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The Electoral College: Size Really Does Matter

by

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Abstract

The Electoral College: Size Really Does Matter

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The goal of this paper is to explore and ultimately convince the reader of the merits of the Wyoming Rule method of congressional apportionment as a method for altering the functioning of the Electoral College in United States presidential elections. This is conducted through an analysis of the role that the Electoral College has played throughout the history of American elections, in depth looks at four common proposals for changing or replacing the Electoral College, and finally discussion of the intricacies of the Wyoming Rule and the effects that it would have on American politics.

Signature Page for Leadership Studies Honors Thesis

The Electoral College: Size Really Does Matter

Thesis presented

by

Alexander Kirk

This is to certify that the thesis prepared by *Alexander Kirk* has been approved by his/her committee as satisfactory completion of the thesis requirement to earn honors in leadership studies.

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Chapter I: Introduction

In the throes of an election year, one can barely read, watch, or listen to the news without coverage of an election. We love elections in the United States. We elect for at least three levels of government, from mayor all the way up to President of the United States. We elect for at least two branches of government; from Congress, state legislatures, and city councils to president, governors, and mayors, and, sometimes, state judges. We do not only vote for people either. We vote for ballot measures and constitutional amendments, too. We vote all the time in the United States, so why does our most important election, that for president of the United States, seem so broken? Why does it seem like it is not even an election at all? Why do 538 people that never appear on television, never campaign for votes, and never hold office get to decide who the president is?

Perhaps the most important questions, however, are those of the “how” variety. How did we get here? How has the Electoral College played out in practice compared to its intended purpose and historical role? And finally, how do we fix it? Or in other words, how do we take a system, enshrined in the Constitution, and iron out its undemocratic tendencies? But even before that, we need to identify what are its undemocratic tendencies that need to be ironed out. There are no easy answers to these questions. Rational minds will disagree on the solutions, the scale of the problems, and even the problems themselves, but that only makes them that much more interesting to think, write, and speculate about.

So that is what we did. We thought about, wrote about, and speculated what some of those problems and solutions are. To start, there is an examination of the how we got here, starting with the Articles of Confederation and traversing through the final days of the

Constitutional Convention. Next, we move through the most notable elections in United States history, starting with the election of 1800. With each election, we examine how that election either shaped or was shaped by the Electoral College. As we move closer to the present day and the election of 2016, we start to consider political realities and how each election shapes the contours of public opinion on the Electoral College.

With the history out of the way, the proposals for the future come next. Five alternatives are postulated and explored in depth, each discussing the legality, winners and losers, impact on minority groups—both demographically and factionally, and the perceived issue that the proposal resolves. The proposals are named as follows: the automatic plan, direct election, the congressional district plan, and the interstate compact. Each gets an in-depth look at their virtues and shortfalls, as well as their chance of being implemented. However, there is one more plan that gets special attention.

The final plan is the Wyoming Rule plan. More outside-the-box than the four before it, the Wyoming Rule is my personal favorite for its combination of innovation and tradition that solves what I view as the most significant underlying issue of the Electoral College, the relative power of voters and states. In Chapter IV, the Wyoming Rule gets the full treatment of the four plans before it plus extra detail on implementation and the math behind it all.

Finally, I give the pitch on why the Wyoming Rule is the way forward for the Electoral College and the United States. As an unpartisan, amendment-free change to the Electoral College, I believe it not only has the best chance of becoming law but is also the technical correction the Electoral College needs to remain the electoral system of the United States for centuries to come. Without further ado, let us take a step back in time to the summer of 1787.

Chapter II: The Electoral College from Birth to Practice

A common refrain for those that are critical of the Electoral College is, “if we were starting over, we would never have come up with the Electoral College as a system for electing the president.” In order to adequately address that, we need to examine how the Framers got where they did. How did they come up with the Electoral College as a system of electing the chief executive of the United States when there were clearly much simpler and more straightforward answers available to them? The answer, as with most questions surrounding the creation of the United States Constitution, is compromise.

Article II, Section 1, Clauses 2 through 4 of the United States Constitution lay out how the President of the United States is to be elected. They read:

“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.

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 [sic] 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 [sic] the President. But in chusing [sic] 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 [sic] from them by Ballot the Vice President.

The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”¹

Although never mentioned specifically as the “Electoral College” throughout the entirety of the document, the system described in the clauses above has come to be known as the Electoral College. When examined through the modern lens, the system seems unnecessarily complex.

¹ United States, *The Constitution of the United States of America, 1787* (Public Domain, 1975), art. II, sec. 1, cl. 2-4, Apple Books.

Using voters to select other voters to then select the president seems like one step too many. We already select congressmen, why not have *them* select the president? We count the popular vote, why not use that instead? Before getting caught up in all the ways one can elect a public official, one needs to recognize how the situation that the Framers found themselves in differed from that of today.

The Articles of Confederation

When the Constitution was written in the summer of 1787 the Framers were not working from a blank slate. Originally tasked with amending the Articles of Confederation, which had governed the newly independent states since its ratification in 1781, many of the delegates to the Constitutional Convention traveled to Philadelphia with the intention of doing just that.² Faced with impending fiscal crises from the threat of defaulting on loans from the French and Dutch, Congress nearly passed a federal impost on goods being imported into the states on two occasions, 1782 and 1786.³ The first was singlehandedly quashed by Rhode Island and the second by New York, fearful of the effect a new impost would have on the impost already being levied on goods entering New York City.⁴ The latter failure to establish a federal tax proved to be the last straw, finally bringing to bear the shortcomings of the Articles of Confederation and triggering calls for a convention to amend them.⁵

Just as the financial crisis was unfolding, Shays' Rebellion began to take form in Massachusetts, furthering the new nation's domestic troubles.⁶ Faced with fiscal austerity and

² Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2010), chap. 1, Kindle.

³ Beeman, *Plain, Honest Men*, chap. 1.

⁴ Beeman, *Plain, Honest Men*, chap. 1.

⁵ Beeman, *Plain, Honest Men*, chap. 1.

⁶ Beeman, *Plain, Honest Men*, chap. 1.

aggressive tax collection by the state government, Captain Daniel Shays led a group of rural Massachusetts men in a call to march on the government arsenal in Springfield and threaten an armed insurgency.⁷ Eventually put down by a private militia organized by Massachusetts governor James Bowdoin, the episode nonetheless further spurred calls for something to be done with the Articles of Confederation.⁸ While the conflicts between the states on import tariffs and the inability to raise an army to defend the country were perhaps the most salient reasons for ditching the Articles of Confederation, a multitude of other factors did as well, including the patchwork of laws and inconsistent treatment that American Indian tribes were subject to and received from the various states.

Just as the dual crises were unfolding up north, a small group of delegates was gathering in Annapolis, Maryland on September 11, 1786 to discuss another shortcoming of the Articles of Confederation, the ability to establish uniform commercial regulations.⁹ Although only five states sent delegates to the convention, leaving it far short of a quorum, the 12 men that did show up were some of the staunchest supporters of a stronger central government in the United States.¹⁰ Led by Alexander Hamilton, John Dickinson, James Madison, and Edmund Randolph, the 12 delegates prepared a letter for the Continental Congress requesting that a convention in May of the following year convene in Philadelphia to amend the Articles of Confederation.¹¹ However, some of the men, especially Hamilton and Madison, had more ambitious plans in mind. Instead of simply amending the Articles, they intended to scrap them altogether and create an entirely

⁷ Beeman, *Plain, Honest Men*, chap. 1.

⁸ Beeman, *Plain, Honest Men*, chap. 1.

⁹ Beeman, *Plain, Honest Men*, chap. 1.

¹⁰ Beeman, *Plain, Honest Men*, chap. 1.

¹¹ Beeman, *Plain, Honest Men*, chap. 1.

new government that was much less favorable to the states.¹² When the proposed convention won the approval of the Continental Congress in early 1787, a small group of men led by Madison and Hamilton and joined by Edmund Randolph, Gouverneur Morris, James Wilson, and Robert Morris hatched plans to create a wholly new government.¹³

The Constitutional Convention

By some historical accounts, there was no fewer than three instances in which the method of selection for the chief executive was discussed at the Constitutional Convention. The first such instance came during the first discussion of the nature and powers of the executive branch of the government. On Monday, June 4, 1787, James Wilson of Pennsylvania led the charge for a unitary, powerful chief executive over the objections of significantly more well-known delegates such as Edmund Randolph and George Mason of Virginia.¹⁴ Having settled on the nature of the executive, the delegates started plotting out exactly how that executive would be chosen. Although most supported some form of election by the national legislature, it was James Wilson, whose name will come up often throughout this discussion, who first proposed direct election by the people.¹⁵ Predictably, however, not a single delegate supported Wilson's proposal.¹⁶ In response to the resounding rejection of his plan for direct election by the people, Wilson laid the groundwork for what would become the Electoral College.

Wilson proposed dividing the states into districts that would select "electors" who would eventually meet and select the chief executive.¹⁷ The electors, he reasoned, would be of superior

¹² Beeman, *Plain, Honest Men*, chap. 1.

¹³ Beeman, *Plain, Honest Men*, chap. 1.

¹⁴ Beeman, *Plain, Honest Men*, chap. 7.

¹⁵ Beeman, *Plain, Honest Men*, chap. 7.

¹⁶ Beeman, *Plain, Honest Men*, chap. 7.

¹⁷ Beeman, *Plain, Honest Men*, chap. 7.

knowledge and sufficiently removed from their communities to be able to make a wise choice while also giving the people at least an indirect say in the choice of the chief executive.¹⁸ Wilson pictured these electoral districts holding elections for the electors, meaning that the people inhabiting a district would vote for the elector they wanted to represent them when the president was selected.¹⁹ While not exactly the direct election of the president that Wilson preferred, the elector method still gave the people a voice. Favoring a strong and independent executive, Wilson wanted to avoid the selection of the president by the national legislature, fearing that the president would simply become a pawn of Congress and unable to act independently and forcefully.²⁰ The delegates recognized that other, more pressing issues needed to be attended to, so they left it for discussion later.²¹

On July 17, Maryland's Luther Martin offered a variation of Wilson's proposal, proposing that the electors be selected by the state legislatures instead of the people in the states.²² If the president was simply elected by the state legislatures, he would be nothing more than a powerbroker between the interests of the individual and factitious states.²³ For that reason, this proposal, too, was similarly rejected without further discussion on the topic, bringing a quick end to the second mention of selection of the president.²⁴

The third time that the issue of selecting the president was discussed was in early September, not by the whole of the convention, but by the recently created Committee on

¹⁸ Beeman, *Plain, Honest Men*, chap. 7.

¹⁹ Beeman, *Plain, Honest Men*, chap. 7.

²⁰ Beeman, *Plain, Honest Men*, chap. 7.

²¹ Beeman, *Plain, Honest Men*, chap. 7.

²² Beeman, *Plain, Honest Men*, chap. 12.

²³ Beeman, *Plain, Honest Men*, chap. 12.

²⁴ Beeman, *Plain, Honest Men*, chap. 12.

Postponed Parts (certainly the most well-named of the committees conducting business at the Convention.)²⁵ Arriving late, John Dickinson of Delaware threw a wrench into the Committee's consensus on the selection of the president by the national legislature.²⁶ Looking ahead to the ratification fight, Dickinson predicted that people would refuse to give such immense power to a chief executive that they could not choose directly.²⁷ It is here that Madison jumped into action. Drawing on Wilson's proposal for election by a slate of electors, Madison sketched out a method for selecting the president.²⁸ The final recommendation of that committee, delivered and debated on September 5, 1787, read:

“Hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected in the following manner, viz: Each State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature. The Electors shall meet in their respective State and vote by ballot for two persons, of whom one at least shall be not be an inhabitant of the same State with themselves; and they shall make a list of all persons voted for, and of the number of votes for each. The Person having the greatest number of votes shall be the President, if such a number be a majority of that of the electors; and if there be more than one who have such a majority, and have an equal number of votes,

²⁵ Beeman, *Plain, Honest Men*, chap. 16.

²⁶ Beeman, *Plain, Honest Men*, chap. 16.

²⁷ Beeman, *Plain, Honest Men*, chap. 16.

²⁸ Beeman, *Plain, Honest Men*, chap. 16.

then the Senate shall choose by ballot one of them for President: but if no person has a majority, then from the five highest on the list, the Senate shall choose by ballot the President. And in every case after the choice of the President, the person having the greatest number of votes shall be Vice-President.”²⁹

If the text sounds familiar to that in the Constitution, that is because it is. The only significant change that came out of the full debate following the Committee’s report was that it would be the House of Representatives that would choose the president while the Senate would choose the vice-president.³⁰ However, as a sort of compromise on the issue that favored small states supportive of election by the Senate, each state delegation would get one vote, regardless of the size of that delegation.³¹ Except for those two changes, Madison’s proposal coming from the Committee on Postponed Parts is the one that ends up making it into the final text, creating the Electoral College that persists to this day.

A common line of attack on the Electoral College today is that the Framers distrusted the general American populace to make an informed decision about who should be the leader of the country. In truth, it was only a small minority of the delegates who believed that the ordinary citizens were not intelligent enough to make such a decision.³² Instead, most of them believed that ordinary Americans were simply too ignorant to choose the president.³³ Even though the number of newspapers in the new republic was growing rapidly, most were still concerned primarily with local matters.³⁴ Additionally, the “news” that came out of other regions of the

²⁹ Beeman, *Plain, Honest Men*, chap. 16.

³⁰ Beeman, *Plain, Honest Men*, chap. 16.

³¹ Beeman, *Plain, Honest Men*, chap. 16.

³² Beeman, *Plain, Honest Men*, chap. 16.

³³ Beeman, *Plain, Honest Men*, chap. 16.

³⁴ Beeman, *Plain, Honest Men*, chap. 20.

country was often not even news at all, accounting events weeks or months after they happened.³⁵ This, the Framers believed, combined with the sheer size of the country made it logistically impossible to create an informed electorate.

Despite their foresight in avoiding direct election by an uninformed electorate, the Framers grossly misestimated how often the contingency plan that they quibbled about so ferociously would be needed. George Mason of Virginia quipped that, “Nineteen times in twenty the president would be chosen by the Senate,” referring to the scenario in which no candidate receives a majority of the electoral votes or two candidates tie with the most votes.³⁶ Instead, in the 58 presidential elections in United States history, only two have resulted in an electoral vote outcome that needed to be settled by the House of Representatives, a far cry from the 95% of elections that Mason had predicted.³⁷ Mason also argued that election by the Senate would, “convert that body into a real and dangerous aristocracy,” instead favoring election by the House of Representatives.³⁸ Wilson, still believing in the importance of popular will in the election of the president, also favored election by the House, as is was the body more closely tied to the popular will.³⁹ In the end, it was Roger Sherman of Connecticut that put together the system of votes by delegation that eventually won the day.⁴⁰ Proposed at the end of the day on September 6, Sherman’s proposal was no one’s first choice, but after informal gatherings of delegates on the

³⁵ Beeman, *Plain, Honest Men*, chap. 20.

³⁶ Beeman, *Plain, Honest Men*, chap. 16.

³⁷ “Electoral College Results,” Electoral College, The U.S. National Archives and Records Administration, last reviewed March 5, 2020, <https://www.archives.gov/electoral-college/results>.

³⁸ Beeman, *Plain, Honest Men*, chap. 16.

³⁹ Beeman, *Plain, Honest Men*, chap. 16.

⁴⁰ Beeman, *Plain, Honest Men*, chap. 16.

sidelines of the Convention worked out that Sherman's was the least-worst option, a consensus eventually formed around his idea.⁴¹

An interesting note regarding the Electoral College is the relatively little coverage it received during the ratification fight following the conclusion of the Convention. Of the 85 essays comprising *The Federalist Papers*, only one—Hamilton's 68—considers the issue of the Electoral College.⁴² Hamilton expounds on the virtues of the system as designed in avoiding the “cabal, intrigue, and corruption” that are an existential threat to the survival of republican government.⁴³ He points out that because the electors are to meet in the state in which they are elected and not altogether in the seat of government, it, “will expose them much less to heats and ferments” of the people than they would if they met in one place.⁴⁴ Hamilton notes the specific and temporary nature of the electors as a virtue as well. Because their only role is to select the president, neither the electors nor the president himself would have much ulterior motive for attempting to sway the outcome of the vote or changing behavior in order to curry favor with more permanent and powerful individuals such as senators or representatives.⁴⁵

The Role of the Popular Vote

A common feature of early American elections, especially those in the first part of the 19th century, was a lack of popular votes. It was not until 1824, the tenth presidential election in American history, that the Federal Archives even include a count of the popular vote in official election results.⁴⁶ It was not until the election of 1868, following the Civil War and the

⁴¹ Beeman, *Plain, Honest Men*, chap. 16.

⁴² Alexander Hamilton, *The Federalist Papers* (Public Domain, 1788), Federalist No. 68., Apple Books.

⁴³ Hamilton, *The Federalist Papers*, Federalist No. 68.

⁴⁴ Hamilton, *The Federalist Papers*, Federalist No. 68.

⁴⁵ Hamilton, *The Federalist Papers*, Federalist No. 68.

⁴⁶ The U.S. National Archives and Records Administration, “Electoral College Results.”

reconstruction of most of the southern states, that every state chose electors via some form of popular vote, almost a century after the first presidential election in United States history.⁴⁷

Election	Total Using Popular Vote	Total Casting Electoral Votes	Percentage Using Popular Vote
1788	6	10	60.00%
1792	6	15	40.00%
1796	9	16	56.25%
1800	6	16	37.50%
1804	11	17	64.71%
1808	10	17	58.82%
1812	9	18	50.00%
1816	10	19	52.63%
1820	15	24	62.50%
1824	18	24	75.00%
1828	22	24	91.67%
1832	23	24	95.83%
1836	25	26	96.15%
1840	25	26	96.15%
1844	25	26	96.15%
1848	29	30	96.67%
1852	30	31	96.77%

⁴⁷ The U.S. National Archives and Records Administration, "Electoral College Results."

1856	30	31	96.77%
1860	32	33	96.97%
1864	25	25	100.00%
1868	34	34	100.00%

As one can see from the table, the number of states using the popular vote fluctuated until 1812, bottoming out at half of the states and increasing until just one state, South Carolina, held out until after the Civil War.⁴⁸ The election of 1864 saw a decrease in the number of states casting votes as eleven had seceded during the Civil War. Starting with the election of 1864 and continuing to the present day, every state has used the popular vote in the state in order to select electors in some way.⁴⁹

Winner Take All

The ability of states to choose for themselves how their electors will be chosen is a power granted by the same passage in the Constitution that creates the electoral system for selecting the president.⁵⁰ It is for this reason that many states and their legislatures were able to avoid using the popular vote to select electors and thus concentrate power in the hands of state political parties via the state legislature. However, given the latitude that states have in deciding how their electors will be selected, it is rather peculiar that nearly every state quickly settled on a winner-take-all system. When considered in the context of the early American republic though, the reasons become clearer. Designed at a time in which people held great pride in their state of origin and political parties were nowhere to be seen, states would work to maximize their sway

⁴⁸ The U.S. National Archives and Records Administration, "Electoral College Results."

⁴⁹ The U.S. National Archives and Records Administration, "Electoral College Results."

⁵⁰ United States, *The Constitution*, art. II, sec. 1, cl. 2.

on the national stage. The best way to do that would be selecting electors as a bloc that would vote together, ensuring that no matter how slim a margin a candidate won a state by, that state could maximize its preference for that candidate. As political parties began to take form, a similar logic was applied. Seeking to maximize support for their preferred candidate, party leaders designed systems that would effectively disenfranchise voters in the minority faction in their states and give their candidate the best chance of winning nationally.

Faithless Electors

In all states but Maine and Nebraska, the party of the candidate who wins the popular vote gets to have its preselected electors appointed as the state's electors. Those electors usually vote with the outcome of the popular vote in their state, ensuring that the candidate that wins the state essentially receives all the electoral votes. Beyond just allowing the parties to select the electors, some states include civil penalties for so-called "faithless electors" that fail to vote with the popular vote in their state.⁵¹ However, as the United States Court of Appeals for the Tenth Circuit recently ruled, states cannot force or coerce their electors into voting a certain way.⁵² As the Constitution dictates, states have absolute authority over deciding how those electors will be appointed and selected, but once they are selected, they hold no sway over their actions, just like any other public official.⁵³ While faithless electors often make headlines—there were ten defectors in the 2016 election, the most ever—they have never changed the outcome of an

⁵¹ Editorial Board, "Voters have concerns about the electoral college. The Supreme Court is clearing one thing up," *The Washington Post*, January 22, 2020, https://www.washingtonpost.com/opinions/voters-have-concerns-about-the-electoral-college-the-supreme-court-is-clearing-one-thing-up/2020/01/22/115c20da-3c79-11ea-baca-eb7ace0a3455_story.html.

⁵² Editorial Board, "Voters have concerns."

⁵³ United States, *The Constitution*, art. II, sec. 1, cl. 2.

election.⁵⁴ However, the risk is always present so long as faithless electors remain an aspect of the Electoral College, as the Framers designed it.

With such a unique system, it is expected that there are bound to be some unanticipated and sometimes counterintuitive election outcomes. I will now go through some of the more interesting ones in terms of their Electoral College outcome and their implications on United States politics and elections, starting with the election of 1800.

19th Century Elections

The fourth presidential election in United States history featured a deeply unpopular incumbent in President John Adams, and another founding father challenging him in Vice President Thomas Jefferson. Jefferson “chose” Aaron Burr as his running mate, a career political operative from New York, a key swing state in the election of 1800, with few concrete positions on the issues of the day. However, as the election took place prior to the passage of the Twelfth Amendment, electors cast two electoral votes each without indicating in any way whom they wanted to be president and vice president.⁵⁵ For the most part, both major parties had figured out how to game the system to ensure that both their preferred president and vice president were elected together. Electors from the party were instructed to choose both candidates on their ballots while one elector would not select whoever was to be the vice president. This would leave the leading vote-getter the president and the vice president one vote behind. For whatever reason, an elector for the Republicans in the election of 1800 that was supposed to vote for someone other than Burr did not, leaving Jefferson and Burr in a tie and throwing the election

⁵⁴ The U.S. National Archives and Records Administration, “Electoral College Results.”

⁵⁵ The U.S. National Archives and Records Administration, “Electoral College Results.”

into the House of Representatives. Still controlled by the Federalists, the House went through 36 ballots and an intervention from Hamilton before finally electing Jefferson the third President of the United States with Burr as his vice president.⁵⁶ The entire episode spurred Jefferson to propose the Twelfth Amendment, creating an independent election for vice president and ensuring that the president and vice president will always be from the same party if a majority of electoral votes are won.⁵⁷ The election of 1800 was and will remain the only election in American history that ended in a majority tie, as the passage of the Twelfth Amendment guaranteed that no election can end that way again.⁵⁸

The next election that will be explored is the first of the five “mismatches” in which the winner of the popular vote does not win the electoral vote and thus the presidency. It is also the only other election that has ever been decided by the House of Representatives. The election of 1824 was a four-man race between John Quincy Adams, Andrew Jackson, William H. Crawford, and Henry Clay.⁵⁹ When the votes came in, Jackson had won a plurality of both popular and electoral votes, but fell 32 electoral votes short of a majority.⁶⁰ Following the provision of the Twelfth Amendment that the top three vote-getters move into the House of Representatives, Henry Clay was disqualified. What followed was what Jackson would decry as a “corrupt bargain” in which Henry Clay pledged his support to Adams in exchange for being appointed Secretary of State.⁶¹ Adams would go on to win the election in the House of Representatives despite being

⁵⁶ The U.S. National Archives and Records Administration, “Electoral College Results.”

⁵⁷ “12th Amendment,” Interactive Constitution, National Constitution Center, accessed April 18, 2020, <https://constitutioncenter.org/interactive-constitution/amendment/amendment-xii>.

⁵⁸ National Constitution Center, “12th Amendment.”

⁵⁹ The U.S. National Archives and Records Administration, “Electoral College Results.”

⁶⁰ The U.S. National Archives and Records Administration, “Electoral College Results.”

⁶¹ “23d. The 1824 Election and the “Corrupt Bargain,”” Politics and the New Nation, ushistory.org, accessed April 18, 2020, <https://www.ushistory.org/us/23d.asp>.

the second-highest vote-getter in the initial election.⁶² Adams' luck would not continue, however, as Jackson would come back and trounce him in the election of 1828.⁶³ While not a "mismatch election" in the sense that the person that won the popular vote lost the electoral vote, the election of 1824 still resulted in the person that won the popular vote did not become President of the United States.⁶⁴ Although the election took a detour through the United States House of Representatives before arriving at that conclusion, the end result was still the same as any other mismatch election.

The election of 1860 is the third that provided an interesting electoral-popular breakdown. Like the election of 1824, 1860 featured four candidates: Abraham Lincoln, John C. Breckinridge, John Bell, and Stephen A. Douglas.⁶⁵ Unlike 1824, Lincoln would win 60% of the electoral vote with only 40% of the popular vote.⁶⁶ As we move through history, we will see that these "win more" elections are common, in which the winner of the popular vote wins a plurality of the popular but a majority of the electoral, essentially creating a decisive winner where there was not one. The interesting part of the election of 1860 is that even if Lincoln's opposition had been united behind a single candidate, he still would have won the electoral vote, only losing California, Oregon, and New Jersey's combined 14 electoral votes.⁶⁷ Lincoln could have won a presidential election against an opponent that won 60% of the popular vote. While it has never really even come close to happening, an election between two candidates that results in a loser that won 60% percent of the popular vote would likely result in a profound decline in trust in

⁶² The U.S. National Archives and Records Administration, "Electoral College Results."

⁶³ The U.S. National Archives and Records Administration, "Electoral College Results."

⁶⁴ The U.S. National Archives and Records Administration, "Electoral College Results."

⁶⁵ The U.S. National Archives and Records Administration, "Electoral College Results."

⁶⁶ The U.S. National Archives and Records Administration, "Electoral College Results."

⁶⁷ The U.S. National Archives and Records Administration, "Electoral College Results."

American democracy that would either seriously threaten its continued existence or provide the impetus for monumental change to the way presidents are elected.

The election of 1876 is the second of the mismatch elections in the United States. 1876 is also the only of the five mismatch elections in which the loser of the election won a majority of the popular vote; in all other cases the popular vote winner has only won a plurality.⁶⁸ Contested between Rutherford B. Hayes and Samuel J. Tilden, the 1876 election is also the only one that has been decided by a single electoral vote, handing Hayes the win despite a three-percentage point popular margin in favor of Tilden.⁶⁹

Just four years later, in the election of 1880, the opposite occurred in which a tiny popular vote margin resulted in a large electoral margin. Separated by fewer than two thousand popular votes out of nine million, James A. Garfield and Winfield Scott Hancock were separated by 59 electoral votes, or 29 more than were needed for Garfield to win a majority.⁷⁰

The election of 1888 was the third election that would result in a mismatch, although not as wide as the one in 1876. Benjamin Harrison would lose the popular vote by less than a percentage point to his opponent Grover Cleveland but would still go on to win 58% of the electoral vote and the presidency.⁷¹ The elections of 1824, 1876, and 1888 would be the only elections that result in mismatches until the turn of the 21st century over one hundred years later.

20th Century Elections

⁶⁸ The U.S. National Archives and Records Administration, "Electoral College Results."

⁶⁹ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁰ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷¹ The U.S. National Archives and Records Administration, "Electoral College Results."

Moving into the 20th century, the election of 1912 was yet another in which four candidates received a significant number of popular votes, although only three received electoral votes. The winner, Woodrow Wilson, would win less than 42% of the popular vote but over 80% of the electoral vote, owing to an opposition divided between Theodore Roosevelt and William Howard Taft.⁷² The 40-percentage point spread between the popular and electoral vote shares was easily the largest in the United States until that time and would only be surpassed just slightly in 1980 by Ronald Reagan's dominant victory over Jimmy Carter.⁷³ Unlike in Lincoln's election in which a similar popular vote share would have won even with a united opposition, Wilson won many of his states with less than 40% of the popular vote in that state, indicating that had he been running against a united opposition, he would not have won.⁷⁴ Against a united opposition, Wilson would have lost all but Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia—the 11 states that seceded from the Union to start the American Civil War—winning only 126 electoral votes out of the 266 needed to win the presidency.⁷⁵

1968 sticks out as another curious election as it showed the power that regional candidates can have on the outcome of the election. Contested between Richard Nixon, Hubert Humphrey, and George Wallace, the 1968 election featured a strong regional candidate in Wallace. With only 43% of the popular vote, Nixon would win both the plurality of the popular and a majority of the electoral.⁷⁶ While it is impossible to say whether Wallace's presence in the

⁷² The U.S. National Archives and Records Administration, "Electoral College Results."

⁷³ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁴ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁵ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁶ The U.S. National Archives and Records Administration, "Electoral College Results."

race hurt Humphrey or Nixon more, Wallace's 13% of the popular and 46 electoral votes showed that a regional candidate with limited nationwide support could materially impact the outcome of an election. Had Wallace's votes gone for Humphrey instead, Nixon still would have won the election although Humphrey would have polled 55% of the popular vote, putting Nixon's victory closer to Lincoln's in 1860 than Wilson's in 1912 in terms of electoral-popular math.⁷⁷

1992 is the final of the 20th century elections that will be examined. Featuring Bill Clinton and George H. W. Bush, the election of 1992 also included independent Ross Perot. Although not winning any electoral college votes, Perot would win nearly 19% of the national popular vote.⁷⁸ Whether Perot's candidacy handed the election to Clinton by hurting Bush's vote shares in important states is up for debate, but Perot's strong showing nonetheless stirred discussion about the role that third-party candidates play in American elections. As discussed earlier, the Electoral College essentially acts as a "win more" device, allowing a candidate that sometimes falls far short of winning a majority of the popular votes to win a majority of the electoral votes. This is certainly the case for Clinton as well, winning only 43% of the popular vote but 68% of the electoral vote.⁷⁹

21st Century Elections

The election of 2000 will stand in infamy for many reasons: hanging chads, dimpled chads, time zone differences in the Florida panhandle, you name it. But there is one event that had not happened in over a century that is of interest for its relationship to the Electoral College. Contested between George W. Bush and Al Gore, the election of 2000 was the fourth mismatch

⁷⁷ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁸ The U.S. National Archives and Records Administration, "Electoral College Results."

⁷⁹ The U.S. National Archives and Records Administration, "Electoral College Results."

election in United States history, with only half a percentage point in the popular vote separating the candidates and Bush only two electoral votes over a majority.⁸⁰ What ultimately came down to 537 votes in Bush's favor in Florida decided who would become president of the United States and kicked off a fresh round of criticism of the Electoral College.⁸¹ However, the 2000 election would only foreshadow the things to come.

The election of 2016 provides the last and perhaps most important lesson for the future of the Electoral College in American politics, that is the extent to which someone can lose the popular vote and still win the presidency. Contested between two deeply unpopular candidates in Donald Trump and Hillary Clinton, the 2016 election would result in the fifth mismatched election in the United States. With almost three million popular votes and two-percentage points favoring her, Clinton would end up losing the electoral vote to Trump by 12-percentage points.⁸² Contested during a period of intense polarization of American politics and resulting in a much wider margin than Bush defeated Gore by in 2000, the 2016 election seems to be a harbinger of things to come.

As Americans continue to move into more polarized and entrenched political camps, the possibility for even wider mismatches is greater than ever. For example, as Democrats continue pushing to the left and running up huge margins in states like California and New York, they will continue winning increasingly large swathes of votes without any additional gain. Combined with traditionally Republican states like Texas becoming more diverse and urbanized, trends that tend to correlate with increasing support for Democratic candidates, the margins by which

⁸⁰ The U.S. National Archives and Records Administration, "Electoral College Results."

⁸¹ The U.S. National Archives and Records Administration, "Electoral College Results."

⁸² The U.S. National Archives and Records Administration, "Electoral College Results."

Republicans win those states will decrease, further skewing the popular vote in favor of the Democrats without any change in the electoral vote.⁸³ Additionally, the 2016 election saw a record ten electors cast their votes for someone other than the person that won the popular vote in their state, highlighting the risk that in a closer election, faithless electors breaking with the vote in their state could have a serious impact on the final results and trigger a “stolen” election that raises serious doubts about the efficacy of an electoral system that places the ultimate decision in the hands of 538 people.⁸⁴

With an understanding of how the Electoral College came into being and the way that it has played out in practice throughout American history, we can move into the present. Following the election of 2016 and the unprecedented disparity between the popular vote and the electoral vote, calls for something new have arisen. Ranging from the abolition of the Electoral College to simple tweaks of its functioning, the alternatives that have been proposed all seek to remedy perceived shortcomings of the Electoral College. Thus, it is vital that any discussion of how to change the system starts with a discussion of the system itself, just as we have done. With that out of the way, we can leave the history of American elections behind and see how those elections might play out in the future.

⁸³ “Quick Facts,” United States Census Bureau, U.S. Department of Commerce, accessed April 18, 2020, <https://www.census.gov/quickfacts/fact/map/US/POP010210>.

⁸⁴ The U.S. National Archives and Records Administration, “Electoral College Results.”

Chapter III: The Alternatives

With an understanding of where the Electoral College came from and how it has played out in practice as an electoral tool, we can move to consider some alternatives that have been proposed were the Electoral College to be replaced. The four proposals that will be covered in this chapter—the automatic plan, direct election, the congressional district plan, and the interstate compact—have all been floated in one form or the other as possible alternatives by authorities in media, journalism, and political science. Each proposal will be evaluated on a number of measures including legality, winners and losers, impact on minority groups, and how it addresses some of the perceived issues of the system it would be hypothetically replacing, the Electoral College.

The Reasons for Change

The reasons for seeking an alternative to the Electoral College are numerous and come in both partisan and nonpartisan flavors. A common partisan one, especially among Democrats, is that two of the last five elections have been “stolen” from their candidate due to the quirks of the Electoral College. In both 2000 and 2016, Al Gore and Hillary Clinton won a plurality of the popular vote without winning a majority of the Electoral College vote which instead awarded the presidency to George W. Bush and Donald Trump, respectively.⁸⁵ This argument, taken alone, almost certainly would find no support on the other side of the aisle. If Democrats want to change the electoral system of the United States, which was fully known and transparent to all candidates and parties, to suit their candidates and their electoral prospects, why should

⁸⁵ The U.S. National Archives and Records Administration, “Electoral College Results.”

Republicans not fight all the same for the maintenance of the system that has delivered them 40% of the last five elections and appears likely to do so again in 2020?

As recently as the 1970s, however, Congress made a serious effort at eliminating the Electoral College in its entirety. Under the stewardship of Senator Birch Bayh of Indiana, doing away with the Electoral College in favor of a nationwide popular vote was a nonpartisan issue.⁸⁶ Although the effort was ultimately unsuccessful, it remained a non-partisan issue up until the election of 2000, when the Republican Party was prepared to renew efforts against the Electoral College had Al Gore won a majority of the electoral vote while losing the popular vote as polls had predicted at the time.⁸⁷ When, in fact, the opposite happened, political realities took hold and the Republican Party moved strongly in favor of the Electoral College.⁸⁸

As for the nonpartisan arguments, most boil down to a simple concern: that the Electoral College is antithetical to democracy because it sometimes fails to reflect the popular will of the people. When framed as an affront to democracy and not as a partisan issue, the arguments for doing away with the Electoral College in favor of another system hold much higher levels of face validity as the motivations of advocates cannot be dismissed as strictly partisan. However, even in the context of nonpartisan arguments and agreements about the nature of the Electoral College, one can never divorce the virtue of such a change for American democracy from the reality such a change would have on the alignment of political power.

⁸⁶ Wegman, Jesse, "The Man Who Changed the Constitution, Twice," *The New York Times*, March 14, 2019, <https://www.nytimes.com/2019/03/14/opinion/birch-bayh-constitution.html>.

⁸⁷ Toner, Robin, "THE 2000 ELECTIONS: THE ELECTORAL COLLEGE; Election Quandary Prompts Pop Civics Test," *The New York Times*, November 9, 2000, <https://www.nytimes.com/2000/11/09/us/2000-elections-electoral-college-election-quandary-prompts-pop-civics-test.html>.

⁸⁸ Toner, "THE 2000 ELECTIONS."

One final note before addressing the proposals mentioned above: no analysis will be conducted as to who would have won in specified elections if such a system existed except for purposes of illustrating the workings of the system in the context of an actual election. The statement made earlier regarding an electoral system that has clear and consistent rules that are transparent and known to all involved would apply in all situations as they happen, but judging campaigns and election outcomes of the past on a different set of rules that was unknown to participants would be superfluous. Saying that under a congressional district plan, Hillary Clinton would have won the Electoral College by a certain amount is futile because it assumes that everything leading up to the election would have remained exactly the same. The campaigns, the advertising spending, and even the platforms of the respective candidates and parties would all be different if the path to the presidency was altered. Simply changing the rules of the game ex post and analyzing the results would not provide any reliable information on the impacts of such a change, so it will not be done in this paper.

The Automatic Plan

The first alternative that will be discussed, the automatic plan, is the simplest and most straightforward of the plans, both in terms of execution and deviation from the Electoral College of today. The automatic plan leaves everything about the Electoral College intact except for the use of electors that actually cast the votes. As currently constructed, the Electoral College consists of states determining on their own how they will select the electors that will cast the votes for president.⁸⁹ The number of electors a state is permitted to allocate is a straightforward calculation of the number of representatives a state is allocated in the House of Representatives

⁸⁹ United States, *The Constitution*, art. II, sec. 1, cl. 2.

plus the number of senators a state is allocated in the Senate.⁹⁰ As every state is allocated two senators and a minimum of one representative, the fewest electors that a state can allocate is three while the most populous state, California, is allocated 55 for each of the 53 representatives that the state sends to the House and the two senators it sends to the Senate.⁹¹ Under the passage laying out the method of selection in the Constitution, it is made clear that states have full discretion in how those electors are chosen as long as “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States” is appointed to the role.⁹² These electors, once appointed by their respective states, are to meet in the state in which they are selected from and cast their votes for the President of the United States.⁹³ In theory, as Hamilton discusses in Federalist 68, “A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations” as to who should be elected president.⁹⁴ Additionally, Hamilton explains that the reasons for having the electors meet in their respective states and not all together is that “this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.”⁹⁵ However, the first aspect of Hamilton’s reasoning quickly proved to be detached from the realities of government.

As early as the first competitive presidential election in United States history in 1796, many of the states themselves and the parties that ran them decided that it was in their best

⁹⁰ United States, *The Constitution*, art. II, sec. 1, cl. 2.

⁹¹ United States, *The Constitution*, art. I, sec. 2-3.

⁹² United States, *The Constitution*, art. II, sec. 1, cl. 2.

⁹³ United States, *The Constitution*, art. II, sec. 1, cl. 3.

⁹⁴ Hamilton, *The Federalist Papers*, Federalist No. 68.

⁹⁵ Hamilton, *The Federalist Papers*, Federalist No. 68.

interest that the entirety of a state's electoral votes go for a particular candidate. By 1796, 12 of the 16 states allocated their electoral votes in a winner-take-all fashion and three of those that did not only allocated one vote for the candidate of the opposite party.⁹⁶ Regardless of how the parties were represented amongst the voters of the state and, more specifically, amongst the legislators in the state legislature, the majority party would ensure that all of the votes went for a single candidate. This practice served two power-maximization purposes. The first was the power of the party selecting the slate of electors that would choose the president while the second was the power of the state in relation to other states. While it seems politically natural that a party would seek to give their candidate every advantage in an election by maximizing their vote count, the power of the individual states was a contentious issue that extended to the power a state had in the federal government. Thus, the practice of slating electors as a group essentially becomes an application of game theory where the implementation of a winner-take-all system in one state drives all the other states to implement the same system to avoid being left behind and relatively weaker. As a result of this gamesmanship among the states, today 48 states allocate their electors via a winner-take-all system with the only exceptions being Maine and Nebraska, which will be discussed later.⁹⁷

The automatic plan seeks to make this officially unofficial practice of winner-take-all legally binding by "automatically" allocating the votes that electors cast today for the candidates that win the popular votes in each of the states and thus eliminating the need for electors. While some versions of the plan would maintain the discretion that states currently hold in allocating

⁹⁶ The U.S. National Archives and Records Administration, "Electoral College Results."

⁹⁷ The U.S. National Archives and Records Administration, "Electoral College Results."

their electors by only eliminating the individuals from the process, the version of the automatic plan being discussed here would involve moving every state to a winner-take-all system. The perceived fault of the Electoral College that this system would remedy is the instance of the “faithless elector,” or an elector that does not vote for the candidate that he or she had pledged to vote for when selected as an elector. However, in the course of United States presidential elections, only 165 so-called faithless electors have ever cast electoral votes.⁹⁸ 63 of those votes were cast in 1872 when Horace Greeley died after election day but before the Electoral College cast their votes.⁹⁹ When it came time to vote, only three of his 66 pledged electors voted for him.¹⁰⁰ Additionally, 75 of those faithless electors were for vice presidential candidates, not presidential ones, and they have never impacted the outcome of an election, only altering the final electoral vote tallies.¹⁰¹ Although a relatively minor “problem” in the grand scheme of the Electoral College, faithless electors may have their power of discretion over their votes reaffirmed or stripped away in the coming months as the Supreme Court hears conflicting appeals from two district courts, one in Colorado and another in Washington, regarding the control that states have over their electors after they have been chosen.¹⁰² If the court rules that states can legally restrict the voting behavior of their electors after their selection, the automatic plan will be enacted in all but name and without a constitutional amendment, which would be required to implement the plan in its entirety.

⁹⁸ “Faithless Electors,” Fairvote, last updated March 19, 2020, https://www.fairvote.org/faithless_electors.

⁹⁹ Fairvote, “Faithless Electors.”

¹⁰⁰ Fairvote, “Faithless Electors.”

¹⁰¹ Fairvote, “Faithless Electors.”

¹⁰² Editorial Board, “Voters have concerns.”

Beyond the elimination of risk of a faithless elector altering the outcome of an election with a vote that goes against the candidate they were selected for, the automatic plan would only change electoral practice for the two states that do not select electors strictly on the outcome of the statewide popular vote: Maine and Nebraska. Both states use a combination of the statewide popular vote and the popular vote in each of its congressional districts to select electors, the details of which will be addressed in the congressional district plan.¹⁰³ The implementation of the automatic plan, which would require a constitutional amendment that is passed with two-thirds majorities in both houses of Congress and the ratification of three quarters of the states in order to become law, would force Maine and Nebraska to give up their current systems and require all states to give up the power to determine for themselves how to select and instruct electors, although there are versions in which this would not be the case, as mentioned above.

The winners under such a plan would be those that believe the Electoral College is still a valid and useful method of selecting the president but believe that its kinks, like independent electors, should be ironed out. Thinking more politically, Republicans would generally win in this situation as they would solidify the functioning of the Electoral College and could claim to be tweaking it enough to bring it into the 21st century and away from the subtle paternalism of the 18th. Losers under the automatic plan would be the states that have now had part of their power guaranteed under the Constitution further subsumed by the federal government. Another segment would be those that desired deeper changes to the electoral system or complete replacement of the Electoral College as the implementation of the automatic plan would require

¹⁰³ "Maine & Nebraska," Fairvote, Accessed April 18, 2020, https://www.fairvote.org/maine_nebraska.

the immense amount of effort and campaigning that is associated with passing a constitutional amendment for very little change.

The impact on minority groups when compared to the Electoral College as currently constructed would be unchanged. As the main structures of the Electoral College would remain in place, nothing regarding voting districts, gerrymandering, or voting access would be neither positively nor negatively impacted. As a result, the automatic plan would have no effect on any groups.

As for the issues of the Electoral College the automatic plan would be resolving, only the phenomenon of faithless electors and the so-far unrealized risk of them altering the outcome of an election would be corrected. The automatic plan is by far the simplest of those that will be detailed in this paper in terms of deviation from the system of today and the limited impact it would have on the American electoral system reflects that. In the next plan, however, the polar opposite will be the case.

Direct Election

Also known as the national popular vote, direct election of the president is the most logically straightforward of the options that will be discussed here. In a democracy, it simply makes sense that the people would choose the president by casting their votes for the candidate of their choosing and whoever gets the most votes wins. However, as many things that involve the United States government and politics, it's not that simple. Moving from the Electoral College of today to the direct election of the president would entail not only a constitutional amendment, but consideration of what happens when no single candidate wins a majority, how to account for the rise of third party candidates, how the strategies of parties would change, and how the role

of the states would change in the American federal system. Additionally, the United States would become the largest country in the world that directly elects its head of government, a logistical challenge not only for the casting and counting of votes, but also for the physical and cyber security of a system that would become highly centralized. While the challenges are certainly numerous, one must also examine the purported virtues of such a system in order to make a complete judgement of its merits.

In theory, the implementation of direct election via a nationwide popular vote would be relatively straightforward. Following the passage of a constitutional amendment that requires the same two-thirds of Congress and three quarters of states to become law, one should be able to create an infrastructure that takes all the vote totals flowing in from around the country on the first Tuesday after the first Monday in November of every other even-numbered year and start counting. Even the infrastructure and the counting would not be all that difficult to come by: every news channel covering Election Day has a running popular vote tally. The Federal Election Commission and National Archives keeps vote totals by state for every United States federal election as well, which is part of the reason that one can look back through history and see which elections resulted in split elections where one candidate won a majority of the electoral vote but lost the popular vote to another candidate.¹⁰⁴ Moving to the direct election of the president would eliminate the phenomenon of the mismatch election and, with it, faithless electors. It is this reason, the ability to eliminate mismatch elections that appear to be antithetical to democracy, that is most appealing to many that support the direct election of the president.

¹⁰⁴ The U.S. National Archives and Records Administration, "Electoral College Results."

However, there are many concerns and shortcomings that would need to be ironed out before such a plan could come into effect without a hitch.

The first such issue would arise when pluralities occur in an election. If no single candidate can claim to have the support of a majority of the people, who becomes the president? In 19 of the 58 presidential elections that have taken place throughout the history of the United States, no candidate won a majority of the popular vote.¹⁰⁵ Only once in the 39 other elections has the candidate that won a majority of the popular vote not won a majority of the electoral, in 1876.¹⁰⁶ Although the Electoral College does have the ability to flip an election and give a candidate that did not win the popular vote the electoral majority, it is historically much more likely to create a majority for the candidate that wins a plurality of the vote. This creates an element of closure that is not seen in other non-parliamentary democracies. France, for example, directly elects its president, but does so in two rounds of voting if no candidate wins a majority of the votes on the first round.¹⁰⁷ Therefore, many candidates will run at the start of a campaign simply hoping to make it into the top two that get to compete in the second round and are thus guaranteed a majority. While there is certainly nothing inherently wrong about a two-round system, doing the same in the United States would present a significantly greater challenge than that faced in France. First, the United States is a significantly larger country, both geographically and by population. Holding two elections within a few weeks of each other would require mobilizing all of the resources that are mobilized for an election at all levels of government twice in a short

¹⁰⁵ The U.S. National Archives and Records Administration, "Electoral College Results."

¹⁰⁶ The U.S. National Archives and Records Administration, "Electoral College Results."

¹⁰⁷ "Legal Texts," Welcome to the english website of the French National Assembly, Assemblée nationale, accessed April 18, 2020, <http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly#Title2>.

time frame. Second, the American federal system is well served by having a single day in November on which citizens can vote for all offices for which there are elections in their area. Even with representation at the local, state, and federal level, Americans do all of their voting on a single day. Asking voters to come out to their polling place again a few weeks later to cast a single vote for president would simply seem silly when a voter's interests were already expressed at so many other levels of government, which leads into the final point. Turnout could easily be expected to decline sharply on this second round of voting as voters who initially chose a candidate that did not reach the final round would be even more disincentivized to vote, selecting their second or third choice candidate and nothing else, having expressed their desires for other offices weeks earlier. As seen in the most recent French presidential election in 2017, turnout declined 13% from the first round to the second, a decrease of almost five million votes in France and nearly 18 million votes in the United States.¹⁰⁸

A possible solution to the two-round situation would be ranked choice voting, in which voters select multiple candidates on a single ballot and rank them in order of preference. To date, only one state, Maine, uses ranked choice voting for presidential elections but the first election in which it will be used is 2020.¹⁰⁹ How well ranked choice works in Maine will be closely monitored, but historically, it has been difficult to implement ranked choice voting in two-party systems like the United States. Much like a traditional direct election system, a possible effect,

¹⁰⁸ "Décision n° 2017-169 PDR du 26 avril 2017," Les Décisions, Conseil constitutionnel, accessed April 18, 2020, <https://www.conseil-constitutionnel.fr/decision/2017/2017169PDR.htm>.

"Décision n° 2017-171 PDR du 10 mai 2017," Les Décisions, Conseil constitutionnel, accessed April 18, 2020, <https://www.conseil-constitutionnel.fr/decision/2017/2017171PDR.htm>.

¹⁰⁹ "More About Ranked Choice Voting," Ranked Choice Voting, Fairvote, accessed April 18, 2020, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used.

as will be discussed shortly, would be the proliferation of third-party campaigns and candidates for the presidency.

Another consequence of direct election would be the opening up of the United States presidential election to third-party candidates. As it currently stands, third-party candidates in American elections stand effectively zero chance of winning the presidency due to the winner-take-all nature of the races in each of the states. Ross Perot provides perhaps the best example of a nationally popular third-party candidate that failed to register on the electoral chart. Running as an independent candidate in 1992, Perot finished the campaign with almost 19% of the popular vote yet failed to receive a single electoral vote.¹¹⁰ Because Perot did not win the plurality of the votes in any of the states, he did not receive the electoral votes from those states. However, in the same vein, a third-party candidate with strong support in a particular state or region can disproportionately impact the electoral vote. The premier example of the strong regional candidate is George Wallace mounting a third-party campaign in the 1968 election. Known for his segregationist stances, Wallace won five states and 46 electoral votes in the South with 13.5% of the popular vote.¹¹¹ Despite underperforming Perot by roughly five percentage points, Wallace was able to pick up eight percentage points more electoral votes than Perot by having a concentrated base of support in a few states. Even with his concentrated base of support, however, Wallace was afflicted by the tendency of the Electoral College to underrepresent the support a losing candidate holds while overstating support for a winning one. Although moving to a direct election system would not move Perot or Wallace any closer to

¹¹⁰ The U.S. National Archives and Records Administration, "Electoral College Results."

¹¹¹ The U.S. National Archives and Records Administration, "Electoral College Results."

actually winning the presidency, it would more accurately reflect the fact that Perot outperformed Wallace nationally, even if the electoral votes would say otherwise, a more democratically intuitive outcome.

Perhaps the biggest sticking point about proposals to move to direct election is the resulting change in campaign and party strategy that would accompany the move. A common line of attack on the Electoral College of today is that presidential elections are only ever decided by a handful of so-called swing states that have populations that could swing either direction with their support. When most other states can pretty easily be sorted out into electoral piles for one candidate or the other, the few that cannot receive the lion's share of advertising dollars, handshakes, and stump speeches as each candidate seeks their route to the 270 votes needed to secure the presidency. The relatively small proportion of the population that ends up deciding the election is often much derided by opponents of the Electoral College. Instead, if direct election were in effect, candidates would be best served by campaigning strictly in the most populous areas of the country where their advertising dollars, rallies, and campaign events would be most effective. Why go to small town Ohio when you can go to coastal California, New York City, or Chicago?

As with each of the other plans, there are winners and losers to direct election. The winners would be the regions just mentioned and other high population, high density areas that can deliver a large trove of votes at low cost. Some other winners would be third parties and their candidates, long sequestered to the fringes of American politics and elections by the Democratic and Republican Parties, as well as those that seek a more straightforward electoral system that is easier to understand. Politically speaking, Democrats would certainly be winners under this

plan as their support is heavily concentrated in America's urban areas and recent electoral history has them winning increasing proportions of the popular vote each election cycle. The losers under direct election would be those states that are lucky enough to be deemed swing states in any given election cycle, a title that is significantly fickle than population trends are. Rural areas also major losers under this plan, as they would essentially be ignored at the expense of campaigning in more efficient areas for vote collecting while today, they are highly sought after in the right states.

Minority groups are also significantly impacted by this plan, and not in a positive way. Under the Electoral College as it stands today, minority groups hold a significantly greater degree of power than they would under direct election. In the Electoral College, the presidency is decided by what is effectively 51 distinct races that are worth different numbers of electoral votes. Each of those races are contested on a much smaller scale than a direct election would be contested on. With smaller scale, as Madison would note in Federalist ten, factions and groups can have a much larger influence than they can on a larger scale.¹¹² The factionalism that Madison hoped to stave off with a larger republic is the same type of power that minority groups would seek to exert; the type of power that is most effective in smaller republics. By competing in elections that are much smaller than a single national election, minority groups are shielded from being drowned out by major population centers and majority groups from faraway regions. Thus, under a direct election plan, minority groups would definitely be classified as losers. For example, American Indian populations make up a tiny fraction of the population of the United States as a whole, but comprise at least five percent of the population in Alaska, New Mexico, Oklahoma,

¹¹² Hamilton, *The Federalist Papers*, Federalist No. 10.

South Dakota, Montana, and North Dakota. When compared to the less than one percent they comprise of the United States population as a whole, American Indians in particular are disadvantaged by a direct election system.

The direct election plan is perhaps the most dramatic of the plans that will be discussed in this paper. Involving burning the entire system down and working solely with the nationwide popular vote, direct election is appealing as a straightforward and simple democratic option. However, when one digs deeper into the functioning of such a system and the groups that would be disadvantaged by direct election, serious concerns can be raised about both its simplicity and democratic bona fides. For the third plan, we return to simply tweaking the Electoral College, but with a little help from Maine and Nebraska.

The Congressional District Plan

The third plan that will be covered is the congressional district plan, also sometimes referred to as the proportional plan. The essence of this plan would essentially involve turning every state into Maine and Nebraska and using their method of assigning electors based not only on the outcome of the popular vote statewide, but on the popular vote in each congressional district. As currently constructed, Maine and Nebraska split the allocation of their electoral votes into those that represent the statewide preference and those that represent the preference of the districts within those states.¹¹³ For winning the statewide vote, a candidate receives two electoral votes from each state, reflecting the two electoral votes that are assigned based on the statewide selection of senators. The remaining electoral votes are distributed based on who wins each of the congressional districts within that state, so if candidate A wins the popular vote

¹¹³ Fairvote, "Maine & Nebraska."

statewide and in one of the congressional districts and candidate B wins the popular vote in the two other congressional districts, candidate A would win three electoral votes and candidate B would win two out of the five total this hypothetical state has to allocate. Putting this plan into practice would involve changing the remaining 48 states to the Maine and Nebraska model for electoral allocation, moving them from outliers to trendsetters.

The benefits of such a plan are that it would not require a Constitutional Amendment to implement and that it would lessen the spread that can feasibly occur between the popular vote and the electoral vote. Due to the wide latitude that states are given when it comes to allocating the electoral votes that they are assigned; no constitutional amendment would need to be passed in order to make such a plan a reality. As Maine and Nebraska have already shown, moving to this method of allocation would simply require an act of the state legislature. However, whether it is easier to pass a constitutional amendment or convince 48 state legislatures to move to this system is up for debate. Additionally, without a firm, federal statute that would hold states to this system, the same game theoretic forces that drove the vast majority of the states to adopt a winner-take-all system would still be present. California would likely be hesitant to hamstring its own power in selecting the president by splitting its 55 electoral votes across its congressional districts. As for the effect that such a plan would have on the risk of a mismatch between the popular and electoral vote totals, the risk would be lowered by the decrease in the distortions of the winner-take-all system. By making each district rather than each state an independent contest, the absolute size of a margin of victory in an individual district is significantly limited. Without the ability to run up huge margins without sacrificing any electoral votes, it would

become significantly more difficult to win an election without winning the popular vote. However, this plan would create some other distortions of its own.

One of the first distortions would come in the effect it would have on the power of differently sized states. As currently constructed, the Electoral College favors voters in small states over large states. By guaranteeing a minimum of three electoral votes per state, the voters per electoral vote ratio in Wyoming is significantly lower than that in California, making a vote in Wyoming count for relatively more than a vote in California. Under the congressional district plan, that gap would be widened. Smaller states have fewer congressional districts across which to allocate their share of the electoral votes, making it more likely that a candidate can sweep all of the votes from a small state and effectively maintaining the power that that state held under the winner-take-all system. For example, since Maine implemented the congressional district plan in 1972 and Nebraska did in 1996, only twice, in 2008 and 2016, has either of the states split their electoral vote.¹¹⁴ A large state, on the other hand, has more districts across which to allocate electoral votes. With more districts comes a higher risk of splitting the electoral votes of that state across multiple candidates, further weakening the power that that state holds in selecting the president and the power of the majority in that state to wield that power as well.

A second distortion would arise in how congressional districts get treated in an election under this system. If congressional districts are to count for the allocation of electoral votes as well as the election of United States representatives, a presidential election simply moves from being about winning states to winning districts. The same electoral phenomenon that results in a handful of swing states deciding an election every four years would move to a smaller

¹¹⁴ Fairvote, "Maine & Nebraska."

subdivision with the creation of swing districts. As much as some Americans bristle at the prospect of Floridians and Ohioans deciding who the president will be, imagine the response to an election decided by the voters of a congressional district in suburban Atlanta or Chicago. Furthermore, unlike states, the borders and makeups of congressional districts change every ten years and it is no secret that those borders are drawn with the interest of the ruling party at the time in mind. Gerrymandering districts would take on a whole new level of importance, deciding not only who gets the majority in the House of Representatives, but also the White House.

As no voting system is neutral, this plan creates its own winners and losers just as each of the others. The winners in this system would be those that believe mismatch elections are a stain on American democracy. While it would not eliminate the possibility of a mismatch entirely as direct election would, it would certainly lower the probability of such an election taking place and the scale at which it would take place. Additionally, small states would be winners in this scenario as many would see their already disproportionate power unchanged or changed very little while big states would see significant decreases thus making them losers.

A final major winner under this plan might be minority groups. As much as the Electoral College already helps minority groups wield political power by breaking elections into 51 individual races, the congressional district plan would operate similarly but to an even greater degree by breaking races into 485 races with slight overlaps in 50 of them. However, there is a risk that minorities are gerrymandered into districts where their votes are drowned out by a larger majority, thus leaving the true benefit or cost to them somewhat dependent on where they live.

While this plan does not require a constitutional amendment to put into practice, it does require the full cooperation of all the states in order to be effective. The next plan, the interstate compact, similarly does not require a constitutional amendment to implement, but only requires the willing participation of enough states to set the course for the entire country.

The Interstate Compact

The interstate compact refers to the plan that is perhaps the closest to becoming a reality. Already signed onto by 15 states and the District of Columbia, the compact pledges each of its signatories to cast their electoral votes for the winner of the nationwide popular vote.¹¹⁵ However, the compact only comes into effect when the 270 vote threshold of electoral votes is accounted for amongst the states that have signed on, thus guaranteeing that the winner of the popular vote nationwide, regardless of where those votes originate from, would win the requisite electoral votes to become president.¹¹⁶ To date, that threshold has not been reached and no states controlled by Republicans have signed on, likely due to the recognition, in light of Trump's election in 2016, that it would hurt their candidates if it were to come into effect.¹¹⁷ Additionally, while the interstate compact would not require a constitutional amendment to become effective as it only operates within the latitude of the states to decide how their electors are selected, interstate compacts do require approval from Congress, as "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State," approval that would be unlikely to come as long as Republicans control at least one of the House of Representatives or

¹¹⁵ "A National Popular Vote for President," Fairvote, accessed April 18, 2020, https://www.fairvote.org/national_popular_vote.

¹¹⁶ Fairvote, "A National Popular Vote for President."

¹¹⁷ National Popular Vote, accessed April 18, 2020, <https://www.nationalpopularvote.com>.

Senate.¹¹⁸ It appears that this clause would conflict with the clause in Article II that gives sole discretion to the states to decide how to allocate their electors, however, only a court ruling would provide clarity on the issue.

Because this plan is essentially just engineering the Electoral College into a direct election apparatus, the resulting impact on the country at large would remain very similar to that of direct election. The same questions regarding who wins when no one wins a majority would arise, but also include the aforementioned question of approval. Just as discussed above, the winners under this plan would be high population and high-density regions of the country that can deliver many votes efficiently. As one can tell by the concentrated support for the compact in Democrat-controlled states, Democrats would win under this proposal while Republicans would lose as moving to essentially a winner-take-all system would favor large urban centers that tend to deliver huge quantities of votes for Democrats. Same for the impact on minority groups. By turning smaller elections into a huge nationwide election, the risk of being drowned out by an overwhelming majority on the other side of the country is a significant risk, lessening their ability to wield political power and have their concerns heard.

¹¹⁸ United States, *The Constitution*, art. I, sec. 10, cl. 3.

Chapter IV: The Wyoming Plan

While the four proposals that were discussed prior are each legitimate proposals for the replacement or alteration of the Electoral College with varying degrees of seriousness and likelihoods of being implemented, as well as their own pros and cons, this final proposal is one that will be examined significantly more in depth and with the goal of convincing the reader of its merits. The so-called Wyoming Rule has gotten significantly less play in the popular media but includes many of the same hallmarks of the plans previously discussed. For example, the Wyoming Rule would correct some of the perceived injustices of the Electoral College system while also having a clear, albeit similarly less than pragmatic, path to implementation. Named for the current least-populous state in the Union, the Wyoming Rule relies on that smallest statewide population as an integral divisor for the rule. Under a Wyoming Rule system, every ten years following the decennial United States Census, Congress would resize itself to ensure that there were enough representatives to make the average population of a congressional district close to the size of the least populous state. Following that, seats in the House of Representatives would be apportioned as they currently are using a mathematical formula that is outside the realm of discussion for this paper.

Implementing the Wyoming Rule would require no changes to the United States Constitution, instead involving only an act of Congress every ten years and the political inertia to make it so. Not changing the Constitution means maintaining the Electoral College as it is. It would still be composed of electors chosen by the states, still select the president following election day, and electors would still be allocated among the states as the sum total of a states' congressional delegation. The effect of the Wyoming Rule comes in as a change to the states'

congressional delegation. By adding or subtracting seats in the House of Representatives every census, the size of congressional delegations would change more frequently and thus so would the number of electors a state had in the Electoral College. By maintaining the function of the Electoral College as currently constructed, the Wyoming Rule in itself does nothing in terms of changing the validity or fairness of the presidential electoral system. Instead, the Wyoming Rule seeks to mitigate some of the electoral inequities that are present in the American electoral system as its method of improving the perceived fairness and validity of American elections.

Due to the Constitutional mandate of each state, regardless of population, receiving a minimum of one representative and two senators, the lowest number of electoral votes a state can cast is three. With a guarantee of two senators for every state, small states and their residents are able to wield outsized power by having fewer people per electoral vote that is cast. For example, Wyoming, the least populated state as of the 2010 Census, has 187,875 people per each of its three Electoral College votes.¹¹⁹ California, by contrast as the most populated state, had 677,345 people per each of its 55 Electoral College votes.¹²⁰ Therefore, a voter in Wyoming is over three and a half times as powerful when casting a vote for president than a voter in California, with the other 48 states falling somewhere in between. However, it is not only the inclusion of two senators that skews the electoral math in Wyoming's favor.

The second culprit of the influence that Wyoming holds is the one representative that the state receives. As of the 2010 Census, the average congressional district in the United States had 708,377 people represented by a single representative.¹²¹ Wyoming's population in 2010 was

¹¹⁹ U.S. Department of Commerce, "Quick Facts."

¹²⁰ U.S. Department of Commerce, "Quick Facts."

¹²¹ U.S. Department of Commerce, "Quick Facts."

only 563,625, meaning that compared to the average American, Wyoming's citizens were overrepresented.¹²² While representation in Congress is not the focus of this paper, it still plays an important role in how states are represented in the Electoral College. Since the passage of the Reapportionment Act of 1929, Congress has had its size fixed at 435 seats with only one exception in 1959 when Alaska and Hawaii were admitted to the Union and each received a single representative outside of the normal reapportionment process.¹²³ In the time since, the population of the United States has increased dramatically without a corresponding increase in seats, leading to the swelling of congressional districts and the spread between the district sizes that is seen today. The combination of ever-larger districts and the Constitutional guarantee of two senators per state has created the inequalities of representation that are seen today. While the number of senators per state is something that cannot be changed without changing the very fabric of American representative government, the sizes of congressional districts is something that can as they have throughout the growth of the nation. That is exactly what the Wyoming Rule seeks to do.

The Math

As mentioned earlier, the way that seats are apportioned in the United States Congress is determined by a mathematical formula consisting of square roots, divisors, and variables that is far beyond the scope of this paper. Instead, the tables below will provide the necessary information for understanding where the Wyoming Rule would start from and the impact it

¹²² U.S. Department of Commerce, "Quick Facts."

¹²³ "Proportional Representation," Origins & Development: From the Constitution to the Modern House, United States House of Representatives: History, Art & Archives, accessed April 18, 2020, <https://history.house.gov/Institution/Origins-Development/Proportional-Representation/>.

would have on the way Congress and the Electoral College is formed. The table below provides the states and their populations as of the 2010 census and the number of seats and electoral votes allocated to each, as well as a simple calculation of the number of citizens per electoral college vote in each state.¹²⁴

State	Population	Seat Count	Electoral Votes	People per Electoral Vote
Alabama	4,779,735	7	9	531,082
Alaska	710,230	1	3	236,743
Arizona	6,392,015	9	11	581,092
Arkansas	2,915,920	4	6	485,987
California	37,253,955	53	55	677,345
Colorado	5,029,195	7	9	558,799
Connecticut	3,574,095	5	7	510,585
Delaware	897,935	1	3	299,312
Florida	18,801,310	27	29	648,321
Georgia	9,687,655	14	16	605,478
Hawaii	1,360,300	2	4	340,075
Idaho	1,567,580	2	4	391,895
Illinois	12,830,630	18	20	641,532
Indiana	6,483,800	9	11	589,436

¹²⁴ U.S. Department of Commerce, "Quick Facts."

The Editors of Encyclopaedia Britannica, "United States House of Representatives Seats by State," Encyclopaedia Britannica, accessed April 18, 2020, <https://www.britannica.com/topic/United-States-House-of-Representatives-Seats-by-State-1787120>.

Iowa	3,046,355	4	6	507,726
Kansas	2,853,120	4	6	475,520
Kentucky	4,339,365	6	8	542,421
Louisiana	4,533,370	6	8	566,671
Maine	1,328,360	2	4	332,090
Maryland	5,773,550	8	10	577,355
Massachusetts	6,547,630	9	11	595,239
Michigan	9,883,640	14	16	617,728
Minnesota	5,303,925	8	10	530,393
Mississippi	2,967,295	4	6	494,549
Missouri	5,988,925	8	10	598,893
Montana	989,415	1	3	329,805
Nebraska	1,826,340	3	5	365,268
Nevada	2,700,550	4	6	450,092
New Hampshire	1,316,470	2	4	329,118
New Jersey	8,791,895	12	14	627,993
New Mexico	2,059,180	3	5	411,836
New York	19,378,100	27	29	668,210
North Carolina	9,535,485	13	15	635,699
North Dakota	672,590	1	3	224,197
Ohio	11,536,505	16	18	640,917

Oklahoma	3,751,350	5	7	535,907
Oregon	3,831,075	5	7	547,296
Pennsylvania	12,702,380	18	20	635,119
Rhode Island	1,052,565	2	4	263,141
South Carolina	4,625,365	7	9	513,929
South Dakota	814,180	1	3	271,393
Tennessee	6,346,105	9	11	576,919
Texas	25,145,560	36	38	661,725
Utah	2,763,885	4	6	460,648
Vermont	625,740	1	3	208,580
Virginia	8,001,025	11	13	615,463
Washington	6,724,540	10	12	560,378
West Virginia	1,852,995	3	5	370,599
Wisconsin	5,686,985	8	10	568,699
Wyoming	563,625	1	3	187,875

As one can see, the variation in people per electoral vote is wide, ranging from Wyoming to California. For the more statistically minded, below are some summary statistics for the people per electoral vote:

Average	491,941
Median	533,494
Standard Deviation	139,431

To calculate what the size of Congress would have been following the 2010 Census under the Wyoming Rule, one simply takes the population of the entire country less Washington, District of Columbia and divides it by the population of the smallest state, Wyoming. That calculation would be 308,143,795 divided by 563,625 for an answer of 547 after some light rounding.¹²⁵ For comparison, there are currently 435 seats in the House of Representatives meaning that the implementation of the Wyoming Rule following the 2010 Census would have added 112 seats to Congress.¹²⁶ Now that a seat number has been calculated, one can simply use the preexisting apportionment method and add seats to the equation in order to get the hypothetical seat counts and corresponding electoral votes. Those are shown below in the table.

State	Seat Count	Electoral Votes	People per Electoral Vote
Alabama	9	11	434,521
Alaska	1	3	236,743
Arizona	11	13	491,693
Arkansas	5	7	416,560
California	66	68	547,852
Colorado	9	11	457,200
Connecticut	6	8	446,762
Delaware	2	4	224,484
Florida	33	35	537,180
Georgia	17	19	509,877
Hawaii	2	4	340,075
Idaho	3	5	313,516
Illinois	23	25	513,225
Indiana	12	14	463,129
Iowa	5	7	435,194
Kansas	5	7	407,589
Kentucky	8	10	433,937
Louisiana	8	10	453,337
Maine	2	4	332,090

¹²⁵ U.S. Department of Commerce, "Quick Facts."

¹²⁶ The Editors of Encyclopaedia Britannica, "United States House of Representatives."

Maryland	10	12	481,129
Massachusetts	12	14	467,688
Michigan	18	20	494,182
Minnesota	9	11	482,175
Mississippi	5	7	423,899
Missouri	11	13	460,687
Montana	2	4	247,354
Nebraska	3	5	365,268
Nevada	5	7	385,793
New Hampshire	2	4	329,118
New Jersey	16	18	488,439
New Mexico	4	6	343,197
New York	34	36	538,281
North Carolina	17	19	501,868
North Dakota	1	3	224,197
Ohio	20	22	524,387
Oklahoma	7	9	416,817
Oregon	7	9	425,675
Pennsylvania	23	25	508,095
Rhode Island	2	4	263,141
South Carolina	8	10	462,537
South Dakota	2	4	203,545
Tennessee	11	13	488,162
Texas	45	47	535,012
Utah	5	7	394,841
Vermont	1	3	208,580
Virginia	14	16	500,064
Washington	12	14	480,324
West Virginia	3	5	370,599
Wisconsin	10	12	473,915
Wyoming	1	3	187,875

And, just as before, some summary statistics for the statistically inclined:

Average	413,436
Median	440,978
Standard Deviation	101,651

Compared to the current system, the Wyoming Rule makes some headway on all three summary statistics in mitigating some of the benefit that small state voters get in the electoral college, especially in terms of deviation from the mean. With a lower standard deviation, there is less spread across states in their relative power and thus a generally more equal distribution of power. Here are the statistics side-by-side:

Measure	Current	Wyoming Rule	Percentage Decrease
Average	491,941	413,436	16%
Median	533,494	440,978	17%
Standard Deviation	139,431	101,651	27%

More specifically, here are the state-by-state changes in people per electoral vote under the Wyoming Rule:

State	Current	Wyoming Rule	Percentage Decrease
Alabama	531,082	434,521	18%
Alaska	236,743	236,743	0%
Arizona	581,092	491,693	15%
Arkansas	485,987	416,560	14%
California	677,345	547,852	19%
Colorado	558,799	457,200	18%
Connecticut	510,585	446,762	12%
Delaware	299,312	224,484	25%
Florida	648,321	537,180	17%
Georgia	605,478	509,877	16%
Hawaii	340,075	340,075	0%
Idaho	391,895	313,516	20%
Illinois	641,532	513,225	20%
Indiana	589,436	463,129	21%
Iowa	507,726	435,194	14%
Kansas	475,520	407,589	14%
Kentucky	542,421	433,937	20%
Louisiana	566,671	453,337	20%
Maine	332,090	332,090	0%
Maryland	577,355	481,129	17%
Massachusetts	595,239	467,688	21%

Michigan	617,728	494,182	20%
Minnesota	530,393	482,175	9%
Mississippi	494,549	423,899	14%
Missouri	598,893	460,687	23%
Montana	329,805	247,354	25%
Nebraska	365,268	365,268	0%
Nevada	450,092	385,793	14%
New Hampshire	329,118	329,118	0%
New Jersey	627,993	488,439	22%
New Mexico	411,836	343,197	17%
New York	668,210	538,281	19%
North Carolina	635,699	501,868	21%
North Dakota	224,197	224,197	0%
Ohio	640,917	524,387	18%
Oklahoma	535,907	416,817	22%
Oregon	547,296	425,675	22%
Pennsylvania	635,119	508,095	20%
Rhode Island	263,141	263,141	0%
South Carolina	513,929	462,537	10%
South Dakota	271,393	203,545	25%
Tennessee	576,919	488,162	15%
Texas	661,725	535,012	19%
Utah	460,648	394,841	14%
Vermont	208,580	208,580	0%
Virginia	615,463	500,064	19%
Washington	560,378	480,324	14%
West Virginia	370,599	370,599	0%
Wisconsin	568,699	473,915	17%
Wyoming	187,875	187,875	0%

Therefore, adding seats to Congress would not only help shrink the average congressional district and improve representation in Congress, but it would also help close the gap between the relatively most powerful voters and the relatively least powerful in presidential elections.

In a 2010 Wyoming Rule, because the number of seats increased, no state would have its absolute congressional representation and subsequent electoral representation decreased. However, a handful of states would see no change in their representation and therefore a

decrease in their relative representation as the total number of seats rose. Below is the seat counts for the two systems by state.¹²⁷

State	Current	Wyoming Rule	Increase
Alabama	7	9	2
Alaska	1	1	0
Arizona	9	11	2
Arkansas	4	5	1
California	53	66	13
Colorado	7	9	2
Connecticut	5	6	1
Delaware	1	2	1
Florida	27	33	6
Georgia	14	17	3
Hawaii	2	2	0
Idaho	2	3	1
Illinois	18	23	5
Indiana	9	12	3
Iowa	4	5	1
Kansas	4	5	1
Kentucky	6	8	2
Louisiana	6	8	2
Maine	2	2	0
Maryland	8	10	2
Massachusetts	9	12	3
Michigan	14	18	4
Minnesota	8	9	1
Mississippi	4	5	1
Missouri	8	11	3
Montana	1	2	1
Nebraska	3	3	0
Nevada	4	5	1
New Hampshire	2	2	0
New Jersey	12	16	4
New Mexico	3	4	1
New York	27	34	7
North Carolina	13	17	4

¹²⁷ The Editors of Encyclopaedia Britannica, "United States House of Representatives."

North Dakota	1	1	0
Ohio	16	20	4
Oklahoma	5	7	2
Oregon	5	7	2
Pennsylvania	18	23	5
Rhode Island	2	2	0
South Carolina	7	8	1
South Dakota	1	2	1
Tennessee	9	11	2
Texas	36	45	9
Utah	4	5	1
Vermont	1	1	0
Virginia	11	14	3
Washington	10	12	2
West Virginia	3	3	0
Wisconsin	8	10	2
Wyoming	1	1	0
Total	435	547	112

Ten states—Alaska, Hawaii, Maine, Nebraska, New Hampshire, North Dakota, Rhode Island, Vermont, West Virginia, and Wyoming—would see no change in their seat counts. The ten highest gainers would be, in order: California, Texas, New York, Florida, Illinois, Pennsylvania, Michigan, New Jersey, North Carolina, and Ohio. Only California would see double digit gains with 13 added seats.

The people per electoral vote ratio would see changes as well, although not drastic ones. Below are the ten states with the lowest ratios in ascending order under the current system as well as under the Wyoming Rule.

Current		Wyoming Rule	
Wyoming	187,875	Wyoming	187,875
Vermont	208,580	South Dakota	203,545
North Dakota	224,197	Vermont	208,580
Alaska	236,743	North Dakota	224,197
Rhode Island	263,141	Delaware	224,484
South Dakota	271,393	Alaska	236,743

Delaware	299,312	Montana	247,354
New Hampshire	329,118	Rhode Island	263,141
Montana	329,805	Idaho	313,516
Maine	332,090	New Hampshire	329,118

While the order of the states on this list changes completely with the exception of Wyoming, only Maine is removed from the first list in favor of Idaho on the second. Although the Wyoming Rule would help shrink the gap between the largest and smallest states in terms of relative power, it would have a limited impact on the power of the states positionally as the smallest states would still be the smallest states. Furthermore, here are the ten states with the highest people to electoral vote ratios under both the current and Wyoming Rule systems in descending order.

Current		Wyoming Rule	
California	677,345	California	547,852
New York	668,210	New York	538,281
Texas	661,725	Florida	537,180
Florida	648,321	Texas	535,012
Illinois	641,532	Ohio	524,387
Ohio	640,917	Illinois	513,225
North Carolina	635,699	Georgia	509,877
Pennsylvania	635,119	Pennsylvania	508,095
New Jersey	627,993	North Carolina	501,868
Michigan	617,728	Virginia	500,064

The pattern is much the same as the prior list, with California and New York topping both lists and Pennsylvania claiming the eighth spot on both. New Jersey and Michigan claim spots on the first while Georgia and Virginia replace them on the second, again showing the limited room that exists for movement to and from positions of power relative to other states. Interesting to note is the size of the decreases in people per vote ratio on the second list relative to the first. For example, a Wyoming Rule California would be 70 thousand people shy of even making the top ten on the highest ratios list under the current system.

Effects

Just as with Chapter III, analyzing the effects that implementing the Wyoming Rule would unleash is just as important as understanding the details of the plan itself. Continuing with the spirit of the chapter, the analysis of the effects for the Wyoming Rule will take on a more thorough approach than some of the more common proposals for altering the Electoral College. This section will still cover the same details regarding legality, winners and losers, impact on minority groups, and how it addresses some of the issues of the Electoral College as currently constructed.

Legality

Part of the appeal of the Wyoming Rule is that it does not require an amendment to the Constitution in order to implement. By working within the framework of the Electoral College as laid out in the Constitution, notably the stipulation that a state gets electoral votes equal to the sum total of the representatives and senators a state sends to Congress, the Wyoming Rule is able to be fully implemented without passing a constitutional amendment. The only legal change that would need to be made is the addition of seats to the United States House of Representatives. As mentioned in earlier in the chapter, Congress can legislate its own size as only the size of the Senate is constitutionally mandated at two senators per state. Even with that power, Congress has not permanently changed the size of the House of Representatives since the Reapportionment Act of 1929, which set the size of the House at the 435 seats that it remains at today.¹²⁸ The only deviation from 435 occurred in 1959 when Alaska and Hawaii were admitted to the Union.¹²⁹ Instead of reapportioning the entirety of the House of Representatives just one

¹²⁸ United States House of Representatives: History, Art & Archives, "Proportional Representation."

¹²⁹ United States House of Representatives: History, Art & Archives, "Proportional Representation."

year in advance of the next census, Congress instead granted the two newest states one representative each until the completion of the 1960 Census and subsequent reapportionment.¹³⁰

While putting the Wyoming Rule into place would only require an act of Congress to increase the number of seats in the House of Representatives, the legal challenge will come in with ensuring that that process reoccurs every ten years after each census. The only way to ensure that Congress is legally required to repeat the process decennially would be to pass an amendment to the Constitution, slightly defeating the purpose of pursuing the Wyoming Rule to begin with. Although Congress could technically be trusted to make the requisite changes themselves, planning a decade into the future is much easier than confronting political realities in the present. Thus, if the party in power in a given census year projected to be a major loser as a result of resizing and reapportionment, the political will to make even a routine and technical correction to American government could quickly evaporate. As soon as something as nonpartisan as maintaining the functions of American government becomes a political tool, the Wyoming Rule becomes less of a rule and more a method of wielding and maintaining power. For this reason, any serious proposal seeking to implement the Wyoming Rule should seek to create guardrails against the political weaponization of congressional size.

Winners and Losers

Just as with each of the plans before, an analysis of winners and losers under the Wyoming Rule is in order. Winners would include people that believe that the Electoral College is a suitable method for selecting the president and would prefer to leave it intact. Similarly,

¹³⁰ United States House of Representatives: History, Art & Archives, "Proportional Representation."

those that generally are okay with the Electoral College but believe that some more incremental changes are needed in order to keep it relevant for the 21st century could be considered winners. However, those that would like to see sweeping changes to the electoral system of the United States—whether via direct election or another method that would require constitutional change—would be disappointed in the simple tinkering of the system that comes with the Wyoming Rule. However, there is very limited middle ground. A sizable cadre of minor changes, like implementing the automatic plan or electing electors by district instead of by state, would require constitutional amendments. At that point, going through the process of amending the Constitution is more appealing if it would involve more drastic change. To many, the amendment process is simply not worth it if the resulting change is marginal.

Politically, the winners and losers are more difficult to define, if there are easily determined winners and losers at all. Although tempting to say that Republicans running for the presidency would likely be losers as the low-population states that hold disproportionate power in the Electoral College would become relatively weaker as high-population states like California, New York, and Illinois gained seats, the exact effect would be difficult to determine due to the simple fact that party platforms and campaign strategies would change to reflect a new electoral system. Even then, it is difficult to determine if Republicans would have even been losers if the 2016 election had been conducted via the Wyoming Rule. While an imperfect guide, under the Wyoming Rule, if the popular vote counts remained exactly the same, Donald Trump would have won 370 electoral votes for his 30 states and Maine's second district while Hillary Clinton would

have won 280 for her 20 states and the District of Columbia.¹³¹ Trump's 57% of the electoral vote under the Wyoming Rule would be a tenth of a percentage point more than he won in the actual 2016 election.¹³²

Looking at the only other election to date conducted under 2010 apportionment, 2012, Mitt Romney would have won 248 electoral votes for his 24 states to Barack Obama's 402 for 26 states and the District of Columbia if the election was under the Wyoming Rule.¹³³ Romney's 38% of the electoral vote is almost exactly what he received in the 2012 election as well.¹³⁴ While two elections are certainly a tiny sample size, the overall effect on political power appears to be benign in the absence of broader platform and strategy shifts by the major parties.

By using the size of Congress to affect how presidential elections are run, Congress would also see major changes under the Wyoming Rule. However, how the added congressional seats would affect the balance of power in the legislature is highly dependent on a multitude of other factors, including who controls redistricting in various states and how campaigning would change to reflect new political realities. In terms of the power of individual legislators, their individual power would decrease as seats are added, although the power of the House as an institution would likely remain unchanged relative to the Senate. Select members of the House, like the Speaker of the House and committee chairs, would probably see their power increase as they wield influence over a larger number of representatives and their political operations.

¹³¹ "Federal Elections 2016," Federal Election Commission, published December 2017, <https://transition.fec.gov/pubrec/fe2016/federalections2016.pdf>.

¹³² Federal Election Commission, "Federal Elections 2016."

¹³³ "Federal Elections 2012," Federal Election Commission, published July 2013, <https://transition.fec.gov/pubrec/fe2012/federalections2012.pdf>.

¹³⁴ Federal Election Commission, "Federal Elections 2012."

Continuing on the same vein, small states would be major losers under the Wyoming Rule as they would see larger states gain lots of seats without picking up many themselves. Not only would their congressional delegation shrink relative to the size of other states, but their power in selecting the president would be significantly diminished as well. However, even with a smaller number of electoral votes and power in the Electoral College, small states would still punch above their weight on a people per electoral vote basis. By virtue of the way the Electoral College is designed, the inclusion of two senators for every state regardless of size and the counting of those senators in the Electoral College will always overrepresent small state residents against big state residents. Adding seats to large states via the Wyoming Rule would only help narrow the gap.

Minority Groups

As a bit of an extension to the previous section on winners and losers, how the Wyoming Rule impacts the fortunes of minority groups also merits discussion. Generally speaking, the implementation of the Wyoming Rule would be good for minority groups. As discussed in Chapter II, the Electoral College is a boon for minority groups when compared to a nationwide popular election. By breaking the country into 51 distinct elections, minority groups within a state can exert more influence over the outcome of the race in that state. If competing in the context of a nationwide election, the influence a minority group can wield is greatly reduced. Expanding on the power of minority groups within states, the power wielded by different groups in different state varies widely. By making states like California, Texas, and Florida more powerful in electing the president, minority groups in those states can exert more influence over the election by influencing a greater number of electoral votes. However, competing in a more powerful state

also means competing in a more populous state, possibly reducing the influence a minority group can exert. As a result, although the Wyoming Rule would make certain minority groups in larger states more powerful relative to minority groups in smaller states, it would not change the power of the minority groups within their own states in terms of their impact on presidential elections.

While the Wyoming Rule is principally designed for altering the method by which the President of the United States is elected, by altering the size of Congress the Wyoming Rule also creates spillover effects for the representation of citizens in the House of Representatives. Minority groups would become winners under this effect as well, as a greater number of representatives results in smaller districts and greater representation. With smaller districts, not only are minority groups less likely to be lumped into a district with a dominant majority, but they are more likely to be the majority themselves. Smaller districts would thus help minorities not be powerless in their legislative district and even possibly elect their own representative to represent their interests. Although the Wyoming Rule would not eliminate the practice of gerrymandering, it would make it more difficult to gerrymander a district that can effectively disenfranchise a large swath of minority voters.

Addressing the Issues

The primary issue with the Electoral College as currently constructed that the Wyoming Rule is meant to address is the imbalance of relative power between small state residents and large state residents. As an extension of that, the Wyoming Rule is also designed to make mismatch elections, in which the candidate that wins a majority of the electoral vote does not win a plurality of the popular vote, less likely and less extreme. By narrowing the relative power gap between small and large states, candidates have a narrower path to winning the presidency

without winning a plurality of the popular vote as the states that once provided an outsized number of electoral votes relative to their population become less powerful.

For example, a candidate that wins the same number of votes in California as they would under the current electoral system would now receive 68 electoral votes instead of 55. Even to simply keep pace, the opposing candidate would need to make up those 13 electoral votes. If the opposing candidate was closing that gap with a collection of small states, they would need to win the equivalent of seven electoral votes in order to do so. Winning seven electoral votes from the opposing candidate thereby deprives the opposition of seven votes in the zero-sum game of electoral politics. To put it in the context of the 2016 election, if Hillary Clinton were to receive 68 electoral votes from California, rather than the 55 she actually received, Donald Trump would have to win not only all the states he previously won, but also pull, for example, New Hampshire and Vermont from Clinton as well. While Clinton's popular vote spread in California would remain the same, Trump would have to add margins of victory in New Hampshire and Vermont to his vote total. Trump would only need to win seven additional votes from Clinton to make up the difference, but Clinton will have done nothing different in order to achieve that lead in the first place. Therefore, a candidate that wins a large state with a high population would now win even more electoral votes, helping to counteract the *Moneyball*-esque electoral-for-popular efficiency of winning small states with low populations. Although the Electoral College guarantees that people per electoral vote will never be an equal ratio across the country, adding seats to the House of Representatives via the Wyoming Rule would help narrow the gap.

Chapter V: Conclusion

To end, I would like to cover why I believe the Wyoming Rule to be the best option for bringing the Electoral College into the present and preparing it for the future. To start, I believe that the Wyoming Rule has the best probability of actually becoming law for two reasons. First, it does not require a constitutional amendment. By only requiring an act of Congress, the Wyoming rule can skip the two-thirds majorities in both houses of Congress and the ratification by three-fourths of the states, significantly cutting down on the opportunities for derailment. Second, as shown by the analysis of what the Wyoming Rule would have done for the 2016 and 2012 elections, it is currently a completely unpartisan change. Although an ex post analysis of previous elections is not an ideal predictor of what would happen under the Wyoming Rule, it is the best one can do at the current juncture due to the multitude of factors that would change if the Wyoming Rule was implemented. While partisan neutrality would ideally not be a deciding factor in how a congressman would vote to overhaul the electoral system of the United States, it is a reality of the times that we live in that it is a concern. Compared to the other alternatives discussed in this paper, save the automatic plan, the Wyoming Rule is by far the most unpartisan, thus giving neither side a political reason to vote against it. As a result, the Wyoming Rule is the best chance of getting structural-level electoral reform passed into law in the near future.

There are more than just practical reasons to support to Wyoming Rule. I believe that the most base-level shortcoming of the Electoral College is the outsized influence it gives small-state voters on a people per electoral vote basis. While that ratio will never be the same across every state due to the inclusion of two senators in the calculation, it can and should be mitigated at a reasonable degree. While one can add seats to the Congress until the ratios are sufficiently small, that number of seats could lie in the thousands or tens of thousands. Therefore, by tying the

number of seats in Congress to the population of the smallest state, a nice balance is struck between narrowing the ratio and maintaining a reasonable number of seats in the House. By not using an amendment, the Electoral College and the House of Representatives can still act as the framers intend and ebb and flow with the state of the country. If Wyoming was to have a sudden population boom, the House could shrink to accommodate the now more even distribution of the population across the states. Even with a shrinking House, the best way to improve the spread of the ratios of people to electoral vote is to not have such wide disparities in population, making the Wyoming Rule a self-correcting mechanism that limits its own influence when that influence is less needed.

Although this paper focused on the implications the Wyoming Rule would have for presidential elections and the Electoral College, adding seats to the House would certainly have implications for the functioning of Congress too. At its most basic, adding seats would improve representation in Congress by reducing the number of people that live in each congressional district. With smaller districts and better representation comes more opportunities for minority groups and factions to have their voices heard through an elected representative. Without a more detailed analysis that is beyond the purview of this paper, it is impossible to predict how a larger House as an institution would have its role altered, nor how individual representatives wield the soft power that comes with their position even if they are officially weaker than their predecessors in terms of influence on legislation.

Finally, I believe that there are wider benefits to American democracy as a whole that the Wyoming Rule would usher in. It is no secret that Americans are increasingly being separated into more polarized camps. Interparty animosity is high, and each party's candidates speak of the

other party's candidates with a scorn that was unfathomable just ten years ago. While there is certainly an element of politics to the development, I believe there is also a structural basis for the divide that starts with the Electoral College. The reasoning is market based. With two major parties, each would take policy positions that it believed would win it a slight majority of what was at stake. In the case of the presidency, that is electoral votes and in the case of Congress, that is seats. Doing anything less would be playing to lose and, at that point, then there is not much reason in playing at all. The issue with the Electoral College is that it divorces what is needed to win, electoral votes, from democratic intuition, popular votes. In doing so, the Electoral College creates opportunities for maximizing outcomes on one metric while ignoring the other, for example allowing the Republican Party to win a sizable majority of electoral votes with significantly less than a majority of the popular vote. Due to their popularity in generally smaller states that happen to be relatively more powerful in the Electoral College than large ones, the Republican Party is able to stake out a platform further to the right than would be necessary to win a majority of the popular vote. If the advantage held by smaller states was not as large, then the Republican Party and their candidate would have to move closer to the middle to bring more states into play. A similar logic holds for the Democratic Party as well. Recognizing that the Republicans are moving further right, Democrats are given the ability to move further left without losing the states they would win otherwise. By refusing to compete in a state like California, Republicans give Democrats free reign to move left without fear of losing California.

The greatest threat that American democracy faces is democracy itself. If polarization and division become the norm and moderation and compromise become relics of a bygone era, the United States will struggle to keep the pieces intact. Although it is more speculation than

anything, I believe that the Wyoming Rule is an excellent way to help ensure that the structures of American democracy do not ultimately contribute to its demise. Combined with the relative ease of putting it into practice, the narrowing of ratios of people to popular vote across states, and the improved representation in the legislature, the Wyoming Rule is the clear choice for Electoral College reform and, with it, democratic reform for the American republic.

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