THE VOTE THAT COUNTS: HOW THE ELECTORAL COLLEGE
THREATENS THE WILL OF THE MAJORITY AND AN
ASSESSMENT OF THE LIKELIHOOD OF REFORM
THROUGH AN INTERSTATE COMPACT

A Thesis
Presented
to the Faculty of
California State University, Chico

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts
in
Political Science

by
Anna Johnson
Fall 2012
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APPROVED BY THE DEAN OF GRADUATE STUDIES
AND VICE PROVOST FOR RESEARCH:

Eun K. Park, Ph.D.

APPROVED BY THE GRADUATE ADVISORY COMMITTEE:

Matthew O. Thomas, Ph.D.
Graduate Coordinator

Alan Gibson, Ph.D., Chair

Charles C. Turner, Ph.D.

Matthew O. Thomas, Ph.D.
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ABSTRACT

THE VOTE THAT COUNTS: HOW THE ELECTORAL COLLEGE
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American general elections are almost exclusively determined by a plurality of votes, excepting presidential selection. The current method of selecting the president weights the importance of citizens based on state of residency and may override a plurality vote. This paper investigates the origins and repercussions of this system as well as the most current suggestion for rectifying these shortcomings, an interstate compact. This compact has nearly met half the membership requirement necessary for enactment and has the potential to change American electoral politics. The compact is analyzed to determine its likelihood of surviving a legal challenge and its potential effectiveness in resolving the issues created by the Electoral College.
CHAPTER I

A NORMATIVE ANALYSIS OF
AMERICAN GENERAL
ELECTIONS

Introduction

The Presidential Election of 2000 evoked confusion, fear, and frustration throughout America. With the final decision falling to Florida and its questionable election procedures, Americans were vocal with their frustrations with the election process. The ever present questions regarding Florida’s election process and the accuracy of the outcome spiraled into conspiracy theories in which large trucks were driving down the street with election ballots flying out of the bed of the truck. Ordinary citizens became concerned that their vote, be it cast in Florida or another state, was being dramatically impacted by a group of Florida state supreme court justices. The nation remained in a state of uncertainty for over a month with neither candidate willing to admit defeat, and both using the court system in the hopes of proving their rightful claim to the presidency (Gore 2000). George Bush filed suit in the United States Supreme Court to answer the question once and for all, who is the 43rd American President? Citizens were glued to their media sources to gain information and clues as to the eminent decision. The United States Supreme Court, in Bush v. Gore, officially and finally stopped the recount of votes in certain counties of Florida and granted Bush the presidency. Al Gore acknowledged
the significance of the Court’s decision, stating; “Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College” (Gore 2000). Gore encouraged Americans to return to their daily lives and forget the turmoil and frustration.

The Electoral College has confounded citizens almost since its creation. It is an indirect method of selecting a president that does not necessarily comport with the will of citizens at the state or national level. Historically, electors of the president have followed the popular mandate, but in 2000 the election was marred by voting irregularities in Florida which resulted in George W. Bush gaining the Presidency, although Al Gore received more popular votes. Most Americans quickly rebounded with their lives. Gore himself argued that it was time to move on, stating “While we old and do not yield to our opposing beliefs, there is a higher duty to the one we owe to political party. This is American and we put country before party. We will stand together behind our new president” (Gore 2000). Despite these urgings, there is still a group that has questioned the foundations and applications of the Electoral College. From this small group, a movement was created.

Since the Election of 2000, there has been a slow push by a vocal minority to abolish or alter the Electoral College to ensure that the wishes of the American public are addressed in presidential selection process. Initiated and fostered by the National Popular Vote Organization, this movement was formally launched in 2006, and since then has been gaining publicity and support nationally. Progress has been slow, but with the recent approval and support pledged by California, a new spark has been ignited and the
potential for change kindled. With the pledged support of each new state by participating in an interstate compact, the nation takes one step closer to ensuring that the President of the United States is selected through a national popular vote rather than an indirect election of electors who vote in a secondary election, as is currently the case.

This movement to alter the impact of the Electoral College has been met with mixed reactions across the nation. Some argue it is a revolutionary attempt to work within the current election system, yet alter its application to meet the interests of the public. Others see it as a direct attack on the United States Constitution and the American election process. The struggle has played out across the nation in debates and hearings in many state legislatures, as each state determines for itself whether altering the selection process will help or hinder its constituents. Although nowhere near successfully completed, the movement has hit the milestone of achieving almost half the support necessary to cause the change to election procedures. It is this achievement that has peaked a renewed interest of citizens and politicians in the movement and its potential for national success.

To understand this movement and its ramifications, it is necessary to review both the Electoral College as it currently exists and the impact of the proposed change. This investigation will begin with an analysis of the Electoral College, its origins, its structure, and impacts on the election process. This paper will examine the framers’ intent when drafting the Constitution and creating the Electoral College as well as the present implications of this institution, framing the question: Were the framers’ able to achieve their goals and create a system of Presidential selection that benefits society?
This section investigates the inner-workings of the Electoral College and how 51 semi-autonomous elections are aggregated to determine the next president.

After reviewing the Electoral College as it currently exists in the light of the goals of the framers, it is clear that the institution fails on both originalist and non-originalist grounds. In other words, it fails to meet not just the original goals of the framers, but it also fails to meet the current needs of society.

The next section enumerates the many relevant arguments against the Electoral College, highlighting its shortcomings in selecting a President. Many academics argue that the Electoral College is the best option for America, trotting out a list of false virtues and “hypothetical horribles” or potential repercussions of eliminating the Electoral College. This section challenges each of these arguments and addresses other concerns with the current electoral system.

Once the case against the Electoral College is set forth, it is important to investigate the alternative means of selecting the President. Since the Electoral College was created in the Constitution, the process of changing or abolishing it is much more complicated than were it a simple piece of legislation. The amendment process, the most commonly utilized method of Constitutional change, and its four potential avenues are addressed. Also addressed are more unconventional methods such as the interstate compact. Finally, the shortcomings of change through amending the Constitution are addressed, prompting investigation into additional means of change.

The current movement to alter the Electoral College seeks to do so by utilizing an interstate compact, or an agreement among states to institute a change in election process. This is an unprecedented means of Constitutional change. A review of
the history of interstate compacts and the process of enactment is followed by a
discussion of the practical application of this agreement to abolish the Electoral College.
The previous uses of interstate compacts to resolve regional, multistate problems are
examined to provide a clear progression of how the interstate compact can be expanded
from its original use, to effectively resolve a national issue such as the method of
selecting the President.

The next section investigates the current reform movement and its most recent
success in California. California’s Assembly Bill 459 is the most recent in a series of
proposed pieces of legislation that were passed in state legislatures to support the
movement to select the President of the United States through a general popular election.
Each state that passes this legislation becomes a member in the interstate compact to alter
the impact of the Electoral College. This reform movement has slowly gained support
from different states, increasing the likelihood of national passage, with California being
the jewel in its crown, pledging its 55 electoral votes to the cause.

The passage of this legislation in California was met with mixed reviews.
Legislation such as this will change not just California election laws, but also has the
potential to change the means of determining an outcome in presidential selection. This
section addresses these changes and concludes that popular election is the best means of
electing the President.

Currently, eight states with half of the necessary votes to change the system
have approved the legislation, but the change in election procedures will not go into
effect until states with more than half of the Electoral Votes have pledged their votes to
this movement. Despite this progress, there is still a long way to go, if this movement is
to be successful. The struggle of each of the current member states is examined to shed light on the current climate for change.

Finally, the remaining sections outline the current status of the movement and the characteristics of current member states. There are several political and demographic similarities among the member states that are worth noting, particularly as the movement continues to solicit new members. An understanding of the member states’ characteristics allows for prediction of future member states and an assessment of whether there is a legitimate chance at success for this movement.

With the nearing of another presidential election, Americans are again questioning the method of selection and whether their vote counts. Much discussion in the news and in newspapers suggests that the outcome will hinge on just five states. As this shrinking of the “relevant” electorate continues, more and more citizens have taken notice and begin to question this system. It is this questioning that provides hope for not just this particular push for electoral change, but also in a selection institution that will accord equal treatment to voters from and within all states.

How We Elect the President: a Brief Analysis of Our Irrational Selection Process

The perception of America as a democratic nation in which individuals are able to express political and social values through elections does not hold true when evaluating our current method of presidential selection. The Electoral College violates three central concepts of democratic theory: commitment to one person, one vote; the proposition that the candidate with the most votes wins; and it diminishes votes when they don’t coincide with the majority party of a state. Created in Article II of the
Constitution and implemented in every presidential election since its establishment, the Electoral College is not an appropriate means of election for a democratic republic (Dahl 2003). The Electoral College does not operate in the way it was conceived by the founders and its deficiencies outweigh its illusionary benefits. The framers of the Constitution were faced with the hefty task of creating a government that would meet the interests of both large and small states to ensure both would be willing to join the union. The desire for a compromise to enhance the likelihood of ratification of the Constitution may have even outweighed the desire for democratic principles. The Electoral College as a method of selection was highly contested by delegates. It was first introduced in the Constitutional Convention on June 2nd and later voted on in various forms five times before approval on September 7th. The sections of Article II that deal with the selection of Section. 1.

Clause 2: 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3: The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a
Choice. In every Case, after the Choice of the President, the Person having the
greatest Number of Votes of the Electors shall be the Vice President. But if there
should remain two or more who have equal Votes, the Senate shall chuse from them
by Ballot the Vice President.

The above text outlines the way in which the president is currently selected,
excepting a few additions due to the ratification of the Twelfth Amendment after the
election of 1800. The Electoral College sets up a system in which there are 51 separate
elections that together determine who is elected president. Each state receives votes equal
to the number of seats they hold in Congress. They vote in the final election based upon
the results determined in their small, statewide election. The Electoral College is
currently comprised of 538 electors, or voting positions in the final election held in a
temporary congress. These are prestigious positions because it is those members of the
Electoral College who are able to vote for the president in the final and formal election on
the behalf of their state constituents. Simply speaking, there are 535 electoral votes that
are divided among the 50 states, with an additional 3 being granted to Washington, D.C.
after the passage of the Twenty-Third Amendment on March 29th, 1961. Electoral votes
are allocated to the states and independent entities based on both statehood and
population, with each state receiving electoral seats equal to the number of members they
have in Congress. Each state is granted two of the 535 electoral votes based on statehood
alone, with the rest being distributed among states by population based on current census
statistics. It is these 538 votes that determine the President of the United States in a
secondary election that occurs after state popular elections are held. Each state is given
the expressed right to determine the manner, in which electoral votes will be given to
candidates, be it en bloc or by a proportional allocation. Currently, each state holds an
individual popular election to determine which candidate will receive the electoral votes granted to the state, although this is an optional, not mandated means of determining which candidate should receive the electoral votes. Once the popular election is complete, the state, if it uses a winner-take-all method, allocates all its electoral votes en bloc votes to the winning candidate. However, Maine and Nebraska use an alternate method of allocation that breaks the state down into district based winner-take-all elections allowing the electoral votes of the state to be divided among the different candidates. The candidate who reaches 270 electoral votes from a combination of any of the 50 states and/or Washington, D.C. becomes the President-elect and will take the oath of office in January. If no candidate reaches the 270 electoral votes necessary to win office, the top three vote earners will advance to another vote in the House of Representatives.

The Electoral College, as originally adopted, was responsible for determining both the president and the vice president of the United States. The person who received the highest number of electoral votes became the president; the second place candidate became the vice president. The eventual prominence of political parties created the need for revision. The original election process was altered by the Twelfth Amendment to require the Presidential and Vice-Presidential candidates from each party to run on the same ticket, alleviating the concern that a split ticket with a President and Vice President from different parties with different priorities would be elected. This occurred in 1796 with John Adams as President and Thomas Jefferson as Vice President. Further, in the election of 1800, there was a tie between the two candidates for the Presidency, Thomas Jefferson and Aaron Burr. Although it was common knowledge that the intent of the electors was for Jefferson to be elected President with Burr as Vice President, Burr was
unwilling to step down throwing the election into the House of Representatives and further evidencing the need for change. The Twelfth Amendment addressed this problem. It reads as follows:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The ratification of the Twelfth Amendment altered the means of determining the vice president. Originally, no candidates ran for vice president, because all individuals in the election were running for the office of the presidency.

If an election was decided in the House of Representatives, no such guarantee is made. When the House of Representatives is voting for the president in what is referred
to as a contingency election, each state receives one vote (Ross 2004, 27). This process forces states to discuss candidates and come to agreement prior to casting their one vote as a unit. The candidate receiving plurality from the representatives from a state earns the state’s one vote, and a tie must be broken before the vote can be cast (Ross 2004, 27). A state that is unable to determine a plurality winner among their representatives will not be eligible to vote in the contingent election. If each state is able to agree on one candidate and cast a vote, a majority may elect the president with twenty-six votes in the House of Representatives (Ross 2004, 27).

The Senate has a similar system for selecting the vice president, if the need for a contingency election arises. The Senate debates between the two highest vote earners as potential candidates. Each state receives just one vote. Both senators must agree on a candidate or abstain from the election. This process is very similar to the one that selects the president. The House chooses between the three candidates who received the highest votes while the Senate picks only from the top two. This creates the potential for a president and vice president to be from different political party because the House has additional candidates and may pick one from a different party than the candidate the Senate chose for vice president.

Despite these slight modifications to the Electoral College, the purpose of this institution was to preserve federalism, prevent chaos, grant definitive outcomes, and prevent tyrannical and unreasonable rule (Ross 2004). The Electoral College was created as an institution that would support the rights of states by allowing each state to determine the method of selecting officials and to cast its vote in a national election. The Electoral College allows each state the authority to manage its own isolated elections and
prevent chaos or corruption as they see fit. This system can prevent widespread fraud or corruption. Each state may isolate precincts or areas with potential problems and address the concern quickly and efficiently. Any issue with fraud can be isolated and addressed without compromising the results in other areas. The Electoral College ensures clear winners and candidate results with a significant spread. As an institution, the Electoral College was intended to promote states’ rights, and encouraged states to account for the interests and values of their residents when supporting a candidate. To get a further ideal of why the framers developed the Electoral College, we should consider the three alternatives they considered.

At the Constitutional Convention, three primary methods of presidential selection were discussed at length. First, direct popular election; second, appointment by the legislature; and third, a hybrid of the above two that evolved into the Electoral College (Ross 2004). The three methods of determining the president all had perceived flaws and attributes which promoted the contentious discussion. The first option, a direct popular election of the president, concerned the framers for three primary reasons. First, as with many components of the new government, a balance of power between more populous and less populous states was necessary for ratification and success of this new government. Small states were concerned that they would be outvoted and overpowered in a direct election, creating a populous state advantage. They therefore promoted the investigation of other options to protect their voters. Candidates elected in a direct election have the ability to ignore the interest of residents of smaller and less populous rural states, focusing instead in areas with greater populations to increase support and ensure political success, creating an urban bias in elections. During the Constitutional
Convention, some small states expressed great concern that direct election restricted the voting power of residents of the small states and minimized their political influence, making the elected officials, such as the President, beholden to the large states at the cost of those smaller states (Ross 2004).

A second concern with the direct election of the president was a lack of confidence in the ability of the general populous to acquire information necessary to accurately determine the best candidate (Amar 2005). Interstate communication and political interaction did not exist in 1787. There was limited ability to acquire information. The geographic spread of the federal system made it difficult to transfer information throughout the country without a central agency to do so (Amar 2005). There was also concern regarding the abilities of the masses to determine the best candidate, though a vocal minority of convention delegates espoused this concern. Delegate George Mason from Virginia argued 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 colors to a blind man” (Monk 2003, 68). Mason and other delegates feared that the American public had neither the access to the knowledge nor the analytical skills necessary to make an appropriate selection. At the time of the Constitutional Convention, communication was difficult and the ability to disseminate information on multiple candidates up and down the Atlantic Seaboard was an immense challenge. With these restrictions on candidate information, much of the voting public would be required to cast a vote on faulty or lacking information. Leaving the selection of the President to “ill informed” voters was deemed too risky, and so this method of selection was cast aside in search of a better option.
Discussion shifted to a method of selection in which the national legislature voted for the president on behalf of the citizens. This was the current practice in the election of governors. Election by the legislature mitigated concern that an ignorant or volatile populous from a few states would dominate the direct election process. In this scenario, the legislature would appoint the president, and would have the power over presidential impeachment (Ross 2004). But the nature of selection by legislative appointment manifested other flaws resulting in extensive debate. Legislative appointment tied the president to Congress, limiting both the authority and the autonomy of the office (Ross 2004). The president would be dependent on Congress for his tenure in office. The concern that the president would be beholden to those legislators that supported him resulted in the defeat of this method of presidential selection. It was believed that the probability of bias and corruption within public works increases exponentially with this method of selection because the president is highly dependent upon representatives to maintain public office. Legislative appointment allows legislators more power than intended by the framers of the Constitution and place them in a position to demand favors from the President to ensure his office. The doctrine of separation of powers and a system of checks and balances were recommended as a means to minimize the concern of corruption and abuse of power. Gouverneur Morris articulated the concerns regarding this intersection of legislative and executive power arguing, “If the Legislature elect, it will be the work of intrigue, of cabal, and of faction,” claiming that consolidating power in a manner such as this would lead to corruption (Ross 2004, 49).

The actual and perceived flaws of the first two methods promoted the search for a third method, a hybrid of the two that assuaged the fears of delegates. The objective
was to provide a republican-style election to include the will of the people without being subject to their whims. On paper, the Electoral College achieved this in many respects. Under the Electoral College, a temporary congress was created with votes distributed among the states based on a combination of state equality as well as population (Amar 2005). It was these votes that would make the final determination as to who the next President would be. This hybrid included the attributes of the other two options. Like the popular election, it was rooted in rule by the people. Like legislative selection, it supplies expertise and the method minimized some of the consequences of the original two options.

The Electoral College was proposed because of its potential to minimize sectional differences between the states. In the North, the predominance of smaller states garnered support for a form of delegate election that would reduce the likelihood of Southern dominance. The Electoral College allowed smaller states more power than they would have proportionally gained. For example, Virginia was the most populous state with ten representatives while Delaware had one (Estes 2011). Under this compromise, Delaware gained three times the power while Virginia gained an additional 20%. The southern states were able to increase population counts by including the slave populations at three fifths and therefore desired a popular form of presidential election under which their slaves would count for the purposes of electing the president. Both regions thus benefited from the application of the Great Compromise to the selection of the president, allocation of votes based on population in the House of Representatives and equality in the Senate. The compromise to include both population and equal representation made this method of selection acceptable to both groups.
The Electoral College, coupled with another major convention compromise, the Three-Fifths Compromise, further settled regional disputes. Madison did not believe that the great difference in interest was between large states and small states, rather, he believed there must be a compromise between slave states and non-slave states (Amar 2005). The debate between counting only free citizens and inhabitants had a dramatic impact on the role the South played in both the House of Representatives and the election of the president. This issue required resolution to ensure support from both groups. The power of states would be dramatically altered depending on the result. Should population be based on free citizens, New York would be a larger and more powerful state than North Carolina, but if counts were based on population, North Carolina had the clear advantage (Estes 2005).

The Three-Fifths Compromise provided the means of determining population counts in the House. Counts would be based on population, with each slave counting as three-fifths of a person. This granted Virginia six more electors than if counts had been based on free populations alone (Amar 2005). The Three-Fifths Compromise provided southern states the additional reason necessary to ensure ratification of the Constitution. The Three-Fifths Compromise accommodated for slavery and ensured that slave states would have substantial power in selecting the president.

The Case Against the Electoral College

The Electoral College is not an institution that “prevents chaos, grants definitive outcomes or prevents tyrannical and unreasonable rule” (Ross 2004, 164). The Electoral College sets up an election system that arbitrarily weights the votes of some
citizens over others is an arbitrary institution that has the capacity to ignore the interests and opinions of a majority of citizens, as most recently seen in the 2000 Presidential Election. Dahl calls the Electoral College “a rather peculiar and ritualized way of allocating the votes of the states for president and vice president” (2001, 31). Rather than allowing a plurality of the American public to determine the President that best meets their values, the Electoral College weights the power of citizens votes depending upon where they live and whether they were part of the majority in their state. Further, the Electoral College allows candidates unable to garner a majority support from the nation to win the office because of success in key states. Residents of many states are ignored under the Electoral College because the electoral votes are all but determined in advance, whereas “in a system of direct election where every citizen’s votes are given equal weight, presidential candidates will be even more eager than they are now to win votes wherever they might be available; and the closer they expect the election to be, the more eagerly they will search out those votes” (Dahl 2001, 85). To meet the needs of citizens nationally and to make each citizen’s vote of equal significance, reform is necessary.

Different opinions and expectations of the Electoral College have led to a bifurcated public. Currently, legislators in eight states and Washington D.C. have become active members in a movement to alter the method of selecting a president (National Popular Vote 2012). Portions of the American public see the Electoral College as an institution that has evolved from the original intent and purposes yet still plays an important role in American elections. Another portion of the public sees the Electoral College as an antiquated institution that arbitrarily provides states with different power in presidential selection. While both sides concede that the Electoral College does not
operate as it was originally intended, proponents of the institution argue that it still plays a valuable role.

Proponents of the Electoral College consolidate their claims into the following four arguments. First, direct elections would allow for regionally specific or narrow election campaigns that focus on the specific issues. Next, the Electoral College decreases chaos by confining vote discrepancies to one geographic area. Third, the Electoral College creates a two-party system with compromise and moderate candidates. Finally, the Electoral College creates clear winners. Upon close consideration, none of these claims has merit.

The proponents’ first claim is that the structure of the Electoral College requires candidates to seek national support, reducing the incentive to focus campaigns on a faction of the population. The Electoral College creates a two-tier election in which candidates must appeal to large sections of the population in states across the nation. It is said that this selection process results in the election of the best candidate for the nation as a whole (Ross 2004). Candidates must campaign and appeal to citizens in several states to ensure national rather than regional support. Judith Best is a well-known political scholar who sees the value in the Electoral College. Best (1996) claims that it is the federal principle seen in the Electoral College that prevents citizen groups from uniting nationally to monopolize politics. Best argues

The federal principle keeps dangerous factions within bounds by penning them up in multiple small societies. If dangerous factions cannot directly combine their votes across state lines, their destructive potential is reduced. If they are confined within the boundaries of a state, the necessity to compromise in order to achieve national representation can instill moderation. (1996, 38)
The ability of American citizens to acquire correct information about presidential candidates and then to act their best interest, as well as national interests, is sometimes called into question. At the dawn of our nation, James Madison argued that mob rule would cause the “greatest threat to the goals of popular government” (Gregg 2001). In Federalist 10, Madison argues that the ability of groups of people to politically unite based on a few similarities allows them to overrule other groups and to infringe upon their rights. The Electoral College, according to its defenders, currently isolates sections of the population based upon geographic location, and minimizes their ability to unite to override the wishes of others. The ability to form factions based on sectional or economic similarities could greatly restrict the will and wishes of the rest of the population. People of this view argue that the breakdown of presidential selection into 51 statewide contests requires candidates to address the needs of each state to garner local support (Gregg 2001). The direct popular election of the president may shift the perspective from the state, to the individual, causing coalitions based on different and potentially destructive characteristics. This shift would create macro-interests, rather than interest groups by allowing citizens from different states to band together and promote their political and personal interests.

In reality, the Electoral College has created its own group or faction consisting of those powerful residents of swing states. This elite group accounted for just 27% of the total population in 2004. This small portion of the population is able to play a significantly greater role in determining the outcome of elections. Under a direct election, the voting groups would be based on demographics and values rather than solely geographic location.
The Electoral College does not create this national consensus for a candidate. In fact, the Electoral College not only limits the role of many states and citizens in the nation, it also reduces the incentive to vote and be an active participant in presidential politics. Under the Electoral College, states run their own elections in which the electoral votes are allocated to the winner of a statewide popular contest. This winner-take-all system ignores the interests of the minority, reducing their incentive to participate in elections. The Electoral College apportions the votes given to different states, which in turn influences the allocation of campaign resources, primarily funds and time. In the 1960 Presidential contest, Richard Nixon pledged that he would visit not just the 48 contiguous states, but all 50 states on his campaign trail (Estes 2004). This resulted in him visiting states that he was sure to win as well as those he was sure to lose. This allocation of resources would today be argued by most campaign managers to be wasteful, but the last time all 50 states were given access to a candidate and his campaign during a bid for the presidency. In current elections, most candidates focus their resources on states they believe to be vulnerable to change with the hope that this will push the votes in their favor. For example, in the 2004 Election, 99% of the funds spent in the last month on advertising were spent in the seventeen battleground states, states that could be persuaded to vote for either major political candidate (Zimmerman 2010). This means that candidates of the major parties ignore many other states such as California, Illinois, New York and Texas, all of which have large populations which are not receiving access to campaign resources including: political and campaign advertisements and information (Zimmerman 2010). In President Obama’s current campaign, he mailed flyers to Californian voters asking for money to be used in nine key states: Nevada, Iowa,
Colorado, Ohio, New Hampshire, Florida, Pennsylvania, Virginia, and North Carolina (Obama 2012, campaign mailer). Campaigns such as this do not promote national tactics; rather, it restricts them to certain states.

In campaigns, states are now divided into two groups: those spectator states where the outcome is easily predicted; and colored either red for a Republican stronghold or blue for a Democratic stronghold, and those labeled battleground states where the outcome is unknown. Classification of states is necessary to determine the best allocation of the scarce resources available for the presidential bid. States that are sure to support a particular candidate are likely ignored in favor of those states that have the potential to swing either way. The vulnerability or flexibility of these states makes their electoral votes “up for grabs” making these states a sort of battleground for the candidates of the major parties, monopolizing candidate time and resources. It is these swing states that ultimately decide the president by allowing a candidate to reach the 270 electoral vote benchmark.

These “swing states” are also called “purple states” and signify the opportunity for a presidential candidate from either party to acquire more of the electoral votes necessary to reach the threshold of 270, the minimum amount to be sworn in as president. The 2004 election was a highly publicized election. This was exacerbated because the election served as a review of the controversial Supreme Court decision that solidified victory by President George W. Bush in 2000. In the 2004 Election, there were seventeen purple states (Zimmerman 2010). This resulted in the majority of campaign resources being focused on roughly one third of the United States; in fact 99% of the $237,423,744 spent in the last month of the campaign was spent in these states.
(Zimmerman 2010). This focus of resources and attention on roughly a third of the states leaves many larger and more populous states ignored, causing a presidential election in which many voters disengaged and became apathetic. It also left significant larger rural areas within these states ignored.

Unfortunately, the trend of shrinking presidential campaign focus has continued under the Electoral College. More recently, the 2008 election saw a decrease in battleground or purple states, yet the manner of resource allocation remained fairly consistent. This impacts the voters in a variety of ways, not just by limiting access to information. In 2008 there were only fifteen purple states and yet, in the last month of the campaign, 57% of all campaign addresses were in these battleground states, resulting in 6% higher voter turnout in these areas than red or blue states (Zimmerman 2010). This unequal allocation of resources results in levels of voter apathy in spectator states and causes a major breakdown in the process of presidential selection. When comparing the United States with other democratic nations, we rank in the bottom third with regard to voter turnout (Dahl 2003).

This voter apathy and decreased voter turnout, which may be accentuated by the Electoral College, results in stagnation in state elections. It is less likely that a citizen would take the initiative to vote in a state in which the full slate of electors is all but guaranteed to a candidate of the other party. The resources required to vote, time away from work or family, as well as gas to get to the polls, seem wasted when the outcome is all but certain (Dahl 2003). This tyranny of the majority at the state level results in many voting citizens choosing not to participate and therefore not be represented in presidential elections, as seen in the 6% lower voter turnout in spectator versus swing states. The
electoral system used by most states, a winner-take-all apportionment of electoral votes, fosters this apathy by providing all the votes of the state to the winner of that state’s popular election, granting those supporting the minority candidate no voice in the final election of the president.

The right to determine the manner in which the electoral votes are allocated after the state contest, currently almost exclusively the winner-take-all method, is expressly granted to the state legislatures by the Constitution. As previously mentioned, states run a popular contest within their borders and then allocate the electoral votes in a manner previously determined by the state legislature. In the commonly used winner-take-all system, the winner of the majority of votes in a state election earns all the electoral delegate positions and all electoral votes. Although most states use this, there is a second method of allocation known as the district apportionment method, currently utilized in only two states (Ross 2004). Maine and Nebraska use district apportionment to select the delegates for the Electoral College, implementing this method in 1972 and 1992 respectively (Ross 2004). This innovative method of vote allocation focuses the competition at the smallest unit of federal government, the congressional district. In these states, the winner of the state popular vote is awarded two electoral delegates, and the rest of the votes allocated to the state are awarded based on the winner of district-wide elections (Ross 2004). This system allows votes to be distributed among multiple candidates, not just one candidate, as is the case in a state that implements a winner-take-all system. This results in the wishes of all citizens being represented in the temporary congress to elect the president. This system protects the votes of more citizens by granting electoral votes based on popular vote and addresses the problem of the tyranny
of the majority on a statewide basis, allowing individuals in districts more power in the election process. Breaking down the election into many district-based segments allows each individual more authority in determining the results of the election. Although this method protects citizens from the tyranny of the majority, it does not have the power to encourage candidates to divide campaign resources more equitably among the states. Candidates must still play a numbers game to correctly determine which states to focus attention and campaign resources toward to promote the optimum return on investment. The Electoral College does not ensure that all states will be visited, in fact, it ensures that many states will not be visited because of long-standing voting records.

Judith Best argues that despite the frustration of minority voters, the winner-take-all method is more widely utilized by states because it: “. . . was favorable to the majority party in each state, and because those states that did not consolidate their electoral power were believed to have less influence and less strength than those that did consolidate” (Gregg 2001, 32). This frequently used system allocates all electoral delegates to one candidate and is seen by many states as the powerhouse of electoral politics, granting them greater control of the election outcome than they would have with the proportional method. It concentrates all state votes toward one candidate, giving that state more power and increasing the likelihood of their candidate’s success. The method places all the electoral weight behind one candidate, minimizing the spread between acquired and necessary electoral votes and furthering the likelihood that a candidate will reach the 270-vote threshold necessary to become president. Take California as an example. Its 55 votes cover over a fifth of the required votes to obtain the Presidency. If they are not allocated en bloc, but divided among multiple party candidates, the power of
California would be greatly diluted. Many argue that placing all selection power through electoral votes behind the candidate garnering the most support in the state election better reflects the wishes of the residents. This theoretical advantage is the logic behind the popularity of the winner-take-all system in American presidential elections. State legislatures promote its continuation despite its propensity to minimize the weight of citizens in several states because of partisan politics and the advantage this system provides the two major parties. For example, Republican voters in California have not had an active role in electing a president since 1988 (270 To Win 2012). Although the Electoral College is argued to spread elections across the nation in a federal system, the reality is that it focuses resources and attention in a few undecided states during each election, supporting partisan politics and power.

The second argument proponents use is that the Electoral College prevents chaos by preventing the case of “50 Floridas.” In the 2000 election, Florida’s election practices caused national turmoil. The structure of the ballot and inaccurate voter registration caused Florida to engage in what was eventually determined to be an unconstitutional recount. The closeness of the election, a spread of just 600 votes, coupled with the vote tally discrepancies caused the nation to watch Florida and the Supreme Court closely. The Electoral College isolates each popular election to the state level, meaning that any inconsistency or violation in vote procedures would only influence the results in the offending state. In 2000, this isolation, according to the proponents of the “50 Floridas” argument, prevented the turmoil in Florida from expanding and influencing other election results. If all the votes were aggregated nationally, there would be no way to isolate geographic areas with voting inconsistencies,
causing all vote results to be called into question. The Electoral College allows for the isolation of inconsistencies to ensure a legitimate national election.

Proponents of the Electoral College claim when aggregating election counts from all states, there is an increased likelihood that fraudulent voters can predict and potentially alter the outcome of the election (Zimmerman 2010). Many, such as Judith Best, argue that the potential for fraud is accentuated by the greater ease of predicting direct election outcomes. The Electoral College decreases the ability to predict votes and to determine the necessary votes to alter the outcome (Ross 2004). The division of elections caused by the two-tiered voting system decreases the ability of individuals to predict and alter election outcomes in a fraudulent manner. In the 2000 election, 600 stolen votes in Florida would have changed the outcome, but the selection method under the Electoral College makes that difficult if not impossible to predict (Ross 2004). Predicting the amount of votes needed to change the results of a national popular election can be estimated as the counts come in and polls begin to close. Altering vote totals in any one state would change the national results and impact the outcome. Under the Electoral College, to alter the outcome of the election would require not just estimating the number of votes necessary, but also in which states they would be needed to alter results. An additional 600 votes in Florida would have changed the election outcome in 2000, but those same 600 votes in another state, such as California would have had no impact on the election results. Determining both the votes necessary and in which states to sway election results is much more difficult, if not impossible.

Realistically, the Electoral College does not prevent voter fraud or electoral confusion. The Electoral College does allow for the isolation of election results to a
particular state, but problems with vote counts can still alter the outcome of the election. Although many claim that the Electoral College prevented the panic from spreading across the nation, the reality is that one state and its practices were able to alter the election results. Had Florida been ordered to complete the recount, or had the ballot been structured differently, the election probably would have gone to Al Gore. Al Gore had a convincing majority of the popular vote with a lead of 524,100 votes. The ability to isolate a problem does not mean that the problem is mitigated or that it is less detrimental to the results. The reality is that this isolated problem in Florida still changed the outcome of the election and the Electoral College gave Florida the power to wrongfully determine the President for the nation.

Further, concerns regarding fraudulent voting are also irrelevant under an alternative election process. Regulations on registration and voting make it increasingly difficult to fraudulently cast votes. The awareness caused by the Florida debacle in 2000 has increased security and accountability in elections, decreasing concerns of miscounts and fraudulent voting. On the rare occasion where confusion does occur either through intentional action or negligence, under the Electoral College this confusion cannot truly be isolated to the offending state. As seen in the 2000 election with Florida’s ballot issues, election logistics at the state level cause confusion and frustration nationally. In 2000, the ability to isolate the state in question and to manage the issue quickly did not ensure an accurate or appropriate outcome.

The third claim is that the Electoral College promotes a two-party system that encourages compromise and moderate candidates. Proponents of the Electoral College’s method of distributing votes, it is argued that it discourages minority candidates with
radical stances within the major political parties (Gregg 2007). To reach the 270 electoral votes necessary to win the presidency, candidates must create a moderate platform that will appeal to citizens of many states throughout the nation. Under the Electoral College, candidates are trying to appeal to a majority in different states. These states have different issues and values, making it different for candidates to focus on just one or two issues to gain support nationally. This cross-section of support can be gained only through moderate campaign platforms that have national appeal. To appeal to voters across the nation, candidates must decrease extreme stances on regional issues. Proponents of the Electoral College claim that a direct election increases the incentive to enter into the presidential race despite extreme views because they can gain political support from other extremists across the nation. Third party candidates with extreme platforms and ideologies will perceive the office of the presidency as more attainable under direct election because they are able to appeal to citizens across the nation with similar extreme values.

In America there are five political parties that believe they can get a large enough portion of the popular vote to make them contenders in a direct election: Republican, Democrat, Reform, Libertarian, and Green (Ross 2004). This will result in more candidates needing more specific and individualized platforms to ensure voter recognition. A candidate needs to differentiate his or her platform from those used by opponents. This need for popular recognition causes extreme campaign platforms that appeal to the needs of only a small portion of the population and prevent compromise. This fractionalization of voters reduces moderation and compromise in politics.
This argument gives the Electoral College credit for creating a system that it could not possibly create. In fact, all levels of American elections show competition primarily between the two major parties without the existence of the Electoral College or an institution similar in function. The two-party system is fostered at all level of elections, not just the Presidency, so it cannot be the Electoral College that causes or prolongs this system (Edwards 2004). Congress is comprised almost exclusively of legislators from the two major parties. In district elections, there is no institution like the Electoral College to ensure that these candidates create platforms based on moderate principles from one of the two main parties. Yet, candidates from the two moderate parties, hold with only a rare exception, all the seats in Congress. America is a two-party system in spite of the Electoral College, not because of it. The presence of a two-party system with moderate candidates is important in American politics, but is not a direct result of the Electoral College, and it can continue to exist without the institution.

Finally, proponents argue that the Electoral College promotes stability in the election of the President by providing a clear and official winner for America. The Electoral College increases the spread in the election results signaling a clear winner. The manner of allocating electoral votes creates a greater spread in the electoral vote count than in the popular election results, an example of this being George Wallace. In the 1968 election, George Wallace, a known segregationist, ran as an Independent with the intent of forcing the selection of the President into the House of Representatives. Although Wallace was unable achieve this, he was able to win five states totaling almost 10 million votes and equating to 46 electoral votes (Pearson 1998). Although he was supported by only 13% of the population, he was able to claim 8.5% of the Electoral Votes (Pearson
1998). This is extremely important in close elections. For example, in 1888, Harrison defeated Cleveland by 16% in the Electoral College, but won by less than 1% in the popular vote (Ross 2004). In 1968, Nixon defeated Humphrey in the Electoral College by almost 20% but won by less than 1% in the popular election (Ross 2004). In the years since the current system has been in place, 176 years, there has not been a deadlock (Best 1996). It is necessary for America to have a clear victor that all citizens will accept and follow as their Chief of State. Proponents argue that the Electoral College promotes a clear victor with large margins to decrease confusion and increase the perception of a popular mandate (Ross 2004). This institution exaggerates the victory for one candidate, minimizing other candidate’s incentive to argue or contest. This was vital to ensure a smooth transition from one president and party to the next.

Although it is true that the Electoral College has generally provided clear winners, this is not necessarily good for America. There are alternative methods for determining a clear winner. A system with a popular vote, like the Electoral College, is able to determine a clear winner in an election. A popular vote is also able to achieve this without exaggerating the margin of victory, and skewing the perception of the results. Unlike in a popular vote, there have been times when the Electoral College has provided a candidate a clear victory when that candidate did not garner the majority of the popular vote. The Electoral College allows candidates to take office without the support of a majority of voters. This reality recently sparked frustration with the institution as a reaction to the 2000 Presidential Election and the swearing in of George W. Bush, a candidate unable to garner the majority, or even a plurality of the popular vote in a national popular election. Although not a regular occurrence, there have been several
other occasions in which the winner of the popular vote lost the presidency: 1824, 1876, 1888, and potentially 1960 due to confusion with the slates of electors (Edwards 2004). The Election of 1824 went to the House of Representatives and Adams was selected as president despite Jackson’s clear victory in the popular contest (Edwards 2004). In 1876, Tilden, the Democratic candidate earned 50.9% of the popular vote and only 50% of the electoral vote and ended up losing the election by 1 electoral vote (Edwards 2004). In 1888, Democrat Cleveland earned 48.6% of the popular vote and earned only 42% of the electoral votes (Edwards 2004). In 1960, Nixon may have won the popular vote by .1% when accounting for the confusion voters had regarding the Alabama’s pledged and unpledged of electors on the ballot, yet he lost in the Electoral College by 17%. Finally, the election still fresh in American memory, with Gore defeating Bush in the popular vote by .5% yet losing in the Electoral College by 1% (Edwards 2004). In each of these four, potentially five, scenarios, the expressed wishes of a majority of the American public were overridden by the workings of the Electoral College. It provided the clear victory to candidates who won based on which key states supported the candidate, rather than by general appeal to the entire nation.

The above claims are most commonly cited by Electoral College proponents as the benefits the institution provides. As shown, none of the proponent’s claims hold up under strict scrutiny, but there are also additional reasons that the Electoral College is a poor selection method. The primary and most valid claim is the inequality of the electoral vote allocation caused by the two Senatorial seats for each state. The unequal distribution of votes diminishes the power of many citizens and dilutes their vote in presidential
contests. The dilution of voters potentially disenfranchises Americans and it violates the democratic tenets on which this nation was founded.

The inequality of vote allocation is a consequence of the Great Compromise and the decision to provide equal representation to all states in the Senate. Each state is provided equal say in the Senate with two seats and therefore two votes. This equal allocation of senatorial seats, explained in Article One of the Constitution, carries over and impacts Article Two by ensuring that each state receives an additional two electoral votes because of said senators. This violates the tenet of “one person, one vote” determined constitutionally necessary by the Supreme Court case *Wesberry v. Sanders*. These two additional votes provide less populous states with substantially more power than they would receive in an election based on one person, one vote. These additional two votes provide citizens in some less populated states with more voting power than they deserve in a truly democratic selection method. The Electoral College instantly triples the strength of small states by granting them as many as three times the votes than they would receive with allocation based on population (Dahl 2003). This system of presidential selection, which has 51 separate elections at the state level followed by one aggregated election based on those results, has the ability to elect a president in a system with undemocratic distribution of power. In Chief Justice Earl Warren’s decision in *Reynolds v. Sims*, he argued that “to the extent that a citizen’s right to vote is debased, he is that much less a citizen” (Edwards 2004, 53). This is most frustrating upon the realization that electoral votes are finite and those allocated on behalf of Senators reduce the total amount divided among states based on population and decrease the power of highly populated states. Take the voting power of California and Montana as examples.
Montana has a population of approximately 940,000 people and receives three electoral votes while California’s population is near forty times Montana’s and receives 55 electoral votes, or only 18 times as many votes (Sampson 2008). Put differently, in 2006, California’s population was approximately 12.2% of the nation and it was granted only 10.2% of the electoral votes (Levinson 2006). This method of vote distribution provides less populous states with an advantage over those more populous states, a powerful position in presidential politics, which makes change more difficult to acquire.

Since the 1960s, Gallup Polls have found that Americans are unhappy with the Electoral College and its real impact on American Politics, stating that they would prefer it to be discontinued (Sampson 2008). In Gallup Polls from 1967 to 1980, respondents were asked, “Would you approve or disapprove of an amendment to the Constitution which would do away with the Electoral College and base the election of the president on the total vote cast throughout the nation?” In 1967, 58% of the population approved of the amendment, support peaked in 1969 with 80% and ended in 1980 with 67% (Saad 2011). The clear push to remove the Electoral College was revived after the turmoil surrounding the 2000 Presidential Election results. From 2001 to 2011, there has been slow growth in support for popular election of the president, starting at 59% and ending at 62% (Saad 2011).

Despite the public push to eliminate the Electoral College, there are those who still argue that the Electoral College is superior to all other methods. Claims that the Electoral College requires cross-national candidate support, promotes a two-party system, and leads to definitive outcomes are among the most cited (Ross 2004). These alleged benefits have been proven inaccurate and America is left with the consequences of a
system based on undemocratic principles. Because popular opinion of the Electoral
College has been so consistently negative, there have been several attempts to amend or
abolish it entirely. As one of the most egregiously affected states, California has taken a
primary role in these actions, attempting to serve as a model for the nation.
CHAPTER II

OPTIONS FOR ALTERING THE CURRENT MEANS OF SELECTING A PRESIDENT

Methods of Changing the Electoral College

One unsuccessful attempt to mitigate the problems caused by the Electoral College was to, in fact, abolish the institution in full. Attempts to alter the Constitution have substantial support, but are still being blocked by a small group of senators. Constitutional amendment requires the approval of two thirds of the Senate. This means that thirty-four senators are able to block an action that is desired by a clear majority of the Senators and potentially the nation (Dahl 2003). The drastic advantage the Electoral College provides smaller states through additional votes means that the possibility for constitutional amendment is all but blocked, causing the search for an alternative means of removing the unfavorable method of presidential selection in America.

The Constitution accounts for change by stipulating the manner in which the portions of the Constitution can be altered in Article Five. The framers understood that both society and the needs of the nation would evolve and therefore explicitly enumerated means of amending governmental practices and structures to ensure that the nation could experience smooth transitions. Article Five explains the four methods of changing Constitutional provisions as follows:
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; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Each of these four methods involves a two-tiered system with majority consent requirements to ensure that proposed changes are analyzed at length. Most commonly, it requires the consent of several or all small states to ensure the success of a constitutional amendment in the Senate. The methods explained in Article Five differ from the unanimous consent that was required under the Articles of Confederation (Monk 2003). Although the requirements were reduced, they are still much higher than those to pass a federal law, making amending the Constitution very difficult.

The four methods of change are composed of two parts, a proposal method and a means of ratification. The first method of change begins in Congress when two thirds of both houses propose an amendment. This amendment must be ratified by three fourths of the states in the nation or it can be ratified by a three quarters vote in a convention. The third method is when two thirds of the two houses of Congress propose a national convention to propose amendments to the Constitution. Amendments proposed at this convention can be ratified by three quarters of the state legislatures or by a three quarters vote at the convention.

Although the Constitution expressly states four methods for amendment, none of these are viable methods of altering the Electoral College. The advantage given to
small states through the current system of presidential selection minimizes the likelihood of small state support, which is vital to passage in the Senate. In 1989, a constitutional amendment to eliminate the Electoral College and to institute a direct election of the president went to the floor of the House of Representatives for a vote. The results of this vote were 338 in favor of the amendment and only 80 opposed (Dahl 2003). This is an approval rating of 83% in the House of Representatives. Despite this overwhelming support in the House, the amendment died in the Senate under a filibuster (Dahl 2003). This filibuster resulted in an extensive debate that postponed the vote indefinitely. To end the debate and call a vote on the issue, in this case the amendment for direct election of the president, 60% of the senators must vote in favor. In this case, only 54 votes, still a clear majority, but not enough senators supported the motion and therefore the amendment died in the Senate (Dahl 2003). An amendment can be blocked by only thirteen states in the Senate, making amending the Constitution a very difficult and unlikely process. Using the 2000 Census data, the senators representing only 7.28% of the nation’s population can block an amendment (Dahl 2003). This minority of the population is given the power to override the wishes on 92% of the nation, should they choose.

If an amendment is able to garner the necessary two-thirds approval in both chambers of Congress, it is still highly unlikely that it will gain the approval necessary from the state legislatures. Again using 2000 Census data, the legislatures from the thirteen smallest states can block an amendment from passing despite the fact that their legislatures represent only a minute 3.87% of the nation’s population (Dahl 2003). Since 1789, more than 11,000 constitutional amendments have been proposed. Of these, only
eliminating the electoral college through an interstate compact

with the realization that constitutional change through amendment is unlikely due to the political climate of the Senate, Californians have moved to another portion of the Constitution as a means of altering the current method of selecting a president. Article 1, Section 10 of the United States Constitution, commonly referred to the “Compact Clause,” allows states to enter into agreements with one another. Agreements sanctioned by this clause have been utilized throughout American history, each different in substance and membership ranging from two or as many as fifty member states (Zimmerman 2004). Academics such as Robert W. Bennett, Akhil Reed Amar, and Vikram David Amar have recommended transferring the use of interstate compacts from regional issues into an alternative to federal legislation (Pincus 2009, 520). This change in procedure would provide California the opportunity to promote a more equitable method of presidential selection. California joined other states in drafting and approving a piece of legislation that would alter the manner in which the electoral votes were allocated at the national level, titled Assembly Bill 459 in California. If the compact is agreed upon by enough states, all the electoral votes allocated to the member states will
be given to a candidate based on success in the national popular contest, not the state popular contest. Put differently, once membership in the compact is equal to or greater than the 270 electoral vote threshold, said electoral votes will all be given to the candidate winning the national popular election regardless of individual state election results. In function, this would allow the president of the United States to be elected based on the outcome of the national popular contest rather than based on a two-round federal selection process. The form and function of compacts could provide California with just the opportunity to ensure its just political power in presidential selection.

Interstate compacts are a pre-revolutionary type of agreement that the colonies utilized with the approval of the British Crown (Florestano 1994). The geographic isolation of these colonies often required them to resolve issues cooperatively. These agreements were used to settle a variety of regional problems, although the most common were boundary disputes (Florestano 1994). The united colonies, and later the United States, was the aggregation of several smaller governments under a federal power and therefore needed a method to settle disputes and to build alliances against common problems. Interstate compacts were a tool in solving conflicts without relinquishing sovereignty. To ensure these agreements were honored by the member states, they were given precedence over state laws and those involved in the compact had the opportunity to sue fellow states in a federal court if the stipulations were not met (Florestano 1994). This sense of accountability made contracts between states binding and ensured that states entered into them with conviction.

Currently, interstate compacts ensure smooth interactions between states and promote the common interests of member states. One of the most well-known compacts
is the New York-New Jersey Port Authority compact which was passed in 1921 (Council of State Governments National Center for Interstate Compacts n.d.). This compact created a joint agency that ensured peaceful management and regulation of the port. Other interstate compacts have higher participation levels and deal with social problems. Two of these include *The Interstate Compact for Adult Offenders* and *The Interstate Compact for Juveniles* (Council of State Governments National Center for Interstate Compacts n.d.). These compacts create a national plan and procedure for dealing with issues that exceed state boundaries and promoting national safety.

After the Revolutionary War, the right to draft and join compacts was included in both the Articles of Confederation and the Constitution. In both of these governmental structures, the right to join an agreement with another state was subject to congressional approval (Florestano 1994). Article 10, Section 1 states: “No State shall, without the Consent of Congress…enter into any Agreement or Compact with another State, or with a foreign Power.” Congress provided states the opportunity to work bilaterally, but within specific confines. The framers saw treaties or alliances between individual states as a threat to the nation as a whole (Pincus 2009, 517). A balance was drawn between the need for cooperation and the fear of sedition by requiring congressional approval of agreements. Congressional approval ensures that the federal hierarchy remained intact and the necessity of approval has been the topic of many Supreme Court cases since ratification.

The right for states to form agreements amongst each other is not expressly stated in the Constitution, but the Compact Clause coupled with the 10th Amendment, which grants states powers not given to the federal government or expressly denied to
states, created the implied power to enter into agreements. Literally, Article 1, Section 10 requires that any agreement between two or more states have the approval of congress, but this is not current practice for interstate compacts. The Supreme Court has done a great deal to clarify the circumstances under which agreements require congressional consent. In 1893, the decision in *Virginia v. Tennessee* determined that only a portion of interstate compacts must have congressional consent (Pincus 2009). This decision called for a subject matter test to determine whether congressional approval was necessary for the ratification of a compact, or if states would form agreements independent of the legislature. In the decision, Justice Fields argued:

Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. *(Id., at 369, 96 S.Ct., at 2117, quoting Virginia v. Tennessee, 148 U.S., at 519, 13 S.Ct., at 734)*

This decision explained that all compacts do not require approval. Further, it determined that compacts that do not expand state powers do not ever require consent. The Court followed past precedent in the *New Hampshire v. Maine* in 1976. In this case, New Hampshire held that an interstate compact should be invalidated because it did not have the necessary congressional approval (Pincus 2009). The court found that this case did not require congressional approval because under *Virginia v. Tennessee* case the compact did not “encroach upon or interfere with the just supremacy of the United States” and therefore did not require consent (Pincus 2009). The Court found that there was no need for congressional consent for a boundary agreement (*U.S. Steel v. Multistate Tax Commission*). Since these cases, the necessity of congressional approval has been marginally refined, although there is still area for interpretation in future cases. The most
relevant current case, *U.S. Steel v. Multistate Tax Commission* created a test to determine which compacts must have congressional approval, expanding the *Tennessee* decision. In this case, the appellants brought suit on their own behalf, arguing that the compact must receive congressional consent, asking the court to abandon the previous decisions in the *Virginia* and *New Hampshire* cases (*United States Steel Corp. v. Multistate Tax Commission*). They pushed for a literal reading of the Compact Clause which would require all compacts to gain approval, but the Court’s ruling was based instead on stare decisis. The appellants brought multiple claims against the commission created in the compact, among them: that the compact encroached on federal supremacy regarding interstate commerce, it provided the state with enhanced power for “apportionment of nonbusiness income,” it increased the power of member states above the power granted to individual states, and it minimized power of nonmember states (*U.S. Steel v. Multistate Tax Commission*). The Court found no support for these conclusions, arguing that the commission was merely applying powers granted to the state beyond state lines. Further, although states working together may have more power as a unit, the commission created by the compact does not grant the member states any additional powers. The Supreme Court decision ruled that compacts that “enhance state power *quaod* the National Government” require congressional approval (Pincus 2009). Although it is necessary for states to implement agreements to manage regional concerns, their ability to unite should not come at the cost of federal power or sovereignty.

The legacy of the *United States’ Steel* case is the practical test it created to determine if congressional approval was necessary. This test hinged on three factors and was broken down into the following questions: 1. Did the compact allow states a new
power? 2. Did the compact delegate a state’s sovereign power to a commission? 3. Could states adopt or reject this compact, did they have the ability to withdraw from the agreement? (Pincus 2009). In the *U.S. Steel* Case, the answer to these questions was no, no, and yes and therefore no congressional consent was necessary. So long as states exercise powers historically seen as within state jurisdiction, they may enter into agreements without congressional consent. Furthering the Court’s reasoning, the impact a compact has on non-member states is not a relevant concern when determining the necessity of congressional approval (Pincus 2009).

Should a compact be deemed in need of congressional approval, there are a variety of ways to achieve said consent. Congress can grant its consent prior to the enactment of the compact, known as permissive consent, or it can grant its consent after the enactment of the compact, known as ratification (Zimmerman 2004). As previously explained, consent is only necessary for certain types of interstate compacts to be enacted. Congress can also grant blanket consent to all interstate compacts that cover a particular subject matter, facilitating the clear understanding of the types of compacts deemed appropriate by Congress (Zimmerman 2004).

In the twentieth century, the interstate compact shifted from a means to settle boundary disputes to an opportunity to handle widespread social problems including environmental and political problems (Pincus 2009). Cooperation between states became a focus of twentieth century America in practice as well as in theory. Prior to 1920, only thirty-six compacts were signed, with that twenty-five additional compacts approved between 1920 and 1941 (Florestano 1994). After 1940, there was a dramatic increase in the number of interstate compacts enacted. Not just the quantity, but also the composition
of interstate compacts changed greatly during this time. Felix Frankfurter and James Landis agree that the value of compacts is in their ability to handle “[t]he overwhelming difficulties confronting modern society” (Pincus 2009). In current society, the problem of inequity under the Electoral College may be just such a concern. Since the 1960’s interstate compacts have been praised as a means to protect state powers from a federal system (Florestano 1994). This expanded role of interstate compacts in a national capacity increases the role of states.

The process of drafting and gaining state-level approval for an interstate compact is laborious. The process can be broken down into a four phase process including: development, enactment, implementation, and administration (Bell 2004). Each of these steps requires an understanding of both the problem the compact is seeking to repair and the means by which the problem would be resolved. Interstate compacts are categorized as: bilateral, multilateral, sectional, and national depending upon the type and location of member states (Zimmerman 2004). Regardless of the type of compact, there is a clear need for the dissemination of information regarding the current problem as well as the potential for the compact to improve the status quo if the compact is to gain necessary support. These compacts can be further divided based on the type of relationship created by the agreement, either reciprocal or parallel. Reciprocal compacts expand the “reach and sphere” of the member states and, for all intents and purposes, make a borderless jurisdiction between member states (Bowman and Woods 2007). These differ from parallel compacts that create similar policies and sometimes a joint administration (Bowman and Woods 2007). Parallel compacts provide a sense of division between states and their jurisdictions, and instead have member states implement similar legislation to
solve a problem that passes state borders. Despite the type of compact or inter-state relationship created, there are logistical concerns involved in the passage and implementation of a compact. A 2004 survey of compact administrators found that one of the greatest concerns these individuals had at all levels of the interstate compact process was the task of educating legislators and officials (Bell 2004). Despite this obstacle, more than 175 compacts are currently enacted, showing the potential for using an interstate compact as a means to alter the Electoral College’s impact on the selection of the president.

When developing a compact, it is necessary to determine the major sources of support to decide which states share the need for this agreement (Bell 2004). Since the statute must be passed in multiple states with identical language, understanding potential allies is necessary early on to ensure that the statute is drafted in a manner that is appealing to all potential parties. A state puts forth an offer for an agreement when its legislature passes the statute. The process of passing the initial statute can be quite volatile. The proposed compact must be approved in the state legislature, making it subject to debate, amendment, rejection, or passage with the potential of a gubernatorial veto (Zimmerman 2004). If the compact statute is passed in the first state, this agreement is considered accepted once one or more additional states adopt a statute with identical language, thus enacting the agreement (Bell 2004). Once the agreement has been made, states must enact the components of the agreement as stipulated in the compact. This stage is mainly logistical and is comprised of staffing an administration to oversee the agreement and enacting the terms of the agreement (Bell 2004). The final stage is the
administration phase in which the obligations of the interstate compact and managed on a
daily basis to ensure compliance (Bell 2004).

States decide to join interstate compacts for many reasons. The interstate compact creates a “horizontal relationship” between the party states, aligning them for a common purpose (Bowman and Woods 2007). Regional differences provide states with the capacity to become allies or foes, dependent upon the issue at hand and the desired outcomes. The creation of interstate compacts minimizes the likelihood of conflict by aligning interests and minimizing the cost of a course of action. These voluntary compacts are different than general agreements because they create formal laws and are generally considered a permanent solution to the problem (Bowman and Woods 2007). This fairly permanent solution created by a compact increases interstate cooperation to resolve social problems that afflict many states simultaneously. In 2003, there were 175 compacts enacted and of those 59 were bilateral, but 33 were national compacts with membership open to all 50 states (Bowman and Woods 2007). The increase in national compacts shows the change in the perception and purpose of compacts, allowing them to resolve national issues in addition to regional concerns. These alliances differ from state policies that are replicated in other states because they create a bond where the two or more member states work together as a new political unit to resolve a concern with joint accountability (Bowman and Woods 2007).

Membership levels and participants in compacts differ based on many characteristics of the state in question. The reasons for state membership are contingent upon the many characteristics of the states and residents. When analyzing the compacts and agencies found in *Interstate Compacts and Agencies 2003*, member states were able
to be typified, explaining membership patterns. States that are more liberal are slightly more likely to participate in interstate compacts than conservative states, as are those states that have a greater bureaucratic capacity (Bowman and Woods 2007). Liberal and bureaucratically developed states were more open and able to deal with cooperative relationships forged by compacts. It was also found that more wealthy states, based on per capita personal income, were less likely to participate in compacts (Bowman and Woods 2007). States with a more affluent population were perhaps able to manage their own concerns through creation of a bond or tax revenues rather than seeking out help from another state and risking their independence. Despite the inverse relation between wealth and participation, states are more likely to join compacts if their neighbors are also members, a phenomenon dubbed “social learning” (Bowman and Woods 2007). The benefits of membership are clear to the neighbor states by witnessing them first-hand, increasing their propensity to become members.

Finally, interstate compact membership is related to the degree of federal legislation and control at a particular time. States increase participation in national interstate compacts when Congress shifts power to the states. When the federal government takes action, there is a 3% decrease in interstate compact participation, ceteris paribus (Bowman and Woods 2007). While some have seen the creation of interstate compacts as a means to minimize the role of the Federal Government, in reality, it is a passive Federal Government that best fosters the scenario for interstate compacts to be passed, not the opposite. Compacts serve as a substitute to federal action rather than a “defense against it” (Bowman and Woods 2007).
Once states have become members of interstate compacts, the power of these statutes is altered. When an interstate compact receives congressional consent, it takes on the power of a federal law (Zimmerman 2004). This opens the potential for a federal review of interstate compacts focused on a historically “federal” question. Specifically, this opens the interstate compact to the Supreme Court’s review (Zimmerman 2004). Judicial review of compacts provides a check on the power of states to create interstate compacts as a means to end-run federal action or regulation on a federal issue. The implementation of a compact with congressional approval can be seen as the repeal of previous legislation that conflicts with the ratified compact (Zimmerman 2004). This furthers the compacts standing as federal legislation and it is therefore subject to review. Before an interstate compact becomes subject to the scrutiny of the United States Supreme Court, it must first be approved by enough states to become enacted.

Using an interstate compact is the only feasible method for altering the manner of selecting the United States president. The interstate compact is a longstanding tool that allows states to work together to promote change and to protect their interests. The role of interstate compacts has expanded greatly in the last century. They are now used to create commissions and to regulate movements of both juveniles and criminal offenders. The interstate compact allows states to challenge problematic situations, even if the federal government is unwilling to do so. The manner in which the Electoral College operates is just such a problem.

Not only is an interstate compact a legitimate tool for altering the manner of selecting the president, it is also much more practical than other means. As explained above, amending the Constitution is an extremely difficult method of change. An
interstate compact requires approval of many states, as would an amendment, but it does not have the excessive super majority requirement that makes a constitutional amendment almost impossible to achieve. An interstate compact cannot be blocked by forty senators like an amendment and it can provide the same change. Instead, it unites states in an agreement to exercise their previously granted powers in a different manner.

This means of change can be achieved without the consent of the federal congress. The interstate compact does not grant states any additional rights not previously held. This is a parallel agreement that exercises the right for states to determine the manner in which electoral votes are allocated, which is expressly granted in Article Two of the Constitution. This is exclusively a state’s right. There is no federal power that is being minimized by the creation of the compact. Rather, several states would be uniting to change how they individually exercise their power. This compact is a constitutional and legitimate means of changing the undemocratic method of selecting a president that was created by the Electoral College.
CHAPTER III

THE NATIONAL POPULAR VOTE MOVEMENT

Current Status of the Reform Movement: The Case for an Agreement Among the States to Elect the President by National Popular Vote

The following explains the content and potential impact of the passage of Assembly Bill 459, legislation designed to align California with other states to alter the method of presidential selection through an interstate compact. Despite the passage of Assembly Bill 459 in California, there is still substantial work before this interstate compact will take effect through increased national membership. If minimum membership requirements are met, the compact will allow for the direct election of the president in a national popular contest. If the minimum membership requirements are not met, the nation will continue with status quo elections.

On August 8, 2011, Governor Jerry Brown signed Assembly Bill 459 into action, potentially altering the manner in which California electoral votes are allocated in all future elections. AB 459 is an interstate compact that would align California with 8 other states and Washington D.C. in a process to ensure the direct election of the president (Senate Rules Committee Analysis 7-14-11). This compact will alter current California Election Code if enacted by achieving the minimum participation requirements stipulated in the compact. If enacted, the compact will be an addition to Chapter 1.5,
Section 6920 continuing through Part 2 of Division 6 of California Election Code, all dealing with the election of the president (AB459 Chaptered Bill). For the following changes to occur, a combination of states with at least 270 electoral votes among them must enact the compact, providing member states the ability to override the Electoral College without jeopardizing their power in the Electoral College. Prior to California’s enactment, Washington, D.C. and seven states: Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, and Washington, had enacted the compact (National Popular Vote 2012). These combined states hold a total of 74 electoral votes plus 3 for the District of Columbia resulting in a total of 77 electoral votes. Since California’s ratification, the total number of electoral votes pledged toward the direct election of the president has risen to 132 votes, which is 49% of the total amount necessary to enact the compact and facilitate major election change (National Popular Vote 2012). Each state, including the District of Columbia, has approved the compact with identical wording, explaining the new process of presidential selection as follows.

The compact is divided into five sections called articles. Each of these articles covers a specific area of change to the current Election Code in California, or other state election code. Article 1 outlines the membership stipulations. Article 2 explains the process of direct election. Article 3 is a thorough explanation of the manner in which electors shall be appointed by member states. Article 4 includes miscellaneous information about the enactment of the compact. Article 5 includes relevant definitions to ensure clear and accurate application of the compact requirements in member states. Just as those portions of the Constitution pertaining to presidential selection are brief, so too is
the language of the legislation for altering that previous establishment. The compact itself is very concise and direct, just 880 words.

Article 1, titled “Membership,” explains the requirements to participate in the compact. This compact is open to any or all of the fifty states as well as the District of Columbia. To become a member of the agreement, states must enact this legislation with identical language in their own legislatures, with executive approval or another means of state ratification. The potential for any state in the country to become a member qualifies this compact as a national compact. The Agreement Among States to Elect the President with a Popular Election is also a parallel compact because each member state is enacting an agreement to follow a specific process of allocating electoral votes, but they are not opening jurisdiction to work as a new political unit as would be necessary for this compact to be dubbed “reciprocal.” A parallel compact such as this allows states to unite in order to solve a problem without forfeiting independence or state sovereignty on the matter.

Article 2, titled “Rights of the People in Member States to Vote for President and Vice President,” ensures a popular contest in all member states. It is the obligation of all member states to authorize and conduct a statewide popular contest to allow citizens to select the presidential and vice presidential candidates. These states are each responsible for their own election and are given discretion to handle the logistics of these elections as previously stipulated in Election Code, or in the manner they deem most fitting.

Article 3, titled “Manner of Appointing Presidential Electors in Member States” is the most verbose article in the compact and clearly outlines how both electors
and votes will be allocated under the new system. Before the date on which electors are required to meet, states must execute a statewide election and determine the national popular presidential and vice presidential candidates by aggregating total popular votes in all fifty state contests as well as Washington, D.C. Member states must allocate all electoral votes granted to their state to the slate of electors associated with the national popular vote victor. This formal allocation is done by a mandated official statement from each chief election official to chief election officials in all other member states.

Article 3 also explains the procedure should the national popular vote end in a tie. In the highly unlikely event of a tie in the national popular vote, the electors pledged to presidential and vice presidential candidates winning the popular vote in the member state election will be awarded the electoral votes. This creates a hierarchy of popular elections, where the federal level takes precedence, allowing the nation as a unit to determine the president, but including a clear alternative if the national popular election is not decisive. In the event of a tie, providing the electoral votes to the winner of the majority of the popular vote in each member state ensures that the wishes of residents are honored in the selection of the president. These electoral votes are to be made public by the chief election official of each member states as they are obtained to promote transparency in the process.

Finally, if there is a discrepancy between the number of electors selected and those allocated to the member state, nominations will be done by the presidential candidates associated with the winning slate. Put differently, if there are too many or too few electors associated with a slate, the presidential candidate winning the popular contest will create a new slate to vote in the Electoral College on his or her behalf. These
appointments are to be certified official by the chief election certifying official of the member state.

Enactment of this compact does not occur immediately. Although membership is open to all states, as explained in Article 1, it is not until a threshold of electoral votes is met that this agreement will come into action. Therefore, this agreement will come into effect when the threshold of electoral votes is met in an election year prior to the date July 20th. The deadline of July 20th ensures that states will have the necessary time to implement the changes for the next presidential election. If the agreement is enacted after July of an election year, it will take effect in the next presidential contest.

Article 4 is entitled “Other Provisions” and clarifies the terms of the compact. First, it confirms that the compact is not enacted until the minimum number of votes to win in the Electoral College, 270, has been pledged to this popular method of election by any combination of states. Second, clear expectations for states wanting to withdraw from the compact are outlined. States may voluntarily leave the agreement as they see fit. However, states may not alter their method of allocating electoral votes within 6 months of the end of a president’s term. Those choosing to leave the compact must wait until the new presidential and vice presidential candidates have been elected to terminate the agreement if attempting to do so within six months of the election. Decisions to join or withdraw from this agreement must be communicated by the chief election official of the offending state to the chief election officials of all other member states to prevent confusion. Finally, Article 4 outlines the longevity of the compact. If the Electoral College is abolished, this compact will terminate, ending the alliance among the states. If a portion of the compact is deemed invalid, that portion alone will be struck and the
remaining provisions will remain in effect. Article 5, titled “Definitions” explains all the
terminology of the above compact, explaining the slates, officials, and elections
clarifying stipulations of the compact.

Assembly Bill 459 was introduced in California by Assembly Member Hill on
February 15, 2011. Assembly Member Hill is a Democrat from San Mateo (Jim Sanders,
Capitol Alert blog, article posted May 19, 2011). The bill was coauthored by Assembly
Members Beall, Eng, Huffman, Ma, Mendoza, Portantino, and Williams. Although this is
the first successful attempt at joining the interstate compact to popularly elect the
president, this was not the first time the compact was introduced and passed in the
California Legislature. The compact was approved in both houses in the California
legislature in 2006 and 2008, but was met by a gubernatorial veto from Governor Arnold
Schwarzenegger both times (Jim Sanders, Capitol Alert blog, article posted May 19,
2011). California was finally able to approve the proposed change in election procedures
on the third time it received congressional approval in 2011.

The two failed attempts to ratify the interstate agreement in California were
Assembly Bill 2948 and Senate Bill 37. Assembly Bill 2948 was authored by Assembly
Member Umberg and passed in the Assembly with 48 ayes and 30 nays and in the Senate
on August 22 with a count of 23-14 (http://www.leginfo.ca.gov). Despite the
overwhelming support for the interstate compact, it was not successfully implemented.
Governor Schwarzenegger returned the Assembly Bill 2948 without his signature on
September 29th 2006. In a communication to the legislature, the Governor explained his
concern with “This is counter to the tradition of our great nation which honor states rights
and the unique pride and identity of each state” (Schwarzenegger 2006). A similar chain
of events occurred with Senate Bill 37, introduced on December 5th 2006 by Senator Migden. The Democrat introduced bill was passed in the Senate on July 14th with a 21-16 vote (Legal Info 2012). Like AB 2948, this bill also had overwhelming support in both houses of the California Legislature, also passing in the Assembly with a 45-30 vote and yet was not enacted. Senate Bill 37 was also returned to the legislature without a signature, citing the concerns explained in the 2006 veto message as the foundation for the decision. Governor Schwarzenegger was concerned that California voters could support a candidate, and yet California would be forced to pledge its votes to another candidate dictated by the outcome of the national popular contest under this compact. Further, Governor Schwarzenegger also addressed the overwhelming impact California’s decision would make on the national presidential selection process, a change he as Governor of California was unwilling to make for America.

The compact was introduced for a third time in February of 2011. Assembly Bill 459 proceeded through the Assembly into the Assembly Committee on Elections and Redistricting Hearing, held on April 12, 2011 which addressed components of the compact, as well as the impact of approval. The bill then continued to the Assembly Committee on Appropriations under Felipe Fuentes on May 4th 2011. Third reading bill analysis shows that it passed easily by a 5-1 vote in the Elections Committee and a 14-2 vote in the Appropriations Committee and a floor vote of 51-21 (http://www.leginfo.ca.gov/). The bill passed in the Assembly, but clearly gained the majority of its support from Democratic members. The legislation earned supportive votes from 47 Democrats and only four Republicans (Legal Info 2012).
AB 459 then moved to the California Senate where it was analyzed in the Senate Committee on Elections and Constitutional Amendments under Lou Correa on June 7th, 2011. The vote in the Senate Committee on Elections was 3-2. The bill then was approved in the Senate on July 14th 2011 with a count of 23-15 (Legal Info 2012). From the Senate, AB 459 was approved by Governor Jerry Brown on August 8, 2011, and filed with the Secretary of State the same day. After filing with the Secretary of State, California officially became the eighth state to enter the interstate compact, pledging its 55 electoral votes to the winner of a popular contest should the agreement reach its membership benchmark and be enacted and pushing the National Popular Vote Movement to the halfway mark.

Success in the legislature was possible in part because of the support Assembly Bill 459 had from outside influences. In the media, important newspapers such as the Sacramento Bee and the Los Angeles Times in California, as well as the Chicago-Sun Times and the New York Times supported the movement to elect the president with a popular contest increasing the attention and support for this bill in California (National Popular Vote 2012). Media sources provide information to the state and nation as a whole, focusing Americans on particular issues. Press support made AB 459 a more salient topic and increased voter and representative support and momentum in California to ensure passage.

Potential Implications of Assembly Bill 459 in California

Passed, yet not enacted, Assembly Bill 459 has become the focus of much political debate in California as well as nationally. Bill analyses, as well as media
coverage of the political movement, provide insight to the motivations for either altering or maintaining the current method of presidential selection. Because of its constitutional under-pinnings, altering the method of presidential selection is a very controversial course of action, particularly in an unorthodox manner such as an interstate compact. The following addresses the prevailing opinions regarding the passage and possible enactment of Assembly Bill 459 and the compact for popular election of the president.

The goal of Assembly Bill 459 is to alter the method of presidential selection to ensure that all voters and states receive access to the candidates and their ideas. The rational for passing Assembly Bill 459 is clearly expressed in the congressional bill analysis as well as the author’s notes included in the legislation. Assembly Member Hill, author of the bill argues that “California is ignored in the general elections of presidential campaigns . . . ” (Jones 2012). As explained earlier, California is often ignored in presidential elections because of its consistent voting practices, whereas the swing states garner the most attention. California experiences minimal campaign advertisements, mailers, polls, and field operations as the outcome for the state level election is all but decided in advance.

Assembly Bill 459 returns California to the field of play in elections. All of California’s 55 electoral votes would not be assigned to the winner of the state popular contest, as is currently the case. Rather, the votes will be allocated to the candidate garnering the majority of the popular vote nationally, which could drastically alter the outcome. Historically, California has been designated a “Blue State,” meaning that it has a tendency to support both Democratic policies and candidates. Currently, California has a Democratic Governor as well as two Democratic Senators, Diane Feinstein and Barbara
Boxer. California also has 33 Democratic and only 19 Republican representatives (Elected List 2012). These election results show a trend in voting behavior toward Democratic candidates, which often discourages campaigning at the federal level by both major parties. Republicans are likely to see California as a lost cause and ignore it, while Democrats take success in California for granted and allocate campaign resources to states where the outcome is less decidedly in their favor. Widening the scope of the popular election from the state to a federal popular contest is more democratic and it promotes the interests of Californian voters and residents of other spectator states are addressed in elections.

In addition to his claim that presidential candidates do not address the voters themselves, Assembly Member Hill argued that issues pertinent to Californian voters and the Californian economy are also ignored in national politics (Jones 2012). Issues such as agriculture and technology often take a backseat in national contests because they are of primary importance to California, a state already classified as leftward leaning. Politically, it is advantageous to tailor campaign messages and agendas to meet the interest of those individuals living in states not yet decided. Making issues specific to those swing states seen as a priority will help solidify a victory in the Electoral College. Assembly Member Hill argues that politicians pander to the residents of “purple states,” ignoring the interests of Californians and other residents of spectator states.

Under the enacted interstate compact, the interest of Californians would be a more substantial and relevant component of national campaigns and elections. As one of the largest and most populous states in the nation, it is vital that the needs of Californians are addressed in a representative government, and these ends are most readily met with
the promotion of competition in national contests. Assembly Bill 459 creates this 
competition, ensuring that the issues historically seen as “Californian” become 
components of a national public policy, examples include: Pacific Rim Trade and high 
technology, as cited by Assembly Member Hill. By addressing issues pertinent to 
California voters, candidates create a more balanced platform and political agenda.

Finally, Assembly Bill 459 changes the power of each vote for the president in 
states. As explained earlier with AB 459, the system of presidential selection is shifted 
from being state based, with several formal elections occurring in different regions, to 
one large-scale popular contest aggregating the votes of individuals cast nationally. 
Under the latter system, all citizens’ voices are heard equally and state boundaries do not 
skew the power of the voter. This allows minority voters in each of the states to aggregate 
their votes with one another, potentially tipping the election in the favor of their 
candidate. The inequity created by the additional two votes per state is eliminated 
because those votes are allocated to the candidate deemed suitable by the majority of 
national citizens, regardless of residency. As noted previously, each of the 50 states and 
Washington, D.C. currently hold a state popular contest to determine the favored 
candidate within their jurisdiction. Once state selections have been made, there is a 
formal vote for president in the Electoral College in which representatives selected at the 
state level head to their state capitol to vote for the president in a final, national election 
as representatives of their state. This system denies all citizens of the United States the 
same power in selecting the president and does not comport with current Supreme Court 
The Court affirmed the importance of equal representation in Congress and the value of
“one person, one vote.” The Electoral College, “weights American’s votes differently on the basis of where they live” and as the battleground states decrease in number, this inequity is reaching new heights (Richie 2007). The number of citizens who have access to candidates and campaign messages continues to shrink as more states acquire spectator status in presidential elections. For example, in the 2008 election, despite claims from both candidates to run widespread campaigns, only 15 states received 98% of the campaign spending in the peak campaign time before the election, identical to patterns from the previous election (Smith-Socaris 2009).

The excessive weight of swing states poses additional problems which are also rectified by AB 459. Assembly Bill 459 will promote equity in the selection of the president by forcing attention on the interests of all Americans rather than a few swing states. The demographic breakdown of residents of these battleground states poses the concern of de facto disenfranchisement of racial minorities. In 2004, only some 27% of the nation’s population was living in the battleground states (Richie 2007). If this sample was descriptively representative of the nation’s population with approximately 27% of all races populating the states, this would not cause concern, but this was far from the case. Battleground states had residency levels of 30% of the nation’s white population, 21% African Americans and Native Americans, 18% Latinos, and 14% of Asian Americans, showing a clear bias toward white voters (Richie 2007). In a winner-take-all system, the choice of minorities is often ignored. Since the purple states have the pertinent role of pushing a candidate to presidential victory, this population advantage provides white voters with a more substantial role in selecting the president than democracy should allow. Although historically the Electoral College has supported African American voters
and minority voters, as in 1976 when 73% of African Americans lived in a swing state; this is obviously no longer the case (Richie 2007). Changes in population demographics require the election process to be altered to promote equity in elections rather than prevent it. Change in California’s population and demographics make this change in election procedures necessary to ensure that these minority populations are addressed.

The repercussions of an election system that creates spectator states do not stop here. Voter turn-out levels vary depending on the state classification, swing or spectator. When reviewing the 2004 election turnout levels, there was a 10% difference in voter turnout levels between residents of a swing state and those in a spectator state. Swing states show much higher levels of turnout, expanding from 3% more participation in 2000 to 10% higher turnout in 2004 (Richie 2007). The concentration of information, campaigning, and advertising done in those battleground states greatly increases the percentage of the population who participates in presidential elections. Implementing AB 459 would increase the incentive to vote in California, regardless of party affiliation by allowing each vote to exercise power in the national popular election.

When isolating to review youth election participation levels, the trend continues. Citizens ranging from age eighteen to twenty-nine show substantially different levels of participation, depending on the role their state of residence plays in presidential elections, be it a spectator or swing role. In 2004, youth turnout was 17% lower in spectator states than in swing states, and approximately 10% below the participation level of adult voters in spectator states (Richie 2007). In swing states, youth participation mirrors that of the older population sets and depicts a sense of efficacy not seen in spectator states. This reduced turnout in spectator state youth has potential long term
problems. If voting is not a priority for Americans, democratic values will diminish and paralyze our political institutions.

Assembly Bill 459 increases the incentive to campaign and advertise in all states. Although many allege that the Electoral College promotes the interests of small states, providing them attention they would not normally receive, many small states are also relegated to the sidelines in presidential elections. In 2004, of the thirteen smallest states in the nation, only New Hampshire was considered a battleground state worthy of campaigning (Richie 2007). Many of these smaller states with only 3 electoral votes are ignored in lieu of states with more electoral votes in play. In fact, in the height of the 2004 campaign, most of the small states did not have campaign ads or candidate visits to their residents (Richie 2007). Under this proposed change, the historically spectator states are pushed into play because all votes of the nation are aggregated, potentially changing the outcome and making every vote count. Small spectator states are doubly hurt because the amount of campaigning needed to change the minds of constituents has high financial costs and is not worth the 3 electoral votes. By reducing the levels of certainty in these states, there is potential for increased access to information, advertisement, and campaigning in these areas, which in turn leads to increased voter turnout nationally. The value of these rural areas increases exponentially, because their votes are aggregated nationally, potentially creating a viable political faction. Increased turnout levels result in a more active and involved population which is better able to advocate for personal goals and exemplifies America’s democratic values. Also, legislation like AB 459 removes arbitrary borders and allows the votes of residents in small and less populous states to be counted equally with those from other states, increasing their role on election results.
Assembly Bill 459 gained support from many organizations, at both the state and national level. Supporting organizations cited in the bill analysis include: American Civil Liberties Union, California Common Cause, FairVote, League of Women Voters of California and the Secretary of State (Jones 2012). On June 28, 2011, the California Legislature confirmed the support of each of these organizations, acknowledging their desire to promote Assembly Bill 459 and its potential changes. In addition to these organizations, California’s push to pass the interstate compact was strongly supported by another organization, National Popular Vote. Although the organization is further explained later, the influence of this organization and its influential role in Californian politics must be addressed. This national organization’s sole purpose is to support all state legislators in the process of promoting the interstate compact to ensure the direct election of the president of the United States (National Popular Vote 2012).

Opinions regarding the enactment of Assembly Bill 459 are hardly unanimous. There is a great deal of concern regarding the constitutionality as well as the consequences of altering the method of selecting the president after 44 “successful” elections. Within the California public, there was dissention regarding Governor Brown’s decision to sign AB 459 into law. Although Governor Brown saw AB 459 as a movement toward “basic, fair democracy” other public officials in California, predominantly those of the Republican Party, have expressed their concerns (Jim Sanders, Capitol Alert blog, article posted May 19, 2011). Although much of the criticism has fallen to the hypothetical horrors previously addressed, there are two additional concerns with this particular means of change.
Concerns regarding the tradition of our current method of presidential selection are commonly cited as reasons to maintain the Electoral College system. The Electoral College has remained basically unaltered since the ratification of the 12th Amendment, which changed the method of determining the vice presidential candidate in 1804. Movement to a national popular vote alters the foundation of presidential politics in America. California State Senator Doug LaMalfa argued that the Electoral College was an “American tradition that protects the fabric of our country from fractionalization and mob rule” (Siders 2011). Some politicians see California’s role in the interstate compact as a threat to American tradition that flies in the face of the United States Constitution. Arguments that the interstate compact alters the foundations of American democracy do not hold up investigation. In the early years of the republic, states often altered the manner in which they allocated electoral votes. Many states shifted between proportional and winner-take-all methods as they saw fit, exemplifying the belief that the Electoral College is an institution that must be made to meet the interests of individual states. The focus on battleground states has made the original “small state advantage” meaningless in our current election system by pushing these states to the sidelines in the fight for states with more electoral votes (Smith-Socaris 2009).

The first concern deals with the practical application of a national popular contest and the logistics of such a great feat. By altering the method of allocating votes on the electoral slate, Assembly Bill 459 is altering the manner of measuring presidential victory in the United States, increasing it from a state-by-state focus to an aggregated national focus. In doing so, the likelihood for error may increase (Zimmerman 2010). Aggregating the totals of fifty-one contests all orchestrated by individual states with
different election codes and plans is problematic. Differences with types of ballots, registration procedures and requirements, and precinct management could result in conflicting results. Currently, states run elections unilaterally to determine a state winner, meaning that the method and manner of managing the election matters only to the constituents of said state. Under AB 459, the manner in which different states run elections becomes the concern of the nation at large, increasing the potential for confusion.

Finally, the ability of a small group of states to force a national change in election procedures is potentially problematic. As previously explained, the original use of interstate compacts was to settle regional disputes, not create national policy. The interstate compact as a tool to alter presidential selection is currently popular because it utilizes a more simplistic and attainable method for of change. With a constitutional amendment, both chambers must approve the change with a 2/3 vote and then 38 state legislatures must concur with that decision (Ross 2004). This means of change is very difficult and unlikely to garner the necessary national support. With an interstate compact, as few as 11 states have the potential to change the election process without the consent or approval of the additional 39 states (Ross 2004).

Concern two, enforcing the interstate compact in other states is a potential concern. The Electoral College was ratified as part of the United States Constitution in 1787. To ratify the document, a clear majority of three-quarters of the states must approve. This rigorous vetting process was created to ensure that a clear majority of the states wanted to participate in the new government and believed that the institutions it would create were sound. The ability to drastically alter this system with only a fifth of
the states causes many to dislike the use of interstate compacts to create national, structural change. If states were forced into compliance, problems specifying state and federal jurisdiction could also occur. States not eager to participate may not be willing to absorb the financial obligations this interstate compact creates. In a close or contentious election, there may be cause for a recount or some other administrative action to solidify the outcome of the contest. If the state is not a willing participant, it could be quite difficult to ensure that these necessary administrative actions are taken to support legitimate popular contests (Ross 2004). Under the Electoral College, each state allocates the votes granted to them as their legislature sees fit. Therefore, any confusion in a statewide contest currently impacts only the voters in that state. Under the popular direct election created by Assembly Bill 459, all states would be impacted by this situation. Since the state in question did not sign on as a willing participant in the compact, there is no clear means to force an action to ensure the integrity of the election process. Change is difficult. It is often a select minority that pioneers for rights before the movement becomes widespread. This is the case with the push to abolish the Electoral College.

Likelihood of Passage

Assembly Bill 459, as it is named in California, is part of a much larger national movement seeking change. In 2006, John Koza and Barry Fadem created National Popular Vote (Sampson 2008). This organization was created with the intent of promoting an interstate compact ensuring direct popular election of the president. Koza calls himself “an Electoral College hobbyist” (Ferguson 2008). Barry Fadem is a practicing attorney who focuses on issues dealing with elections, particularly initiatives
and referendums (National Popular Vote 2012). The two are co-authors of the book, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*, with Mark Grueskin, Michael S. Mandell, Robert Richie, and Joseph F. Zimmerman (National Popular Vote 2012). The creation of this organization was the next step in a hobby Koza found in 1966. As a college student, Koza created a board game that looked at “mathematical permutations” under the Electoral College called Consensus (Ferguson 2008). Although the board game did not catch on, his dedication to the subject and altering the system was a lifelong interest. The idea to promote electoral change came to venture capitalist Koza in 2004 when he was working in Atlanta in the lottery industry, which uses interstate compacts (Lyman 2006). Koza was frustrated with the manner in which presidential campaigns were orchestrated. “Now, the candidates spend almost all of their time in a handful of battleground states like Ohio and Florida and ignore the rest of the country. This would force candidates to campaign nationally for every vote” (Lyman 2006). University of Michigan PhD. graduate Koza argues that this system perverts campaigns to focus on issues only important to swing voters while important national issues are swept to the side (Ferguson 2008).

The National Popular Vote Organization was founded on the premise that states have the ability to pick electors as they see fit, the National Popular Vote under Koza supports state legislators with the intention of introducing the interstate compact in their state. Koza spends much time in Mountain View at the movement’s office or traveling across the nation lobbying to legislators (Ferguson 2008). In 2008, between the months of June and November, only Ohio and Pennsylvania received more than forty visits from candidates (CNN Election Center 2008). Tom Golisano, a spokesman for
the National Popular Vote Group said it best. “When more than 200 million Americans live in flyover states and are virtually ignored by candidates who seek the presidency, the right reform is required” (John Micek, Capitol Ideas with John L. Micek blog, article posted September 27, 2011). National Popular Vote under Koza and Fadem promotes the interstate compact as the best means of altering the influence of the Electoral College to increase equity in presidential elections without outright abolition of the institution. This method is the most direct path to achieve change and it does not have the supermajority requirement necessary to amend the Constitution (Bowman & Woods 2007).

The utilization of an interstate compact as the catalyst for change is a slow process. As explained above, educating citizens and representatives about the merits of a compact is a very laborious task. Currently, eight states and Washington, D.C. have pledged their support to National Popular Vote by ratifying the legislation to join the agreement. As states pass the legislation, other states react to this support, changing the political climate and increasing the likelihood of the movement’s national success. The National Popular Vote Movement was introduced in Washington, D.C. at a news conference on February 23rd, 2006 and since the movement’s introduction, support for the cause has increased through states attention and legislative promotion (Zimmerman 2010).

On April 10, 2007, the first state, Maryland, passed the interstate compact to promote the direct election of the president as supported by National Popular Vote (Wagner 2007). It took Maryland just over a year from the Washington, D.C. introduction conference to acquire approval in both legislative chambers. This push for change was largely spurred by the lack of attention Maryland receives in presidential
elections. Frustration with Maryland’s spectator status motivated legislators to pass this bill. The legislation was passed in the Senate and then had a partisan victory in the House, with a vote of 85-54 with only one Republican representative supporting the legislation (The Associated Press 2007). Despite its partisan support, the Agreement Among States to Elect the President by National Popular Vote was first passed in Maryland and at the time of passage, identical legislation had been introduced by 305 legislators in 37 states (National Popular Vote 2012).

The momentum of the National Popular Vote Movement continued and on January 13, 2008, New Jersey became the second state to ratify the interstate compact, pledging its 15 electoral votes along with the 10 Maryland had previously pledged toward direct election (Hester 2008). This push for the direct election was primarily from the Democratic representatives, as was the case in Maryland. New Jersey backed the Democratic candidate for president for two decades prior to passing this legislation and much of the push for this Democrat-sponsored legislation arose from the results of the 2000 Election (Hester 2008). The legislation, S2695 in the Senate and A4225 in the Assembly, sponsored by Assemblymen Joseph Cryan, D-Union, and Reed Gusciora, D-Mercer, was passed in the Assembly with a vote of 43-32 (Hester 2008). The signature from Governor Jon Corzine confirmed New Jersey’s support for the national movement just under two years after the National Popular Vote news conference in 2006.

Another predominantly Democratic state, Illinois, was the third state to ratify the interstate compact under Governor Rob Blagojevich who had himself promoted a Constitutional amendment to alter the Electoral College (Huy Vu 2008). Again, support for the legislation originated from frustrations with the 2000 Election as well as Illinois’
status as a “Blue spectator state.” Movement founder John Koza explained the importance of the movement to Illinois politics stating “We’re just coming along and saying, ‘Why not add up the votes of all 50 states and award the electoral votes to the 50-state winner? . . . I think that the candidate who gets the most votes should win the office” (Huy Vu 2008). In the 2004 election, neither candidate visited the state in an attempt to reserve scarce campaign resources when the outcome was so surely Democratic (Huy Vu 2008). On May 31, 2007, the legislation was passed in the Senate with a 37-22 vote (Illinois Legislature 2012). The interstate compact was passed in the 95th General Assembly. HB 1685 was passed on January 9, 2008 with a vote of 64-50 (Illinois Legislature 2012). The interstate compact was signed by Governor Blagojevich on April 7th, 2008 (Riopell 2008). Unlike in other states, the Illinois bill achieved bipartisan support with Republican co-sponsor, Senator Kirk Dillard (Swanson 2008, Chicago Tribune). This bipartisan support is an anomaly, as the previous states and latter states experienced movement support almost exclusively from the Democratic legislators in response to the 2000 Election controversy.

The state of Hawaii officially pledged its four electoral votes after overriding the executive veto on May 1st, 2008. In January of 2007, the bill was introduced in the House as HB 234, and it was introduced in the Senate in as SB 1956 (National Popular Vote 2012). Much Hawaiian support again arose from frustration regarding the outcome of the 2000 Presidential Election (Reyes 2008). The Senate vote showed the clear separation in support between the Democrats and Republicans in the 19-4 vote in which all opposition came from representatives affiliated with the Republican Party (Reyes 2008). Despite concern from the Republicans, the legislation passed in both houses. It
was after this legislative success that Governor Linda Lingle vetoed the bill in April expressing her concern that the candidate garnering the majority support in Hawaii could still be denied Hawaii’s four electoral votes under this proposition (DePledge and Shapiro 2008). The Governor’s concern that the president would be elected by individuals, rather than states mirrored the sentiments from California Governor Schwarzenegger’s address, but was not enough to kill the legislation. The veto was met by opposition in both chambers of the state legislature. Both the Senate and the House overrode the veto on May 1, 2008 (Hawaii Legislature 2012). The Senate overrode with a 20-4 vote while the House was able to defeat the veto with a 36-3 (Hawaii Legislature 2012). Unlike in California, the Hawaiian legislature was able to reach the three-quarter majority vote necessary and was able to override the veto, enacting the legislation and making Hawaii the fourth state to do so on May 2, 2008 (Hawaii Legislature 2012).

In the contiguous United States, Washington became the fifth state to join the interstate compact on April 28th, 2009 with SB5599. The battle over ratification took place at the grassroots level more so than in other states. In the first weeks of May the same year, 800 Washington voters were polled and showed a 77% approval rating for joining the interstate compact to popularly elect the president (National Popular Vote 2012). The legislation passed in the Senate on March 12, 2009 with a vote of 28-21 (Washington State Legislature 2012). It’s success was followed in the House a little over a month later on April 15 with a vote of 52-42 (Washington State Legislature 2012). Despite this seemingly overwhelming support, not all Washington residents were content. A referendum petition was also circulated and gathered 300 signatures, but the movement ended a few months later, showing the mixed feelings residents of Washington held and
the shift of focus toward economic concerns (Sherman 2009). Although residents were conflicted regarding the legislation, there was enough support in the legislature to ratify the compact. The Associated Press reports that the vote in the House was 52-42 preceding the 30-18 vote in the state Senate. The legislation experienced success in both houses, and a particularly substantial one in the Senate which may be in part because of the 41 sponsors the bill had, pledging the 12 electoral votes to the winner of the national popular vote.

On August 12, 2010, Massachusetts became the sixth state to join the interstate compact and pledged its 11 electoral votes (LeBlanc 2010). With this approval and the pledge of Massachusetts’ votes, the compact reached 27% of the electoral votes needed for enactment. Just before signing the legislation into law, Governor Deval Patrick explained that his support for this legislation spurred from his support for democracy (LeBlanc 2010). The legislation passed through both houses of the legislature in the summer of 2010. This was not the first time this legislation was discussed in the Massachusetts Legislature. In 2008, the legislation passed in both houses of the Legislature, but it did not receive the necessary support for passage (The Boston Globe 2010). On the second attempt, in June of 2010, the legislation passed in the House with a vote of 114-35 (The Boston Globe 2010). In July, the legislation received a 28-9 vote in the Senate (Goodnough 2010). The voting patterns again divided along party lines. Senate Minority Leader Richard Tisei expressed concern that this legislation would move the focus of elections from rural to urban areas, hurting American voters (Goodnough 2010). These clear margins mimic support for the legislation found in surveys taken around the same time. There was a 72% approval rating total, with 86% of Democrats
and 54% of Republicans supporting the legislation (National Popular Vote 2012). Clear support among voters as well as representatives made the discussion in Massachusetts short lived and increased the national momentum for the interstate compact.

Washington, D.C. pledged its three electoral votes and passed the interstate compact in 2010. The process began with a survey of 800 voters in Washington, D.C. in February which confirmed that approximately 75% of the population supported changing the method of presidential selection toward a popular election method (Klopott 2010). This survey information confirmed that, as was the case in California, the support for change was substantially higher among Democrats, at 80%, and lower with Republicans at only 48%. The popular support led to the introduction of the bill in April of the same year. Committee reports explained the introduction of the legislation on April 20 as an attempt minimize the power of battleground states and protect “voters from nearly 2/3 states [who are] disenfranchised” (Council of District of Columbia 2012a). In May, there were hearings on the legislation and the committee returned a vote of support for the bill with an 11-2 count on July 13th (Council of District of Columbia 2012b). The legislation then went to the District of Columbia Council and was passed in September and the Mayor signed the legislation into law on October 12, 2010 (Rosenstiel 2010).

After three attempts, Vermont was the seventh state to approve the “Agreement Among States to Elect the President with a Direct Popular Election,” followed only more recently by California (Remsen 2011). In Vermont, the Governor was a sponsor of the bill, making support in both chambers of the legislature the major obstacle for success in 2011 as executive approval was certain. In 2008, this interstate compact was met by a much different climate. In 2008, the legislation was passed in both
chambers before being vetoed by then Governor Douglas (Remsen 2011). In his address, the Governor stated “I am not willing to cede Vermont’s voice in the election, and ultimately in the operations of our federal government, to the influence and interests of larger states that would most assuredly prevail in all but the rarest occasions” (Remsen 2011). The bill was introduced a second time in January and February of 2009 in both chambers. This time, the House failed to act on the bill, assuming another veto from Douglas would be not far behind (Remsen 2011). A year later, the bill passed in both houses, first, on February 23rd 2010 the bill passed in the Senate with a 20-10 vote and a voice vote moved the bill to the House where on April 15th it passed with a vote of 84-51 (Vermont State Legislature 2012). The legislation was delivered to the governor on April 20 and on April 22, 2011 Governor Peter Shumlin signed the bill making Vermont and California the two most recent states to join the movement (Vermont State Legislature 2012).

Although no states have ratified the agreement since California in August of 2011, there has still been substantial focus placed on this movement in the different state legislatures. In addition to the 8 states, and Washington D.C. which have ratified the agreement, two more states, Colorado and Rhode Island have passed the legislation in both houses of the state legislature (National Popular Vote). These two states are currently awaiting executive action on the legislation. There are also ten states that have passed the compact in at least one chamber including: Idaho, Wyoming, Texas, Florida, Georgia, South Carolina, Tennessee, Indiana, and Ohio (National Popular Vote 2012). Nine other states have introduced the bill in the legislature, starting the process toward potential ratification.
In addition to legislative progress, there is substantial documentation of popular support for the movement. There is a national support level of approximately 75% for the enactment of the “Agreement Among States to Elect the President By National Popular Vote” (Smith-Socaris 2009). Support is divided among states regardless of their position in election politics. Small states such as Alaska, Idaho, Maine and South Dakota show support levels around 70%. The battleground states of Florida and Pennsylvania both have support ratings of 78% (National Popular Vote 2012). The interstate compact is clearly gaining momentum with residents and this momentum is spiraling upward to representatives who are using this new political tool as a means to promote change.

Despite this clear popular push to alter the manner in which we elect the president, it is important to note that this method is not perfect. As with any constitutional change, there are both intended and unintended consequences that must be anticipated to ensure a smooth transition. The National Popular Vote Movement will achieve many of its goals. It will ensure that the votes of all citizens are granted the same significance in presidential elections. It will increase levels of access to candidates and campaign information to voters currently residing in stagnant or pre-determined states such as California. It will ensure that, barring a contingency election, the president-elect will always be the candidate who was able to garner the plurality in a national popular contest. Finally, it will magnify the democratic nature upon which this nation was built.

Despite these clear achievements, there are still concerns for which to account. The two primary concerns deal with the validity of state representation, and the logistics of election management under the new system. Although the interstate compact
to elect the president through a national popular vote is a vast improvement over the current means of selection, there are shortcomings that must be addressed.

As articulated by the governor of Hawaii and Governor Schwarzenegger of California, shifting the method of determining the outcome of the election from a state popular contest to a national popular contest reduces the significance of votes within the state. It is possible under this proposed change that Hawaiian citizens could overwhelmingly support one candidate for president, and yet the electoral votes granted to those citizens would be allocated to another candidate because of the national vote outcome. This changes the role of the state to one in which it fosters the interests of its citizens to one in which it caters to the will of the nation. Although this is not necessarily a problem, it is a drastic change that will require much attention and explanation to ensure a smooth transition into a system based on a national popular contest.

The second concern has the potential to be much more problematic. Changing the manner in which election outcomes are determined changes the entire election system. Currently, each state is responsible for orchestrating its own elections and dealing with electoral concerns as they arise in a manner that the state deems fit. In the current system, logistical problems in the elections impact the election results in one state, potentially altering the outcome of that state primarily. As long as a clear plurality winner can be determined in the state, the outcome will not be altered in the forty-eight winner-take-all states. Under the new system with a national popular election, each vote is critical. There is an incentive for the national government to manage the manner in which elections are orchestrated, ballots are counted, and recounts are instituted. Despite this incentive, there is no means to achieve this.
A national popular vote changes the scope of elections, and it is able to achieve this without the consent of all states. States have the potential to alter their election procedures, refuse to participate in recounts, or exercise any number of tactics that may jeopardize the legitimacy of national popular vote. Under a Constitutional amendment, there is federal accountability to honor the approved changes, under an interstate compact; no such obligation exists to nonmember states. Serious discussion regarding this real shortcoming is necessary if and when the movement gains the support necessary for enactment.
CHAPTER IV

CONCLUSIONS REGARDING

ELECTORAL REFORM

Retrospect and Prospect: Has the Reform
Now Stalled?

The potential power that the interstate compact, Assembly Bill 459 in California, has to alter our current system of government is monumental. This movement experienced its first political success in California, although it was short-lived. California was the first state to pass the legislation in 2006, only to have it vetoed twice by Governor Schwarzenegger. Since then, seven other states have successfully entered into the agreement. These states are all Democratic leaning states, that vary in size but have all been categorized as spectator states in the presidential election. This interstate compact has taken an indirect path to garner the support that it currently holds. Despite this unorthodox method, the potential for change is still present. The passage of Assembly Bill 459 and other states’ ratification of the agreement may alter not just the means of selecting the president of the United States, but also the significance of citizens in that process. Presidential elections follow the division of the nation into states, semiautonomous territories that are responsible for determining the will of their constituents and acting to meet it. Information gathered by states is utilized by representatives on the national level, to deal with widespread issues and concerns.
Altering the method of selecting the president from a state basis to an individual basis breaks down those geographic barriers. It allows for the unification of a variety of individual citizens from different regions to promote personal interests in the political sphere. Under this change, the focus in presidential campaigns is moved from states to individuals, and the aggregation of individual thoughts to select the president. This new method, honoring the decision in *Westberry v. Sanders*, guarantees every citizen their “one vote.”

Although this movement was quick to win support, waning interest has brought up the question of whether this transition will likely occur. The momentum of the National Popular Vote Movement has slowed over the past six years, just reaching 49% of the electoral votes necessary for enactment. California, as the eighth state continues to fit the mold of pro change states. The “Agreement Among States to Elect the President with a Direct Popular Election” garners most of its support from registered Democrats, which may be another major obstacle for movement success. For such monumental change to occur, states historically labeled conservative must also support the movement if it is to reach the 270-electoral-vote threshold and be enacted. Without bipartisan support for the movement, as experienced in Illinois, the likelihood of success is much diminished.

Despite this slow in momentum, there are still many incentives for states to join the movement. If the interstate compact gains enough support to become enacted, it will increase voter incentives to participate in national elections (Smith-Socaris 2009). Under this system, the power of voters in spectator states increases and so will voter turnout levels. The shift in power will increase voter turnout, helping states with policy
decisions. Also, passing the interstate compact will increase equity in elections. As explained above, powerful swing state residents are predominantly white, and therefore, minority citizens receive less power in the selection of the president (Smith-Socaris 2009). Supporting this legislation will provide minority citizens, and all citizens, their fair role in elections. It is for this reason that the NAACP has endorsed the National Popular Vote Movement, arguing it promotes civil rights (Smith-Socaris 2009).

In addition to the benefits explained above that apply to all states if the legislation is passed, there are benefits specific to some states. For example, small states would benefit from participating in the National Popular Vote Movement. The focus on battleground states has made the original “small state advantage” meaningless in our current election system (Smith-Socaris 2009). Originally, the Electoral College was instituted to protect the interests of small states, but it no longer does that. In fact, small states are predominantly ignored in presidential elections, with the one exception being New Hampshire (Smith-Socaris 2009). This legislation reallocates electoral power and divides it equally among all citizens so that populous states are not punished by the small state advantage and rural states are not ignored for more urban areas.

Likelihood of Survival of a Legal Challenge

Despite the slowing of momentum, some question the constitutionality of such a movement and its long-term repercussions. These concerns are rooted in the federal principles of American Government and are based on two issues. First, the question has been posed as to whether the interstate compact deals with a directly federal question and must gain the approval of Congress prior to enactment or if it deals with an issue
classified as a “state’s issue.” Second, a question arises as to whether the interstate compact violates the preclearance requirement of the Voting Rights Act. These legal concerns will probably not impact the passing the interstate compact, but they lay a foundation for Supreme Court analysis down the road if and when the compact is enacted.

The topic of congressional consent has been a central focus in the discussion of the interstate compact and its legitimacy. The United States Constitution expressly states “No State shall, without the Consent of Congress ... enter into any Agreement of Compact with another State” (Pincus 2009, 511). Although the intent of the “Compact Clause” seems clear, the United States Supreme Court has addressed the requirements for congressional consent on multiple occasions. In the *U.S. Steel v. Multi-state Tax Commission Case*, a test was created that explains criteria under which interstate compacts require consent. The focus of the *U.S. Steel* case was the degree to which the agreement had an actual impact of federal powers. The Court argued that the issue is whether the compact creates “any potential rather than actual impact upon federal supremacy” (Pincus 2009, 525). It is only in the event that the compact had an actual impact upon federal supremacy that it would require congressional consent. The Supreme Court’s decision did not address the impact of compacts on non-member states, focusing only on real shifts in power that may occur between the state and federal levels of government. Though some are critical of the results of using the *U.S. Steel* test as a means to determine the need for congressional approval, it is the current method of determination. Under this test, the “Agreement Among States to Elect the President by Nationwide Popular Vote” does not require congressional approval because it does not
create or transfer state power and entrance to and withdrawal from the agreement are open (Gringer 2009).

The necessity of preclearance is the second issue. Sections Two and Five of The Voting Rights Act have implications on the legality of the interstate compact to create a direct popular election of the president. Section Two deals with dilution of minority power in elections and protects the power of minority voting blocs. The legal issue is whether moving from a state level election to a federal election will dilute minority influence in the election outcome (Gringer 2008). This dilution could potentially occur in some states and not others, therefore only impacting certain states where census data shows a dilution of power. Section Two applies to all states, and therefore states such as Hawaii and Washington D.C. have different concerns because of their minority-majority populations (Gringer 2008). Should the voting power of a minority be diluted by changing the system, the compact would be in violation of The Voting Rights Act and be infringing on minority rights.

Supporters of the National Popular Vote Movement argue that a Section Two claim is not relevant. States that move to the national popular vote as a means to allocate electoral votes are, in fact, treating all citizens equally, a goal of Section Two (Gringer 2008). This equity ensures that all voters in every state are treated equally, not placing a particular privilege to residents as a method of allocating votes. The compact allows for minority voters to aggregate nationally to support a candidate without the state borders limiting their power. It increases the power of minority groups by allowing group members, or those who identify with the group, to vote “en blac,” or as a group, increasing their power in elections. Supporters take this argument one step further to
argue that changes in swing state demographics since the 1970s place minorities at a current disadvantage, as they are underrepresented in swing states therefore wielding little or no power in election outcomes (National Popular Vote 2012). With the enactment of the interstate compact, this issue would be rectified by treating votes equally, regardless of the jurisdiction from whence they originate. Therefore, enacting the interstate compact would actually support minority voting rights and rectify the current de facto disenfranchisement of minority voters, both goals of the Voting Rights Act.

Section Five of the Voting Rights Act requires certain regions to submit any changes in voting procedures to the Attorney General or the District Court of Washington D.C. for preclearance prior to enactment (Gringer 2008). The Section Five requirement was instituted to ensure that the voting power of minorities was not minimized through gerrymandering or other bureaucratic procedures. The potential necessity of preclearance to change election procedures poses a threat to the interstate compact. The Code of Federal Regulations contains an extensive list of potential changes to the election code that would require preclearance and among them are: “any change in determining the outcome of an election” and any alteration made to the “counting of votes” (Gringer 2008). Failure to acquire this preclearance “renders the change unenforceable,” halting the enactment of said agreement (Gringer 2008).

California as a whole is not a jurisdiction that is required to gain preclearance to change election procedures, but there are counties within California that do require preclearance. Since the legislation impacts those counties, specifically Yuba County and Monterey County, the legislation must acquire preclearance prior to enactment (Gringer 2008). The intent of this requirement is to ensure that minority voters are not worse off
than they were prior to the enactment. The legal goal is to push toward, not away, from equity in elections. Since no state acquired this preclearance prior to ratifying the agreement, should the interstate compact be enacted, lawsuit will doubtlessly follow shortly thereafter. The potential necessity for preclearance would be avoided by Congressional approval of the compact in full, giving it the power of federal law. This, however, is unlikely, particularly with the current Republican majority in the House of Representatives. This congressional approval would alter the standing to a federal action, therefore not needing clearance from the Attorney General (Gringer 2008).

Although already passed in many states, the interstate compact and the election procedure changes have not yet been enacted. This gives states the time necessary to file paperwork for approval of the changes to election procedures to ensure compliance with Section Five of the Voting Rights Act. Until the interstate compact earns the support from enough states for enactment, states have time to review election law and to determine first if the petition is necessary, and second, the manner in which to do so.

These legal questions and others will surely arise in greater numbers as the enactment of the National Popular Vote draws nearer. Other concerns, such as the constitutionality of changing the Electoral College and the method of presidential selection without a constitutional amendment may make their way to the Supreme Court. Despite these legal questions, the push for a method of selection that honors the wishes of all citizens, rather than those residents of swing states, will continue nationally. While California pushes for changing electoral slate selection nationally, states such as Pennsylvania wish to change allocation at the state level, favoring the method used by Maine and Nebraska (Norman Ornstein, Campaign Stops blog, article posted November
This change in election procedures is also very controversial and will be highly contested if it gains momentum. Regardless of the means, the push for a more balanced method of election is gaining momentum, although the form this change will take is still unclear.

Final Thoughts

The interstate compact to alter the method of presidential selection is unique not just because of the manner in which change is being proposed, but also because of the participants in the movement. This interstate compact is by no means guaranteed success, but nonetheless, the states willing to become members and pledge their electoral votes to a new style of selection are making a dramatic statement. The challenge of educating legislators and residents of different states is a major under-taking. Despite the success of the National Popular Vote Movement to date, this success may be short lived if national opinion regarding the Electoral College changes. It is only through state support that this national change can take place.

The composition of states choosing to participate is one of the more provocative aspects of this movement. Currently, the movement for electoral change is led predominantly by small and less populated states, the exception being California. States such as Vermont, District of Columbia, and Hawaii are examples which have 3, 3, and 4 electoral votes respectively. These less populous states exemplify the type of state that the Electoral College was originally instituted to help. These small states would receive a reduction of power under a direct election and still pioneer the change, promoting election reform because, despite their increased advantage under the Electoral
College as it currently operates, they are still spectators in national elections. Other states, such as Massachusetts, Maryland, and New Jersey, have slightly more clout in the Electoral College, with 12, 10, and 15 electoral votes, but they are still characterized as small states that should be seeking refuge in the Electoral College rather than promoting its demise.

The small state promotion of the interstate compact depicts the reality that few if any states are really helped under the current system. Minorities are disenfranchised, and small states with a supposed advantage are still pushed to the sidelines and are not major contenders in presidential politics. In fact, California was the first large state to join the movement, exemplifying the desire of both large and small states to unite for reform. Frustration with campaign tactics has caused these different states to unite for the cause.

Another interesting characteristic of all states involved in the agreement, is their bias toward the Democratic Party. All states currently pledging their votes toward direct election would be classified as Democratic. In fact, in 2010, all the legislative bodies that have passed the interstate compact were controlled by the Democratic Party (The Electoral Map 2010). This clear partisan support for the movement has major implications on its perception in society as well as its likelihood of success. The support found in the Democratic Party may be enough to ensure enactment of the compact, but it will be seen as a political tactic rather than a democratic electoral reform. The perception of the movement as a knee-jerk reaction to the 2000 Election will continue to plague future supporters unless the movement is able to gain backing from predominantly Republican legislatures and states as well.
Currently, the movement may gain momentum from small Democratic states such as Rhode Island, Maine, Connecticut, and Delaware, as well as Independent states such as New Hampshire and New Mexico. Each state has just a few electoral votes and the desire for increased significance in presidential selection, but the success of this movement is unlikely. The momentum for the interstate compact has slowed dramatically, with no states following California’s dramatic pledge. The likelihood of success is slim, but the role this movement will serve in elections may still be dramatic.

Historically, amendments to abolish the Electoral College have been blocked by a small group of small states in the Senate. This movement brings to light the benefits of a direct election and the potential for it to help citizens of all states acquire access to candidates and platforms in presidential elections. It has provided a fresh lens under which to review the benefits and consequences of our current election system. The dissemination of information caused by the National Popular Vote Movement may cause enough states to support the change that a constitutional amendment will gain the support necessary in the Senate for passage. The potential for the wave of support currently felt by the “National Popular Vote Movement” to shift toward a more conventional change is highly likely. Although the interstate compact does provide a substantial improvement to the current method of selecting the president, there are some shortcomings that would be better addressed through a constitutional amendment. Though the “National Popular Vote Movement” may not successfully amend the Electoral College, it may still achieve its goal, national popular election of the president of the United States.
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APPENDIX A
ASSEMBLY BILL NO. 459

CHAPTER 188
An act to add Chapter 1.5 (commencing with Section 6920) to Part 2 of Division 6 of the Elections Code, relating to presidential elections.
[Approved by Governor August 8, 2011. Filed with Secretary of State August 8, 2011.]

legislative counsel’s digest
AB 459, Hill. Electoral college: interstate compact.
Existing law provides for statewide election of a slate of electors to vote in the electoral college for President and Vice President of the United States. Under existing law, each political party selects its slate of presidential electors in accordance with statutory procedures that differ by party. This bill would ratify a specified interstate compact that requires the chief election official of each signatory state to appoint the slate of presidential electors that was nominated in association with the presidential ticket that received the largest national popular vote total. This compact would only become effective if states cumulatively possessing a majority of the total electoral votes have ratified the compact.

The people of the State of California do enact as follows:
SECTION 1. Chapter 1.5 (commencing with Section 6920) is added to Part 2 of Division 6 of the Elections Code, to read:

Chapter 1.5. Voting Compact
6920. The Legislature of the State of California hereby ratifies the Agreement Among the States to Elect the President by National Popular Vote as set forth in Section 6921.
6921. The provisions of the Agreement Among the States to Elect the President by National Popular Vote are as follows:
Article 1. Membership
Any state of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.
Article 2. Right of the People in Member States to Vote for President and Vice President
Each member state shall conduct a statewide popular election for President and Vice President of the United States.

Article 3. Manner of Appointing Presidential Electors in Member States
Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each state of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.

The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official’s own state.

If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state’s number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state’s presidential elector certifying official shall certify the appointment of such nominees.
The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained. This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.

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Article 4. Other Provisions

This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.

Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official’s state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

Article 5. Definitions

For purposes of this agreement, “chief executive” shall mean the governor of a state of the United States or the Mayor of the District of Columbia; “elector slate” shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate; “chief election official” shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate; “presidential elector” shall mean an elector for President and Vice President of the United States; “presidential elector certifying official” shall mean the state official or body that is authorized to certify the appointment of the state’s presidential electors; “presidential slate” shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both
names appear on the ballot presented to the voter in a particular state; “state” shall mean a state of the United States and the District of Columbia; and “statewide popular election” shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.