a number of other states need to pass the legislation to bypass the 270 electoral votes necessary to implement the compact.

While the proponents of this legislation have their reasons for supporting it, the NPV legislation is constitutionally suspect and undermines the original intent of the Electoral College in Article II of the Constitution. Overall, the purpose of this chapter is to discuss the NPV legislation and what makes it a violation of the intent of Article II. To do this, we will take a closer look at secondary sources on the subject. We will also analyze the framers’ original intent in creating the Electoral College by examining the Constitution, James Madison’s notes from the Constitutional Convention, notes from the

\textsuperscript{207} Ibid.
\textsuperscript{208} Ibid.
state ratifying conventions, the *Federalist Papers*, and several Supreme Court cases that shed light on this topic.

Following this discussion of the problems with this legislation, we will turn to steps necessary to neutralize the threat that the NPV poses. In doing so, we argue that the NPV is the result of constitutional language that gives states broad power to choose how they will select their electors, which cannot be fixed without a constitutional amendment or a court battle. As such, in conclusion we will argue that given the significant concerns surrounding the implementation of the NPV—and entrenched constitutional language being a major cause of the NPV—the Electoral College should be replaced via constitutional amendment with the direct popular vote.

**Literature Review: Is the NPV Constitutional?**

In political science, there are those who defend the NPV legislation and those who oppose it. Defenders of the NPV argue that Article II Section I Clause II of the Constitution gives states wide-ranging power when it comes to how they choose their Electoral College electors and how they award their electoral votes.\(^{209}\) The clause gives states the power to “appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”\(^{210}\) This language has been interpreted by defenders to mean that states have plenary power in how they select their electors and

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\(^{209}\) US Constitution, art. 2, sec, 1, cl. 2.
\(^{210}\) Ibid.
how electoral votes are awarded. For instance, National Popular Vote Inc.—an organization leading the NPV movement—argues that:

Section 1 of Article II of the U.S. Constitution does not prohibit, require, encourage, or discourage the use of any particular method for awarding a state’s electoral votes. The wording “as the Legislature may direct” permits the states to exercise their power to choose the manner of appointing their presidential electors in any way they see fit subject only to the implicit limitation on all grants of power in the Constitution, namely that the states not violate any specific restriction on state action contained elsewhere in the Constitution.  

Defenders of the NPV also cite Supreme Court Cases McPherson v. Blacker and Bush v. Gore noting that sections of each case say that states do indeed have plenary power in selecting their electors. For instance, National Popular Vote Inc. argues that “[t]he U.S. Supreme Court ruled in the 1892 case of McPherson v. Blacker that the choice of method for appointing a state’s presidential electors is an ‘exclusive’ and ‘plenary’ state power.” They continue, “[m]oreover, the U.S. Supreme Court approvingly referred to McPherson v. Blacker as recently as the 2000 case of Bush v. Gore.”

In “Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities”, Vikram David Amar refers to this broad language in Article II Section I Clause II. He notes that the NPV “seeks to take advantage of the decentralization of the presidential election process, in particular the discretion Article II of the Constitution gives each state to decide how to select its electors...” He continues, “there is nothing in Article II—or elsewhere in the Constitution’s text, structure, or

212 Ibid.
213 Ibid.
history—that prevents a state from appointing electors who are expected to support the presidential and vice presidential candidates who receive the most support in the nation instead.”\textsuperscript{215}

A few critics of the NPV disagree with Amar’s statement that there is nothing in Constitution or history that prevents states from awarding their electoral votes based on the winner of the national popular vote. For instance, in “Why the National Popular Vote Compact is Unconstitutional” Norman Williams argues that changes to the framework of the Constitution must be done through the constitutional amendment process.\textsuperscript{216} He cites, \textit{U.S. Term Limits, Inc. v. Thornton} to support his argument. This Supreme Court case struck down the constitutionality of state laws that set term limits for their respective members of Congress. In the case, those in support of term limits pointed to seemingly categorical language supporting plenary power for states choosing how to impellent elections.\textsuperscript{217} “Clause I of Article I, Section 4, which delegates power to the state legislatures to control the ‘Times, Places and Manner’ of holding elections for Congress…” was argued to provide plenary powers to state legislatures to adopt election regulations not forbidden by the Constitution.\textsuperscript{218} Since term limits are not explicitly banned by the Constitution, supporters of term limits argued that they were constitutional.\textsuperscript{219}

\textsuperscript{215} Amar, “Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities,” p. 263.
\textsuperscript{216} Norman R. Williams, "Why the National Popular Vote Compact is Unconstitutional," \textit{Brigham Young University Law Review} 2012, no. 5 (2012): p. 1523.
\textsuperscript{217} Ibid., p. 1574.
\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid., p. 1575.
However, the court ruled that term limits violated the Qualification Clauses of Article I.220 This is because states were attempting to add additional congressional qualifications without a constitutional amendment and that there was no history of states having the power to set congressional term limits.221 As such, Williams uses this precedent to argue that there is no history of states awarding electors based on the national popular vote, the Constitutional Convention purposely chose not to implement a direct popular vote, and that “states may not use their constitutionally delegated powers…in a manner that fundamentally interferes with the constitutional structure.”222

These arguments are also supported by Patrick C. Valencia in “Combination Among the States: Why the National Popular Vote Interstate Compact is an Unconstitutional Attempt to Reform the Electoral College.” Citing U.S. Term Limits, Inc. v. Thornton, he also argues that congressional term limits “must come not by a state law or [state] constitutional amendment, but as other important changes in the electoral process have come—through Article V amendment procedure.”223 In addition, Valencia discusses other Supreme Court Cases to show that the NPV cannot interfere with other provisions of the Constitution. For instance, he cites INS v. Chadha, which outlaws one chamber of Congress implementing a legislative veto over use of executive powers that were delegated to the executive by Congress.224 In defending the constitutional

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220 Williams, "Why the National Popular Vote Compact is Unconstitutional,” p. 1575.
221 Ibid., p. 1527.
222 Ibid., p. 1580.
224 Ibid.
importance of bicameral congressional action, he notes the following about the Court’s
decision in the case:

Respect for the finely wrought Constitutional procedures of bicameralism and
presentment—which require every bill to pass both the House and Senate and be
presented to the President before becoming law—led the Court to strike down the
one-house veto because these requirements represented the significant and carefully-
}  

He also cites \textit{Clinton v. City of New York} which struck down “the Line Item Veto Act
of 1996 as inconsistent with legislative procedures detailed by the
Framers. The Act gave the President the authority to cancel individual
provisions in bills passed by Congress when signing the rest of the bill into
law.”\footnote{Ibid.}

Like Williams, Valencia also cites the problems of implementing the
direct election of the president through the NPV legislation. For instance, he
discusses the problems of electors from different states working together or
combining for a common goal. He argues that the NPV “promotes
combination \textit{among} the states and not \textit{within} a state, effectively resulting in a
direct popular election, both of which are results the Framers deliberately
sought to avoid by prescribing detailed electoral procedures.”\footnote{Ibid.}

Citing provisions in Article II of the Constitution, he continues,

\begin{quote}
The Framers specified that Electors were to meet in their “respective states” for the
same reason they required electors to meet on the same day throughout the United
States: “for the express purpose of preventing combinations.” The Framers wanted to
\end{quote}
Defenders of the NPV have offered counter arguments to some of these points. For instance, in regards to the unconstitutionality of NPV—because the framers twice rejected the direct election of the president—defenders argue that framers rejected many methods including, “electing presidential electors by districts, having state legislatures choose the President, having Governors choose the President, nationwide direct election, and having Congress choose the President.” As such, since many states have selected electors via state legislatures and by popular vote in Congressional districts, they sarcastically ask whether these elections are unconstitutional as well.

In addition, regarding U.S. Term Limits, Inc. v. Thornton and Clinton v. City of New York, The National Popular Vote Inc. argues that NPV is not violating a section of the Constitution like the laws struck down in these cases were. In fact, defenders argue that the NPV legislation is adhering to Article II Section I Clause II of the Constitution which gives states wide-ranging power when it comes to how they choose their electors and how they award their electoral votes. They ask, “[w]hat ‘requirement’ of Article II, section 1, clause 1 would be evaded by the National Popular Vote compact?” In regards to today’s winner-take-all selection of electors in all states but Maine and Nebraska they argue, “[t]here certainly is no

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230 Ibid.
231 Ibid.
232 Ibid.
‘requirement’ in Article II, section 1, clause 1 mandating that 100% of a state’s presidential electors must vote in lockstep or that they must vote in accordance with the dictates of an extra-constitutional body such as the nominating caucus or convention…” 233 However, it is important to note that NPV defenders do not address other sections of Article II—discussed by Valencia—that may better align with these Supreme Court precedents. We will discuss this later in the chapter.

**Analysis of Arguments in Support of NPV**

As noted above, supporters of the NPV legislation believe the compact is a constitutional way for states to award their electoral votes for many reasons. The Constitution does indeed read in Article II Section 1 Clause II that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...” 234 As such, many states believe they can use any method they wish to select members of the Electoral College. 235 Given the many ways that electors have been selected throughout the course of American history, one can understand why supporters feel this way.

As discussed in a previous chapter, in the first presidential election in 1788, the legislatures of four states appointed electors directly, three had statewide general ticket popular elections—where individuals vote for as many electors as the state can send to the Electoral College— and Virginia established districts in which voters popularly

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234 Ibid.
235 Ibid.
elected the elector. Further, Delaware allowed each citizen to “vote for one elector, who had to reside in his county, but the top three vote recipients statewide (not the top recipient from each county) became the state’s electors.” In Massachusetts, following popular elections for electors in congressional districts, the legislature would select electors from the top two vote getters in each district. The Massachusetts legislature would then also appoint two electors with no initial popular vote from the people.

In the following elections, the methods remained diverse. In 1796, eight states chose their electors by legislative appointment, three used a popular general ticket statewide election, three used popular election by district, and others still used different models. For instance, in Tennessee in 1796 the state had a group of private citizens in three separate districts each select an elector. It is important to note that—despite the early diversity in the methods for choosing Electoral College electors—by the 1830s the process had become largely uniform across the country. In 1832, twenty-two out of twenty-four states relied on general ticket state-wide direct election of electors and only Maryland was utilizing district based popular elections to choose electors. Additionally, by 1836 only the South Carolina legislature was appointing their electors while all other states relied on popular election of some kind. The last time that a state legislature directly appointed their electors was in Colorado in 1876. Today, only two

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236 Norman R. Williams, "Why the National Popular Vote Compact is Unconstitutional," p. 1563.
237 Ibid.
238 Ibid., pp. 1563-1564.
239 Ibid., p. 1565.
240 Ibid.
241 Ibid.,” p. 1571.
242 Ibid., p. 1570.
states do not utilize general ticket state-wide popular elections. Nebraska and Maine elect their electors by congressional district.\textsuperscript{243}

Given this diversity of methods for selecting electors and such broad language in the Constitution, one can understand why supporters of the NPV believe they can award electors to the winner of the national popular vote. Additionally, while states have generally been appointing electors via general ticket state-wide popular vote since the 1800s, it is important to note that this movement toward state-wide popular elections does not diminish states’ ability to use other methods to select electors. States are capable of returning to other methods other than choosing electors through a state-wide popular vote. This point is supported by the opinion of the Court in \textit{McPherson v. Blacker} when it ruled that the State of Michigan could choose their electors via popular vote in congressional districts rather than a winner-take-all state-wide popular vote.\textsuperscript{244} “Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.”\textsuperscript{245}

As noted above, \textit{McPherson} is also utilized widely by supporters of the NPV legislation to defend states selecting electors based on who wins the national popular vote.\textsuperscript{246} The opinion of the Court states that “[i]t is seen that from the formation of the government until now the practical construction of the clause [Article II Section I] has

\begin{thebibliography}{99}
\bibitem{243} Norman R. Williams, "Why the National Popular Vote Compact is Unconstitutional," p. 570.
\bibitem{244} \textit{McPherson v. Blacker}, 146 US 1 (1892).
\bibitem{245} Ibid.
\end{thebibliography}
ceded plenary power to the state legislatures in the matter of the appointment of electors.”\(^{247}\) Plenary power of course meaning full, complete, or unlimited power for states in determining the method of choosing electors. Also discussed above, *McPherson* was affirmed in *Bush v Gore* when the Court stated 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 state legislatures in several States for many years…”\(^{248}\) The opinion continues that, “[t]he State, of course…can take back the power to appoint electors” even if they currently allow election via the state-wide popular vote.\(^{249}\) Again, with these precedents, it is easy to see why defenders believe NPV is constitutional.

However, there is an important section of *McPherson* that admits that the states are limited in how they choose Electoral College electors. The Court states “the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.”\(^{250}\) In this passage, *McPherson* acknowledges that the Electoral College is intended to be free from congressional and federal influence. We will discuss this further below.

**Analysis of Arguments Against NPV**

While there are clauses in the Constitution that point towards states having unlimited power to choose the method of selecting electors, there are others that point in
the opposite direction. For instance, Article II Section I Clause II of the Constitution structures the Electoral College in a way that protects electors in each state from being influenced by electors of other states, by powerful individuals at the national level, and by agents of foreign governments. For instance, the clause reads that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”\textsuperscript{251} This clause is to help ensure that electors are not influenced by powerful federal office holders like members of Congress or cabinet secretaries. As discussed in chapter one, electors were intended to act as trustee electors who used their best judgement to elect the most qualified individuals for president and vice president. In order to do this to the best of their abilities, they needed to be insulated from influential federal forces whose priorities may lay elsewhere than electing the most qualified president.

Article II Section I continues in Clause III, “[t]he Electors shall meet in their respective States, and vote by Ballot for two Persons…”\textsuperscript{252} It further states in Clause IV, “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States…”\textsuperscript{253} As acknowledged by Valencia, there is a reason that members of the Electoral College never meet as a collective body. There is a reason that they meet on the same day across the country in their respective states. This is to avoid members of the Electoral College being swayed or influenced by a powerful cabal, faction, or group.

While Valencia largely focuses on the importance of states and their electors not

\textsuperscript{251} US Constitution, art. 2, sec, 1, cl. 3.
\textsuperscript{252} US Constitution, art. 2, sec, 1, cl. 4.
\textsuperscript{253} Ibid.
combining, the framers also feared that electors would be vulnerable to the influences of Congress and other actors if they all met in one place in the nation’s capital surrounded by powerful Americans and the agents of foreign powers.

These arguments are widely supported by founding documents. As discussed in Chapter One, when the nearly final Electoral College framework was presented to the full Constitutional Convention in 1787—by a committee assigned to tackle the issue—Gouverneur Morris of Pennsylvania outlined the reasons why the committee recommended the plan. One reason was that, “[a]s the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible also to corrupt them.”

In the Virginia Ratifying Convention, Governor Edmund Randolph noted, “[a]nd there can be no combination between the electors, as they elect him on the same day in every state. When this is the case, how can foreign influence or intrigue enter?”

Additionally, Alexander Hamilton in Federalist 68 argued, “Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.”

Speaking at the Pennsylvania Ratifying Convention, James Wilson furthered these arguments: “To avoid the inconveniences already enumerated, and many others that

might be suggested, the mode before us was adopted. By it we avoid corruption; and we
are little exposed to the lesser evils of party intrigue… As discussed in the previous
chapters, other framers of the Constitution that are on record with similar arguments
include George Mason of Virginia and Charles Cotesworth Pinckney of South
Carolina.  

These passages are interesting for numerous reasons. As noted by Valencia, it is
clear that the framers wanted to avoid electors working together in combination. The
NPV legislation operates in exactly this fashion. When looking at the characteristics of
the National Popular Vote, it appears to be the type of cabal that the framers did not want
influencing the Electoral College. As clearly stated by Edmund Randolph at the Virginia
Ratifying Convention—and in sections of the Constitution that force electors to cast their
ballots in their respective states—Electoral College electors were not meant to
coordinate with one another and were meant to be immune from a national organizing
force that would influence how they vote. An agreement among fifteen states and the
District of Columbia to pick electors who are pledged to the winner of the national
popular vote is exactly what the framers of the Constitution were looking to avoid. Some

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260 US Constitution, art. 2, sec, 1, cl. 3.
may argue that this is the coordination of state legislatures and not electors. When looking at the results the NPV will implement, however, defenders cannot run away from the fact that compact member electors—if the compact ever goes into effect—will cast their ballots in coordination based on a national outcome, rather than a state outcome. This is the type of national interference that the Electoral College was designed to avoid.

Of note, while Valencia discusses the problem with state electors combining, he fails to discuss the political nature of the combining state electors or the danger it presents. For instance, only Democratic states have passed this legislation. As seen in Table 1, no Republican Governors have signed the NPV legislation into law.\(^{262}\) In 2008 in Hawaii, Republican Governor Linda Lingle vetoed the legislation, which was overridden by the Democratic Party controlled Hawaii legislature.\(^{263}\) Even so, all other states that have signed this legislation into law had Democratic Governors at the time.\(^ {264}\) Additionally, at the time the NPV legislation passed, fourteen out of sixteen legislatures had both chambers controlled by the Democratic Party.\(^ {265}\)

For the remaining two, the District of Columbia only has one chamber—the DC Council—which was controlled by Democrats and had a Democratic Mayor when the NPV legislation passed.\(^ {266}\) Connecticut’s House and Governorship were controlled by


Democrats when NPV passed. The Connecticut Senate was split evenly between
Democrats and Republicans with the Democratic Lieutenant Governor acting as the tie-
breaker for the state, effectively giving control of the Senate to the Democratic Party.267
As such, of the NPV legislation that has become law, none of the bills have passed
through a Republican controlled legislative chamber or have been signed by a Republican
governor. Of note, some Republican statehouses have passed the legislation through one
chamber and Republicans are on record voting for the legislation.268 However, the fact
remains that a Republican governor or legislative chamber has never passed this
legislation into law.

Table 1: Partisan Breakdown of Governors & Legislatures in Year State Signed
NPV Into Law

<table>
<thead>
<tr>
<th>State</th>
<th>Year Signed Into Law</th>
<th>Governor</th>
<th>Governor's Party</th>
<th>Party in Control of Legislature</th>
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</thead>
<tbody>
<tr>
<td>CA</td>
<td>2011</td>
<td>Jerry Brown</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>CO</td>
<td>2019</td>
<td>Jared Polis</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>CT</td>
<td>2018</td>
<td>Dan Malloy</td>
<td>D</td>
<td>S*</td>
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<tr>
<td>DC</td>
<td>2010</td>
<td>Adrian Fenty</td>
<td>D</td>
<td>D*</td>
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<tr>
<td>DE</td>
<td>2019</td>
<td>John Carney</td>
<td>D</td>
<td>D</td>
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<tr>
<td>HI</td>
<td>2008</td>
<td>Linda Lingle</td>
<td>R</td>
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<tr>
<td>IL</td>
<td>2008</td>
<td>Rod Blagojevich</td>
<td>D</td>
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<tr>
<td>MA</td>
<td>2010</td>
<td>Deval Patrick</td>
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<tr>
<td>MD</td>
<td>2007</td>
<td>Martin O'Malley</td>
<td>D</td>
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</tr>
<tr>
<td>NJ</td>
<td>2008</td>
<td>Jon Corzine</td>
<td>D</td>
<td>D</td>
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<tr>
<td>NM</td>
<td>2019</td>
<td>Michelle Lujan Grisham</td>
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<tr>
<td>NY</td>
<td>2014</td>
<td>Andrew M. Cuomo</td>
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<tr>
<td>OR</td>
<td>2019</td>
<td>Kate Brown</td>
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<tr>
<td>RI</td>
<td>2013</td>
<td>Lincoln Chafee</td>
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<tr>
<td>VT</td>
<td>2011</td>
<td>Peter Shumlin</td>
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<tr>
<td>WA</td>
<td>2009</td>
<td>Chris Gregoire</td>
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Additionally, when we look at the breakdown of the way these states have voted in recent presidential elections in Table 2, the partisan makeup of these states becomes even more defined. Since the year 2000, these states have only voted Republican in a presidential election in three instances.\(^{269}\) Colorado voted Republican in 2000\(^{270}\) and 2004 and New Mexico voted Republican in 2004.\(^{271}\) Since 2000, in these sixteen jurisdictions, across five election years, and eighty state-wide elections for president, only three contests have supported the Republican Party.\(^{272}\) Of note, since the State of Maryland became the first state that introduced the NPV legislation in 2007,\(^{273}\) none of the NPV states have voted Republican in a presidential contest. Of relevance, some of these states do have Republican governors. For instance, Democratic strongholds like Massachusetts, Vermont, and Maryland currently have Republican governors.\(^{274}\) However, according to the results of the last five presidential elections in these states, one does not expect them to award their electoral votes to a Republican candidate any time soon.

\(^{273}\) Ibid.
Table 2: Political Party that Won in NPV States in Last Five Presidential Elections

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<td>RI</td>
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*D = Democrat; R = Republican.*

*Data from 270 To Win*

Some may ask, “why does this matter?” According to statements made by the framers of the Constitution, they did not want cabals—like political parties—influencing the Electoral College. As only Democratic governors and only Democratic Party controlled state legislatures have passed this legislation into law, it is undoubtable that the Democratic Party prefers this method more than the Republican Party. This is likely an outcome of circumstance and done with the best intentions of Democratic lawmakers, but when looking at the NPV legislation, it can be described as Democratic state parties and their electors working together to change and influence how the Electoral College operates. As discussed above, this action violates the intent of Clauses II, III, and IV of Article II Section I of the Constitution, which were written to stop electors and party factions from influencing the decisions of the Electoral College.
In addition—and as discussed by Williams and Valencia—it is important to note that the framers of the Constitution actively rejected the national popular vote serving as the method for electing the president. For instance, as discussed in chapter one, the Constitutional Convention specifically voted against electing the president via popular vote on July 17 and August 24, 1787 with only Pennsylvania in support for both votes and Delaware voting in favor on August 24, 1787. Of significance, on August 24, 1787, the Constitutional Convention rejected electors chosen by the people with only five states voting in favor of the proposal. These three votes show that not only is a direct popular vote against the original intent of the founders, the majority of states also preferred to select electors through a method other than the popular election of electors. As discussed in chapter one, framers such as Elbridge Gerry, Roger Sherman, Charles Pinckney, George Mason, and Hugh Williamson are all on record opposing the direct election of the president.

It is worth noting, National Popular Vote Inc. makes strong counterpoints against arguments that NPV is unconstitutional because the framers rejected the direct popular vote twice. They argue that many other methods that framers rejected have been used to elect the president. In fact, the Constitutional Convention voted against electors selected by the people, the exact method we use today. As such, why would selecting electors via national popular vote be unconstitutional but selecting electors via state popular vote be constitutional? While this is a strong argument, again we refer to sections of the

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276 Ibid., p. 526.
Constitution, numerous statements made by the framers, and language from *McPherson v. Blacker* that clearly show that electors were intended to be free from national or federal influence. While the framers rejected direct elector selection by state legislature or popular election of electors—which have all been used to choose electors in the past—these are state actors or institutions that are choosing electors. Additionally, none of these state methods for selecting electors have actual constitutional provisions intended to prevent them like national influence over electors does. As such, the votes against the direct election of the president in the Constitutional Convention is not the deciding factor in the potential unconstitutionality of the NPV, the language in the Constitution and in the federal convention intended to stop national or federal influence over electors is.

Finally—and as noted by Williams and Valenci—if the country wants to change the Constitution and implement a direct popular election, there is a method for changing how the Electoral College operates built into the Constitution. Article V of the Constitution states that:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress...279

Given the significant evidence above that the framers actively wanted to avoid a faction like the NPV influencing the Electoral College, those wishing to implement the national popular vote need to use the amendment process. As noted by critics of the NPV

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279 US Constitution, art. 5.
legislation, these arguments are supported by Supreme Court cases which we will discuss further below.

**Supreme Court Case Analysis**

For instance, in the case *U.S. Term Limits, Inc. v. Thornton*, the Court ruled that the State of Arkansas’ constitutional amendment to place term limits on their members of Congress is unconstitutional.\(^{280}\) Although the Constitution in Article I Section IV Clause I (the Elections Clause) gives broad power to the states to regulate the "Times, Places and Manner of Holding Elections", congressional term limits violate other sections of the Constitution.\(^{281}\) For instance, the Court argued that placing term limits on members of the Congress violates the Qualifications Clauses of the Constitution (Article I Section II Clause II for the House and Article I Section III Clause III for the Senate) because additional qualifications limiting who can be a member of Congress cannot be added without constitutional amendment.\(^{282}\) The Court states, “[i]n our view, an [Arkansas] amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand.....”\(^{283}\) Further the Court argued that the Arkansas’ reading of the elections clause was inconsistent with the framers’ intent. The Court argues, “[t]he Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office....”\(^{284}\)

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\(^{281}\) Ibid.

\(^{282}\) Ibid.

\(^{283}\) Ibid.

\(^{284}\) Ibid.
This case is applicable for the NPV legislation for many reasons. Like the Elections Clause, Article II Section I Clause II gives states wide-ranging power when it comes to elections. In terms of the Electoral College, it gives states the power to “appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”\textsuperscript{285} However, like the Elections Clause being limited by the Qualifications Clause, this broad language of Article II Section I Clause II is limited by language within itself which says that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector…”\textsuperscript{286} The following language in Article II Section I Clause III also limits the Section when it states: “[t]he Electors shall meet in their respective States, and vote by Ballot for two Persons.”\textsuperscript{287} Clause IV also limits the section when it says: “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”\textsuperscript{288}

As we discussed above, these clauses were intended to limit cabal, intrigue, and national influence over the Electoral College. Just as the Elections Clause is limited by the Qualification Clause, Article II Section I limits its own language and the operation of the Electoral College in a similar fashion. Supporters of NPV greatly misunderstand the depth of Article II Section I that grants state legislatures the ability to select their electors but was also drafted to protect them from outside influence and cabals. As such, as term

\textsuperscript{285} US Constitution, art. 2, sec, 1, cl. 2.
\textsuperscript{286} Ibid.
\textsuperscript{287} US Constitution, art. 2, sec, 1, cl. 3.
\textsuperscript{288} US Constitution, art. 2, sec, 1, cl. 4.
limits are unconstitutional because of the Qualification’s Clause, the NPV legislation is at least constitutionally suspect because of the intent behind of Article II Section I Clauses II, III, and IV.

Other precedent supports these arguments. In 2001, the Court in *Cook v. Gralike* affirmed *U.S. Term Limits, Inc. v. Thornton* and struck down a Missouri constitutional amendment that required each member of Missouri's congressional delegation to work towards passing a constitutional amendment at the federal level that would create term limits for members of Congress.289 The amendment also requires that the phrase “‘DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS’ be printed on all primary and general ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of the proposed [federal] amendment.”290 The amendment also provides that the statement “‘DECLINED TO PLEDGE TO SUPPORT TERM LIMITS’ be printed on all primary and general election ballots next to the name of every nonincumbent congressional candidate who refuses to take a ‘Term Limit’ pledge” to fight for federal congressional term limits.291 In declaring the amendment unconstitutional, the Court cited *U.S. Term Limits, Inc. v. Thornton*. The opinion reads, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."292 In affirming *Thornton* and reemphasizing the unconstitutionality of the

290 Ibid.
291 Ibid.
292 Ibid.
states evading important constitutional restraints, the Court strengthened arguments above that the limiting clauses of Article II Section I should be adhered to.

Finally, regarding Valencia’s use of *INS v. Chadha* and *Clinton v. City of New York* to declare the NPV legislation unconstitutional, we disagree that these cases apply to the constitutionality of the NPV. For instance, these cases were in response to lawsuits against the one chamber legislative veto and the presidential line item veto which have no direct constitutional language supporting their constitutionality. There is no direct language in the Constitution that supporters of the legislative or line item veto could point to for supporting their constitutionality. This is not the case with the National Popular Vote legislation.

The Constitution reads in Article II Section 1 Clause II that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...” As such, defenders of the NPV have direct constitutional language they can point to that supports their cause. The same can be said about states implementing congressional term limits in *U.S. Term Limits, Inc. v. Thornton*. Defenders of state based term limits could turn to Article I Section IV Clause I (the Elections Clause) which gives broad power to the states to regulate the “Times, Places and Manner of Holding Elections.” As such, it took the congressional Qualifications Clause being in conflict with the Elections Clause to strike down these congressional term limits. For the

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same reason, it will take Article II Section I Clause II conflicting with Article II Section I Clauses II, III, and IV to strike down the NPV.

Without the qualification clause, state based congressional term limits may have been declared constitutional given the broad grant of power in the elections clause. Additionally, without the NPV conflicting with Article II Section I Clause II, III, and IV, broad Article II Section I Clause II language giving states wide discretion in the selection of electors may have made the NPV less constitutionally suspect. No such conflicting constitutional language exists for *INS v. Chadha* and *Clinton v. City of New York*. The one chamber of Congress legislative veto and the line item veto simply conflicted with the finely wrought constitutional structure of how a bill becomes a law. Given the conflicting constitutional language surrounding the NPV and Article II as well as conflicting language surrounding state-based term limits and the qualifications clause, it is hard to argue that these provisions are finely wrought. As such, for a more accurate comparison, critics of the NPV should rely on *U.S. Term Limits, Inc. v. Thornton* and *Cook v. Gralike* to strike down the NPV legislation.

**Conclusion**

Overall, proponents of NPV believe that broad language in Article II Section I Clause II gives states plenary power to select electors in any way they wish, including based on who wins the national popular vote. They claim that these arguments are supported by *McPherson v. Blacker* and *Bush v. Gore* which both say that the state legislatures do have plenary power in this regard. However, Clauses II, III, and IV of Article II Section I of the Constitution—which include language intended to limit the influence of factions, federal office holders, electors from other states, political parties,
and foreign governments on the Electoral College—clearly show that the NPV is constitutionally suspect as it attempts to influence the Electoral College against the wishes of the framers. As noted above, these arguments are supported by statements made by such founders as Gouverneur Morris, Edmund Randolph, Alexander Hamilton, James Wilson, George Mason, and Charles Cotesworth Pinckney in the Constitutional Convention, the State Ratifying Conventions, or the *Federalist Papers*. As such, the power of state legislatures to select electors cannot be completely plenary. The states cannot choose their electors in a way that violates another clause of the Constitution.

When we look further at the characteristics of the NPV legislation, it is clear that the NPV is constitutionally suspect because it represents the type of cabal that the founders wished to avoid. In practice, the NPV can be described as coordination between the state legislatures and electors of sixteen Democratic jurisdictions. To boil it down further, the NPV is Democratic state lawmakers and electors working in combination to change how the Electoral College functions without a constitutional amendment. Based on the intent of the framers that electors should be protected from outside influence, there is no doubt that the framers of the Constitution would be concerned by the NPV legislation.

Supreme Court precedent supports these arguments. Noting that the intent of the founders in implementing the Electoral College was to avoid such influence over electors, it is clear that the NPV is constitutionally dubious. As noted by *U.S. Term Limits, Inc. v. Thornton*, and *Cook v. Gralike*, such changes to the framework of the Constitution must be done via constitutional amendment. As such, if supporters of the NPV would like to implement the direct election of the president through a popular vote,
they must do so through the amendment process stipulated in Article V of the Constitution.

In addition, this amendment should happen sooner rather than later. As this chapter shows, there is confusion about how much discretion Article II Section I Clause II of the Constitution gives states to choose their electors and how they award their electoral votes. This presents many legitimate concerns. For instance, the National Popular Vote legislation allows the compact to go into effect as close as six months before a presidential election.294 One can imagine the problems trying to implement the NPV in this short time frame before an election could cause. The process would likely see lawsuits—and as a result—confusion among voters and presidential campaigns. The crucial question would likely be, “how quickly can the Supreme Court rule on the constitutionality of the NPV?” This is a less than ideal scenario.

Finally, while the NPV is a major threat to the stable functioning of the Electoral College, we must acknowledge that the Electoral College is the reason for the NPV legislation. Vague, poorly drafted constitutional language that created the Electoral College in Article II Section I Clause II has opened a back door to a potential end run around the system. Unfortunately, few acknowledge this fact. Today, critics of the NPV are looking to preserve a system that may literally come with accidental self-destruct button called the NPV. Further, defenders of the NPV who look to move forward legislation to elect the President via loophole are not helpful in preserving or honoring constitutional democracy. Given the flaws of the Electoral College and the NPV, the

United States should move forward with a constitutional amendment to implement the direct popular vote as soon as possible.
Bibliography


Paper Conclusion

As discussed above, the Electoral College continues to face a number of issues that can be traced directly to language from the Constitution that was the result of compromise in the Constitutional Convention. As we have seen, this language led to the creation of an unprecedented, untested, and unique way to select a head of state that has led to unforeseen consequences and confusion regarding how the Electoral College is intended to function. Language from Article II Section I of the Constitution has led to significant confusion over whether electors are intended to act as delegates or trustees, created swing state bias during presidential elections, and opened a potential back door to replacing the Electoral College through the National Popular Vote Interstate Compact.

In Chapter One, we proved that framers intended electors to act as trustees and not delegates. As noted above, the Constitutional Convention voted three times against the direct involvement of the people in the selection of the president with five framers speaking directly against the involvement of the people in the presidential election process. Three of these five framers signed the Constitution and were from states that voted at least twice against direct involvement of the people in the presidential selection process. In addition, four signers of the Constitution stated in the state ratifying conventions or the Federalist Papers that the people do not play a direct role in electing the president. As such, it seems unlikely that the Constitution binds electors to vote as directed by the people given these votes and statements. Further, six Constitutional Convention delegates discussed how the system insulates electors from intrigue and corruption. If electors were intended to be delegates, these six men likely would not have
discussed this feature of the Electoral College since delegates by definition can’t change their vote, even if corrupted. Additionally, six delegates to the Constitutional Convention discussed the importance of having highly qualified electors. If electors were intended to be delegates, these conversations likely would not have taken place since delegates electors do not need to be highly qualified to parrot the votes of others. Finally, since 1789, 167 electors have acted as trustees and thirty-one states and the District of Columbia have laws on the books to stop electors from acting as trustees. These examples of trustee electors and actions taken to stop trustee electors show that electors have always had the ability to act as trustees which strongly implies the intended role of electors. These many pieces of evidence clearly show that electors are intended to act as trustees and not delegates.

While this paper has proven that electors are intended to act as trustees, this question has yet to be decided by the Supreme Court. Without a court ruling, a constitutional amendment clarifying the role of electors, or replacing the Electoral College, thirty-two unconstitutional laws will remain on the books that attempt to force electors to act as delegates. Additionally, the role of electors will remain undecided in the minds of defenders and critics of the Electoral College. As such, this yet to be litigated question leaves in place the possibility of a faithless elector attempting to swing a presidential election to a candidate other than who should win the Electoral College. This in turn would likely lead to state action attempting to stop it. Further, this would undoubtedly lead to a major lawsuit and a potential constitutional crises. Worst of all, the faithless trustee elector would likely win the case and undermine the choice of the people. Why should we live with this reality?
While it is understandable why state lawmakers have attempted to fix this situation through legislation, they have chosen an unconstitutional solution that will ultimately result in the outcome that they do not want. While we agree that trustee electors are out of touch with a country that has seen significant democratization since the Constitutional Convention of 1787, an unconstitutional solution to the problem is no solution at all. To avoid faithless electors swinging an election and the Supreme Court upholding this action, constitution language creating the Electoral College must be replaced by a constitutional amendment and the direct election of the president.

This argument is further justified when we consider other issues with the Electoral College that stem from language in the Constitution. As discussed in Chapter Two, Article II Section I has allowed nearly all the states in the union to implement winner-take-all state popular elections when it comes to awarding their electoral votes, which has led to the creation of swing states. This paper proved that swing states are problematic because presidential candidates ignore the majority of the country while trying to capture the electoral votes of swing states. For instance, across the 2008, 2012, and 2016 presidential elections, 80% of post-convention campaign events featuring presidential and vice presidential candidates took place in swing states.

Of note, while we found that swing states are extremely problematic, it is important to point out that they are slightly less problematic than originally predicated. For instance, while examining the 2008, 2012, and 2016 presidential elections, we proved that all states theoretically have the opportunity to become swing states. For instance, over the last three elections, swing states are increasing and do indeed change over time. Eighteen states were swing states in at least one of the three elections examined, though
only two were swing states in all three elections. As such, swing states are less unfair since any state can theoretically be a swing state next election cycle and receive additional attention from candidates. Additionally we have shown that swing states are extremely diverse. There are swing states that are small states, large states, eastern states, western states, northern states, southern states, agricultural states, industrial states, urban states, rural states, and states with large minority populations. As such, no geographic area or population group appears to be disadvantaged by swing states.

However, these arguments in defense of swing states are greatly limited by other conclusions in the chapter. For instance, thirty-two states and the District of Columbia were not considered swing states in 2008, 2012, or 2016, which makes defenders’ assertion that ‘a safe state today could be a swing state tomorrow’ seem unlikely and shows that many states have been stuck as safe states for the last few elections at least. Additionally, while swing states are geographically diverse, so too are safe states. They are both made up of small states, large states, eastern states, western states, and so on. As such, while the Electoral College doesn’t help any specific group or region, it does help certain states over others. Given the democratization of America since 1787, these facts are unacceptable. Constitutional language that has led to the citizens of swing states being able to more fully participate in their democracy than millions of citizens of safe states is objectionable. This constitutional language must be repealed and replaced with the direct popular vote through the constitutional amendment process.

While language in Article II Section I creating swing state bias is objectionable, it is even more so since it has also resulted in the creation of the National Popular Vote Initiative. As noted above, Clauses II, III, and IV of Article II Section I of the
Constitution—which include language intended to limit the influence of factions, federal office holders, electors from other states, political parties, and foreign governments on the Electoral College—clearly show that the NPV violates the intent of the Constitution as it attempts to influence the Electoral College against the wishes of the framers. As noted above, these arguments are supported by the statements of six framers in the Constitutional Convention, the state ratifying conventions, or the Federalist Papers.

Further, when we look closer at the characteristics of the NPV legislation, it is clear that the NPV violates the intent of the Constitution because it represents the type of cabal that the founders wished to avoid. As discussed above, since only Democratic legislatures and governors have passed the NPV legislation—and all these states voted Democratic in presidential elections since 2008—the NPV can be described as Democratic state lawmakers and electors working in combination to change how the Electoral College functions without a constitutional amendment. Given the partisan makeup of this legislation, there is no doubt that the framers of the Constitution would be concerned by the NPV legislation.

Of note, the arguments of this chapter directly contradict arguments by NPV supporters who claim that Article II Section I gives state legislatures plenary power to choose how they will select electors and award their electoral votes. However, it must be emphasized, the power of state legislatures to select electors cannot be completely plenary because states cannot choose their electors in a way that violates clauses of the Constitution, including the intent of Clauses II, III, and IV of Article II Section I. As such, if supporters of NPV want to implement the direct election of the president, they should do it through the Article V constitutional amendment process. These points are
also supported by Supreme Court precedent. As noted by *U.S. Term Limits, Inc. v. Thornton*, and *Cook v. Gralike*, changes to the framework of the Constitution must be done via constitutional amendment.

While we understand NPV supporters’ earnestness in trying to implement the direct popular vote, like attempts to bind faithless electors, the route they have taken is questionable. As we have discussed above, the NPV legislation is a constitutionally suspect attempt to do an end run around the Electoral College and implement a direct popular vote. While passing sixteen state laws to implement the NPV is bad enough, if this interstate compact is allowed to come to fruition, it will undoubtedly result in controversy and disruption. When and if the compact goes into effect after 270 electoral votes worth of states join, there will be a lawsuit questioning the constitutionality of the NPV.

What’s worse, this litigation could all happen as close as six months before a presidential election, leading to confusion for presidential candidates and the electorate. Of note, the strategy to winning the popular vote is different from trying to win the Electoral College. As such, as litigation makes its way to the Supreme Court, will candidates be spending their time in swing states trying to win the Electoral College or turning out their base in population centers for the popular vote? What happens if candidates need to switch gears just a few months from Election Day after a court ruling? This could be disruptive to say the least. As such, unless scholars come up with an end run around the first amendment to stop NPV supporters from doing their own end run, the best path to stop the potential fallout of the NPV legislation is using the Article V amendment process—as the framers intended—to implement the direct popular vote.
As noted many times above, the desired replacement of this paper for the Electoral College is the direct popular vote. While it is beyond the subject and bandwidth of this paper to fully discuss the strengths and weaknesses of the direct popular vote—which defenders and critics of the Electoral College have debated at length—the direct popular vote offers many benefits to the electorate. Other than implementing direct democracy, the direct popular vote will bring an end to all electors faithless or not, swing state bias, and the push for the NPV initiative. It will also bring an end to constitutional language that has caused all these problems in the first place. That being said, defenders of the Electoral College would likely argue that the direct election of the president would lead to candidates only focusing on turning out their supporters in highly populated areas, lead to increased voter fraud, require national election laws to ensure fairness, require runoff elections, and many other counterarguments.

Additionally, it is worth noting that two of our issues could be fixed via constitutional amendment without implementing a direct popular vote. For instance, regarding the role of electors, Congress could begin the process of passing a constitutional amendment to stipulate that electors must act as delegates. Given the thirty-two jurisdictions that attempt to bind electors, there is no doubt that there would be some interest in such a provision. Such an amendment would eliminate fears that faithless trustee electors would swing an election and lead to a contentious court battle and constitutional crises. The same could be done for swing state bias. Mirroring the current method used in Maine and Nebraska, language could be included in the Constitution that requires states to award their electoral votes based on the popular vote winner in congressional districts. This would eliminate the possibility of winner-take-all states and
candidates spending all of their time in competitive states. Rather, candidates would likely campaign in competitive congressional districts, making the candidates focus on more areas in a democratic fashion. No longer would dozens of states be stuck as swing states from election to election. However, certain congressional districts would undoubtedly remain struck as safe congressional districts and would still be ignored.

Unfortunately, supporters of the direct popular vote would unlikely settle for these fixes to the Electoral College. If a constitutional amendment is passing to amend the Electoral College, they will likely want to implement a direct popular vote rather than fix the Electoral College. To date, sixteen jurisdictions have attempted to implement the direct popular vote through the NPV. Given the less than acceptable means that supporters of direct election have already taken, it seems unlikely that they are willing to settle for a simple fix that would leave the Electoral College fully in place.

Further, anything less than the direct popular vote seems more unlikely given that critics of the Electoral College have many more issues with the institution than faithless electors and swing states bias. For instance, fixing faithless electors and swing state bias would not necessarily fix issues seen as recently as 2016 and 2000 where the winner of the national popular vote lost the Electoral College. Nor would it fix Electoral College critics’ issues with the Electoral College contingency election process where the House of Representatives picks the president if no candidate wins a majority of electoral votes. As such, there will likely be many who will argue that the Electoral College has too many structural problems and should be scrapped rather than incrementally fixed.

Even so, this is an area that should be studied further. Given the many critics and defenders of the Electoral College—and the unlikelihood that an amendment to replace
the Electoral College would go into effect any time soon—it is important to ask: would an amendment to fix issues with the Electoral College be acceptable to both sides? A survey of prominent Electoral College scholars should be conducted to see if both camps would be willing to accept an amendment that fixes some of the most glaring issues with the Electoral College while leaving the system intact. This would certainly be in the spirit of 1787 where delegates of the Constitutional Convention compromised in implementing the Electoral College when they could not decide between popular election and election via Congress. Until then, it is clear that there are a number of issues with the Electoral College that cause significant problems for the United States. Policy makers must continue debating ways to fix these issues and decide on a path forward for the good of the country. The status quo should not continue and should preferably be replaced with the direct popular vote.
Bibliography


Curriculum Vitae

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