

SELECTING THE PRESIDENT: A BAD IDEA OUT THERE IN CALIFORNIA

*Robert W. Bennett**

California, like all states but two, chooses its electors in a single state-wide winner-take-all contest. California has been reliably Democratic in recent presidential elections, and the result is that neither major party candidate has seen fit to campaign in the state, despite the fact that, at fifty-five electors, its delegation is the nation's largest by some measure. Other populous states with a decided political tilt, like Texas, New York and Illinois, are similarly given short shrift in presidential campaigning. The large "swing" states like Florida, Pennsylvania, and Ohio get almost all of the general election attention these days from major-party presidential candidates.

The campaign neglect has apparently rankled in California, and the state has become the site of a great deal of reform effort. The most recent proposal¹ would change California's winner-take-all approach to the system found in Maine and Nebraska, where all but two of the electors are determined by the popular vote in individual congressional districts. Maine's and Nebraska's use of districting (since the 1972 and 1992 elections, respectively) attracts little attention because those states have small numbers of electors (and, to boot, the districting has never yielded a split electoral college delegation in either state). A major claim on the website of the organization sponsoring the California move is that this would make the presidential elections in the state more "democratic" by making the process competitive. While the problem of competitiveness in California and other non-swing states is real, the suggested cure in California—without similar action by other states—is a terrible idea.

Most congressional districts in California, as elsewhere in the country, have been produced by political gerrymandering and hence are themselves characterized by a decided political tilt. At best, selecting electors in district elections would induce campaigning only in the small number of competitive congressional districts, not in the state as a whole. Even that increase in campaigning would be quite modest, moreover, as small competitive winner-take-all states (New Hampshire, with four electoral votes,

* Nathaniel L. Nathanson Professor of Law, Northwestern University School of Law.

¹ Californians for Equal Representation, Request for Title and Summary for Proposed Initiative (July 17, 2007), http://ag.ca.gov/cms_pdfs/initiatives/2007-07-17_07-0032_Initiative.pdf (link).

might be an example) would represent considerably bigger electoral college prizes than any one California district. And the large swing states would continue to represent far more attractive campaign grounds than California.

For this reason, it seems likely that the real motivation for the reform effort is simply to move a good number of California's electors from the Democratic column to the Republican one. If the proposal were adopted, the Republicans might hope to capture perhaps twenty of California's fifty-five electoral votes, instead of the present zero. Without similar reforms in other large states, however, this would simply give the Republicans an edge in the nation as a whole, rather than move presidential elections in a "democratic" (with a small "d") direction. Thus, adoption in California alone would have no particular effect in assuring that the nationwide popular vote winner captures the presidency. And it would leave the competitive situation around the country essentially unchanged.

Partisan politics also explains why the measure is being proposed in the form of a popular initiative rather than through legislation, which could never get through the Democratically controlled California legislature. But this raises another problem. The Constitution gives power to determine the "manner" of choosing electors to the state "legislature,"² and the Supreme Court has never considered whether the word "legislature" in the Constitution's electoral college provisions might be construed to encompass direct democratic decisionmaking. The Court has held that the same word in the Article V's amendment provisions does not allow for direct democratic decisionmaking,³ but it has also suggested more leeway in another constitutional use of the same word.⁴ Taking note of this problem in a recent column in the *New York Times*, Bob Herbert warned that enactment of the California districting proposal could invite the federal courts into the middle of yet another presidential election.⁵

If competition for voters throughout the state of California were really the goal, two different reforms would hold more promise. The easier of the two to achieve would be awarding the state's electors in proportion to the statewide vote. This would give each of the two major party candidates some incentive to campaign throughout the state, lest the opponent capture an extra electoral vote or two. This too would essentially assure a split electoral college delegation for California and hence aid Republicans, perhaps even more than districting. As with the proposed reform, however, only a small number of electors would truly be in play in a proportionality system, and if pursued by initiative, it would, of course, pose the same question of the meaning of the word "legislature" as does the districting proposal. But at least the focus of campaign attention in a proportionality

² U.S. CONST. art. II, § 1 (link).

³ *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (link).

⁴ *Davis v. Hildebrandt*, 241 U.S. 565, 570 (1916) (link).

⁵ Bob Herbert, *In 2008, Bush v. Gore Redux?*, N.Y. TIMES, Sept. 22, 2007, at A27.

state would be on state voters as a whole. A proportionality initiative went down to defeat in Colorado in the 2004 election, but there seems no reason why it should fare any less well in California than the current districting proposal.⁶

Even more effective in stimulating statewide competitiveness would be getting on board the nascent effort to have the state's electors awarded to the winner of the nationwide popular vote (once states with a majority of the electoral votes have signed on).⁷ The effort faces a decidedly uphill battle, and to date it has succeeded only in Maryland.⁸ But if the nationwide vote were determinative, both major party candidates would have plenty of incentive to campaign in the state as a whole, since California contains a lot of potential voters for each of the major parties. And if adopted by states with the required electoral college majority, candidates would have an incentive to campaign everywhere in the country where they thought votes could be effectively harvested. A measure to join this nationwide vote movement was passed by the California legislature, but was vetoed by Governor Schwarzenegger last year.⁹ Some diehard proponents of this proposal remain in the state, and seem prepared to keep trying.

To make the nationwide vote determinative through this route, however, requires a good number of other states to sign on. And many states will be reluctant, because they would face the prospect that their electors would go to a candidate who lost the popular vote in the state. The measure would also raise difficulties in calculating the nationwide vote in a close contest—or dealing with challenges to the count—since non-participating states with a clear statewide winner would have little incentive to count the vote in their states with great care, especially if the preliminary nationwide totals seemed to favor the candidate who won in the state.¹⁰

The present California effort teaches important lessons to the nation as a whole. Electoral college decisionmaking is left largely in state hands, but decisions made in one state—particularly the populous ones with large chunks of electoral votes—can be very important in choosing the president and hence have important implications for voters in other states. And the universal embrace by the states of some form of popular election to choose electors camouflages complications and technicalities in the process that require careful attention to reform proposals, particularly given the willing-

⁶ A proportionality measure does present complications that district elections do not, most obviously the problem of dealing with fractions in divvying up a small whole number of electors by percentages of a much larger popular vote. The Colorado formula is reproduced in ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 212–13 n.18 (2006).

⁷ *See id.* at 161–78 (chapter ten entitled “Popular Election of the President Without a Constitutional Amendment”).

⁸ H.B. 148, S.B. 634, 423d Gen. Assemb., Reg. Sess. (Md. 2007) (link).

⁹ A.B. 2948, 2006 Leg., Reg. Sess. (Cal. 2006), *vetoed by Governor Schwarzenegger on Sept. 29, 2006* (link).

¹⁰ *See* BENNETT, *supra* note 6, at 174–76.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

ness demonstrated in the 2000 election of the United States Supreme Court to enter the fray. Around the nation, the electoral college process is receiving long overdue attention. But this latest proposal in California alone is not a step toward constructive reform.