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Electoral College Reform Is Heating Up, And
Posing Some Tough Choices

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Electoral College reform is beginning to get some attention, with two different emphases, a move to institute a nationwide popular vote without a constitutional amendment, and a move to forbid faithless electoral votes. There is no logical incompatibility between the two, but in political and public policy terms, there are tensions between them. This paper evaluates the relative merits and importance of the two efforts and explores the tensions in simultaneous pursuit of the two.

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By

Robert W. Bennett¹

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In late February of 2006 a press conference was held in Washington to announce the publication of *Every Vote Equal*,² a book that formulates and advances a proposal for popular election of the president without a constitutional amendment. The book seems closely coordinated with an effort to get the American Bar Association—long associated with the effort to institute a nationwide popular vote for president—to consider the authors’ proposal. Thus former Senator Birch Bayh, also a longtime proponent of popular election of the president, is associated with both efforts. Because of the involvement of Bayh and of the American Bar Association, and also of some other prominent political figures, the proposal may gain a degree of political visibility in state legislatures where action would be required. Already implementing legislation has been introduced in Illinois, and plans are apparently afoot for introduction in other states.

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²John R. Koza, Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, & Joseph F. Zimmerman, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (National Popular Vote Press 2006).

At the same time, an entirely different electoral college reform effort has attracted preliminary attention from the National Conference that proposes uniform state laws. This would deal with the problem of “faithless electors,” members of the electoral college who vote contrary to their pre-election commitments to the candidates of the parties that advanced them for the office of elector. At the present time about half the states—but not the other half—discourage this practice through one device or another incorporated into the state’s statutes. A uniform law would presumably forbid the practice outright, and assure that the electoral votes of every enacting state were in accord with the popular vote in the state. In my view each of the two suggested reforms would be salutary, but the two are not equally compelling. That each is in the air poses the question of whether they might get in each other’s way, with the more urgent of the two lost in the shuffle.³

The popular election proposal would have states with a majority of votes in the electoral college enter into a compact in which each would agree to award its electoral votes to the winner of the nationwide popular vote, instead of—as now, in the case of all states but two—to the winner of the statewide vote. There is good reason to think that states have the authority to make this change, for the Supreme Court has repeatedly said that each state has “plenary” authority to decide how its electors are to be chosen. There are certainly limits to this authority, but no apparent reason to think that a state could not use the nationwide vote. Once the target states had signed on, this would essentially institute a nationwide popular vote for president, since a simple

³I discuss the faithless elector problem at length in Chapter Seven of Robert Bennett, *Taming the Electoral College* (Stanford University Press 2006) (scheduled for publication in April of 2006). Chapter Ten of the same book is devoted to the nationwide vote proposal that I first discussed in published form in *Green Bag* articles. *See* *Popular Election of the President Without a Constitutional Amendment*, 4 *The Green Bag*, 2d ser. 241 (2001); *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 *The Green Bag*, 2d ser. 141 (2002). Some of the ideas presented in this article are also discussed in the book and in the *Green Bag* articles, but I will refrain from proliferating citations to them. I should say that while the National Conference had earlier flirted with electoral college concerns, I played some role in stimulating the present effort. The *Every Vote Equal* Authors seem to have formulated the popular election idea without awareness of my *Green Bag* presentations.

majority of the total of “appointed” electors is what is necessary for electoral college victory.

At the present time, 270 electoral votes would do the trick, and the eleven most populous states command 271 votes. While these eleven states would do, one or more of them could combine with other states to come up with the required 270 votes. While the authors propose that the states reach agreement on the change, it might be possible for individual states separately to pass implementing legislation, simply making the commitment of each contingent on similar action by the requisite configuration of other states. The effort to deal with faithless electors conceivably might also be the subject of agreement among states—or of contingent action—but if the National Conference moves ahead, any proposal it makes would presumably take the form of a law that once adopted would be identical from state to state, but that would not for any state depend on action by others.

At the state level, the different approaches make sense for the different problems, if each is considered on its individual merits. For any given state, a move to have its electors awarded to the winner of the nationwide vote would be potentially quite controversial, for two reasons. First, politicians and public officials in many states might worry about the state’s losing a degree of political advantage in presidential elections. There is actually a good deal of controversy about which states gain and which states lose from the electoral college mechanism. The clearest winners are “swing” states which get almost all the attention from presidential candidates. Swing states can, of course, change from one election to the next. In addition, the size of a state’s electoral college delegation is equal to its number of members of the House of Representatives plus two, representing the state’s representation in the Senate. This means that the least populous states have more favorable ratios of electors to population than do other states. Thus in terms of this ratio the least populous states benefit from the electoral college. At the same time, all states but two employ a winner-take-all approach to the choice of electors. As in Florida in 2000, winning the state means that a party’s entire slate of electors is chosen. It turns out that with winner-take-all the electorate in states with the largest electoral college delegations

cast the mathematically most weighty vote. So there is also a plausible claim that the electoral college benefits the most populous states. The size of a state's electoral college delegation can, of course, also change, but is unlikely to do so quite as rapidly as "swing" state status. In any event, the result is that a variety of states might fear the loss of electoral say if the electoral college were replaced by a nationwide popular vote, and opposition to the suggested state compact might well emerge in many of those states.

The other reason to expect controversy is that any state joining the effort to institute a nationwide vote would risk having its electors awarded to the statewide loser. Particularly in states that lean decidedly to one of the major parties or the other, this possibility might be hard to swallow. And even in competitive states, post-election resentment would likely be expressed by a party the candidate of which won the state—and would have won the electoral college—but for the fact that it lost the nationwide vote. The suggested agreement among states would certainly not stifle the controversy, but it would at least provide some cover for parties to the agreement and also an assurance that no one of them would be implicated in the controversial move unless success were assured.

The effort to forbid faithless electoral votes, in contrast, might be largely uncontroversial across the country. An argument is frequently made that elector faithlessness is constitutionally protected, because presidential electors were originally conceived as a deliberative body, the members of which would exercise discretion in their choice. We have, of course, come a long way since then, and elector faithlessness is entirely out of sync with the modern understanding of presidential elections. If the constitutional question could be put to rest, it is hard to see any substantial interest in the society that would oppose the elimination of the possibility of elector faithlessness—if that issue is posed in isolation from more contentious issues.

While each of the two measures is appealing on its individual merits, the degree of appeal depends on a very different sort of calculus in each case. The harm must be assessed, but so must the chances of that harm being realized. As the title of their book suggests, the authors of

Every Vote Equal see the most basic of democratic values at stake when we use the electoral college mechanism rather than a nationwide popular vote. This same sentiment has been expressed by nationwide vote proponents over the years, often associating it with the Supreme Court's apportionment jurisprudence slogan of "one person, one vote." Put most starkly, the electoral college victor need not have won the nationwide popular vote, a possibility that critics of the electoral college often refer to as a "wrong winner." The chances of such an outcome, moreover, while not great in any given election, are far from trivial according to these critics, as evidenced by the fact that over the years there have been several elections where the nationwide popular vote winner has lost in the electoral college. The 2000 election, of course, is presented as the most recent instance of such a wrong winner. This wrong winner claim in 2000 and a smattering of other elections is a bit overstated, however, because there is no telling who would have won the nationwide vote if that had in fact been the way the winner was to be determined. But there is no doubt that the electoral college mechanism as structured at present does allow victory by one who would not have won the nationwide vote had that been the understood basis for winning.

In contrast, while the authors of Every Vote Equal discuss the faithless elector phenomenon, they suggest no corrective measure. They count eleven faithless presidential votes over the years, and quite plausibly suggest that ten of those eleven would have voted faithfully had there been any apparent chance that their votes would have affected the outcome. The eleventh came very early in our history, and even his vote did not change the electoral outcome. Given that no faithless elector has ever been determinative in a presidential election, the authors apparently think that the chances of that happening in the future are close to zero. For this reason, the problem can apparently safely be ignored.

My own assessments are very different. Starting with what is at stake in the choice between a nationwide vote and the electoral college, democratic legitimacy seems in no serious jeopardy under the electoral college as structured at present. If "one person one vote" is counted

as fundamental, each voter *is* counted equally in each electoral college contest, where popular voting has become the universal mechanism for selecting electors. It is true that electoral vote totals across the nation need not be traceable to nationwide popular vote totals, but that is also the case in many recognized democracies where legislatures choose the prime minister. Indeed legislation in the American Congress emerges from a two step process, where outcomes need not be traceable to popular majorities through those two steps. This is obviously so for the senatorial part of the vote, where apportionment (*i.e.*, equal representation for each state regardless of its population) does not hark the one person one vote ideal. But it is also true for the House of Representatives, where for a variety of reasons representatives, each of whom has one vote in passing legislation, may have been put into office with very different popular vote totals.

There is, moreover, something seriously misleading in the one person one vote slogan itself. In the state legislative context in particular, the Supreme Court allows some consideration of other districting concerns, like drawing lines along nature's divisions—rivers, or mountains, or valleys and the like—or to coincide with political borders. More fundamentally, the Court does not really require that the voting population of a state be divided equally when districts are drawn up. The typical division is instead of total population, and mostly on account of varying numbers of children in districts, that may mean that districts have widely varying numbers of voters.

In addition, the proposal of Every Vote Equal would continue to tolerate state by state variation in qualifications to vote and in procedures to register or establish bona fides at the polls. These variations do not square easily with an insistence that an integrated nationwide vote is the only truly “democratic” way to choose a president. In point of fact there is no canonical “democratic” way to choose the nation's chief executive, so that to my ear at least the claim that the electoral college system as it presently operates is fatally undemocratic rings pretty hollow. Indeed, I would say that the more serious challenge to the democratic legitimacy of an electoral college result comes from the faithless elector possibility. I will return to that problem below.

I do nonetheless believe that the electoral college is a bad idea, but for a different reason. My objection is to the skewed incentives that the electoral college provides. Presidential candidates have little incentive to campaign—and to make promises—in politically lopsided states—populous or not so populous—where the outcome seems foreordained. Their incentives are instead to campaign in the “swing” states, and to concentrate on the most populous of those. With a nationwide popular vote, in contrast, candidates would go where votes can be harvested, and concentrate especially on those where the harvesting can be done most efficiently.

This would likely mean campaigning a great deal in populous states, many of which are basically ignored at the present time. Sparsely populated states would receive relatively little attention, but that is also true under the present system, unless the sparsely populated states are truly up for grabs *and* the more populous states seem unlikely to “swing.” The different incentives seem to me to argue decisively in favor of the move to a nationwide vote, for it is likely that candidates would reach out to a much broader swath of the population. But the difference is a matter of degree and emphasis, not one of high principle. The authors of *Every Vote Equal* advert to this consideration as well, but it clearly plays second fiddle in their analysis.

My calculus is also quite different for the faithless elector problem. As mentioned, no faithless elector has ever changed an election outcome. At the present time, moreover, while candidates for elector are chosen in different ways in various states, the state political parties generally loom large in that selection process. The result is elector candidates who are by and large party loyalists and hence quite likely to be faithful. But despite this history and present practice, I do not think we can write off the possibility of elector faithlessness in the future as easily as the *Every Vote Equal* authors apparently do.

The possibility of decisive elector faithlessness seems very different depending upon the apparent size of the electoral college margin after the election day returns are counted. Those returns are usually depicted as a contest between presidential candidates, but under the electoral

college system, they are formally votes for electors. That is, of course, what sets up the possibility of faithlessness, when the electors meet and vote some forty days after “election day.” If after the election day dust has settled it appears that the electoral college margin for one candidate will be large, then it would take large scale elector faithlessness to change the electoral college outcome. Large scale faithlessness among those chosen in good part because of their party loyalty does seem exceedingly unlikely. And over the years the electoral college margins of the winners have typically been quite sizeable, even in otherwise close elections. Thus since the Twelfth Amendment changed the voting protocol for the electoral college, only the 1876 one vote margin and the 2000 four vote margin (five in the final tally on account of a faithless abstention by a District of Columbia elector) have been close enough to make elector faithlessness a real possibility for changing a presidential outcome.

In a close election, however, it does not seem at all fanciful to think that one, or two, or three electors might be induced to break faith. In the 2004 election, for instance, one Republican candidate for elector from West Virginia announced *before* the election—when a very close electoral college race seemed to be a distinct possibility—that he did not think he could vote for George Bush if Bush carried the state. That elector did eventually vote for Bush, but if the apparent electoral college margin had been a lot smaller, who knows just how tempting faithlessness might have been to somebody already predisposed to it? Electors are human beings subject to a variety of loyalties and influences. Party loyalty may be important to all or most as they start out, but other influences may come to matter as well. This is so for many reasons.

First, as the 2004 example suggests, even at the outset political party allegiance need not be accompanied by commensurate fidelity to the party’s presidential candidate. Elector candidates may be chosen for local political service, but that need not bring unbreakable fidelity to the national ticket. And they may be chosen for regional, racial, ethnic, gender, or even ideological, balance within the state, in addition to party loyalty. Or they may be celebrities, chosen for their name recognition.

Second, there is little doubt that in a close contest, the possibility of faithlessness would occasionally be explored by one or both campaigns. There is, for instance, evidence that elector faithlessness was explored in the close 1876 contest. There are also entirely believable accounts that both campaigns considered such efforts in the 2000 election. In 2000, the parties' energies turned to the Florida litigation, but bargaining for elector faithlessness might well have emerged—in this case on the Gore campaign's part—if Bush had won Florida decisively and it was only the very close electoral college count that seemed to stand in the way of the popular vote “winner” capturing the presidency. While the 1976 contest was not terribly close in the electoral college count, in post-election comments Republican vice presidential candidate Bob Dole made clear that if the election had been close the campaign was prepared to bargain for elector faithlessness. Dole remarked that “the temptation is there for that elector in a very tight race to really negotiate quite a bunch.”

Third, a campaign seeking to turn an elector around has a number of different arguments it can deploy. I'll turn to other settings shortly, but for the moment assume a two person race with two or four, or even six, votes separating the candidates, and an effort by the apparent losing campaign to change elector votes. Most obviously, an apparent winner may have lost the nationwide popular vote, and that fact would provide a plausible argument that the “statesmanlike” response is to put the “right” winner into office. It is also entirely possible that an elector's home base within a state may have voted for the candidate of the other party, and an elector's future political ambitions might provide some temptation to break party ranks. In addition, a campaign can make promises of various enticing sorts. Perhaps an ambassadorship or other appointment to high office could be put into play for an elector “wise” enough to defect, or perhaps embrace of an elector's favored policy position.

These enticements could be reinforced by the possibility that other electors might change their votes. The electors meet in fifty-one separate (state and District of Columbia) meetings, and a number of the votes are held in secret. A campaign dangling an offer before an elector

could plausibly point out that spurning the offer risks turning down what is promised for naught, if others break faith in those secret votes.

Faithlessness by those other electors also risks sending the selection process into the House of Representatives if the outcome is a tie (or conceivably if abstentions keep all candidates below the required electoral college majority). In the House, each state's delegation gets one vote, and a majority of the total number of state delegations is required. Depending upon the pattern of partisan alignments—and the strength of party fidelity—in the various state delegations, the House process could threaten stalemate, uncertainty, or decisive victory by one side or the other. Any of these possibilities might be used to help convince an elector that faithlessness would be a constructive, even a patriotic, move. And finally, the campaign can appeal to the original conception of an elector who was to exercise discretion and judgment. To disdain the possibility of real choice, it could be argued, is to be unfaithful to the very idea of the electoral college.

For these reasons, in a two candidate race the chances of decisive elector faithlessness are bound up with the chances of close electoral college contests. And those chances can hardly be dismissed as remote. As mentioned above there have been two quite close electoral college contests in our history, the latest just two elections back. There is no way to be certain about future prospects, of course, but it would hardly be surprising if close contests started to come more frequently. The country is closely divided politically at the present time, and indeed has been for a number of election cycles. The campaigns understand that it is the electoral vote count that matters, and each of the two major competitors has available to it ever more powerful computers and sophisticated polling techniques. In such an atmosphere we might well expect more close votes in the electoral college.

Building on the 2000 experience, the 2004 results may be suggestive of just such a trend. The eventual result—a Bush victory of 35 electoral votes, 286-251 (there was one “faithless” Minnesota vote that was cast for John Edwards, perhaps by mistake) was in fact closer than any

electoral college count since the Twelfth Amendment was passed, besides the two squeakers mentioned above, and the four person contest in 1824 that went to the House of Representatives for want of a candidate with the required electoral college majority. Had Ohio's closely contested 20 electoral votes gone for Kerry instead of Bush in 2004, the margin (for Kerry) would have been five. The latest electoral experience thus suggests a narrowing of margins from the longer term experience. A five or six vote margin can be turned into a reversal or a tie by a switch of just three votes.

Indeed even some of the earlier contests seem likely to have been as one-sided in the electoral count as they were largely because of the chunkiness of electoral votes produced by the winner-take-all rule that is so prevalent among the states. Because of winner-take-all electoral votes from the more populous states come in sizeable blocs, like Ohio's twenty in 2004 and all the way up to forty or fifty or more that have been held by one or two states since 1912. In that environment a switch of just one sizeable state can make a seemingly lopsided contest into a squeaker, just as the Ohio example above suggests. For these various reasons, complacency about the prospects for close electoral college contests seems to me to be misplaced.

Two variations on the election day outcome deserve separate mention. At the extreme of a close electoral college contest is a dead heat, which is entirely possible in the present environment with an even number of electors. In that case, the prospect of a House proceeding is presented *unless* there is elector faithlessness, and that would provide a powerful arguing point for each of two campaigns to urge faithlessness. This might be particularly appealing if delay and uncertainty seemed likely in the House.

The other possibility is third party capture of electoral votes, which also threatens to send the selection to the House. Victory in the electoral college requires a majority of the appointed electors, a goal obviously harder to reach when the total is divided among three (or more) rather than two candidates. In the Twentieth Century third party candidates did win electoral votes on occasion, most recently in 1968 and 1948. In neither year was the electoral college count

indecisive, but that prospect clearly looms larger if third parties capture votes in the sort of close contests that may be in the offing. And in 1968, some electors made no bones about the temptation of faithlessness if the third party candidates they found offensive threatened to hold the balance in the House, or even in the electoral college count itself.

If elector faithlessness were to turn an election around, it could threaten serious damage to the operation of American government, and to the goodwill of the electorate that sustains the system. The Constitution prescribes that the electoral votes are to be counted in a joint meeting of the two houses of Congress, about three weeks after the electoral college delegations meet and cast their votes. Challenges to the faithless votes could be expected at that joint meeting, and so could charges of bad faith by both the major parties. What is even more unsettling is that the charges on both sides would be sustained by a degree of plausibility. Faithless votes are faithless to the modern conception of presidential elections, but, as we have seen, not so clearly to the original conception.

The courts might step in, but there is no guarantee that they would insist on a faithful vote, at least absent a clear state law forbidding faithlessness. Indeed there is no assurance that a court decision—either way—would be readily accepted, particularly if the losing side in court controlled one or both houses of Congress. And even if one victor or the other emerged with clarity from the joint meeting count or a court decision, the remaining rancor would be likely to make the bitterness after the 2000 election seem like child's play.

It is for these reasons that I attach much more importance to dealing with the faithless elector problem than to assuring that the nationwide vote winner becomes president. But perhaps there need be no competition between the two. State legislatures could simultaneously pass the uniform law on elector faithlessness and join the compact for a nationwide vote. Substantively there is no incompatibility between them. Thus entrepreneurial action by interested state legislators might over time bring both measures into law. Unfortunately, however, there are tensions not far beneath the surface that threaten to get in the way.

First, there is the matter of timing. Sentiment in favor of a nationwide popular vote for president has been a more or less constant feature of American public life for many years now. The fact that there was a “wrong winner” in 2000 thus tapped into a political current that was already present. Particularly if the American Bar Association puts its support behind the Every Vote Equal proposal, a degree of attention in some state legislatures would probably emerge in a short time frame. As mentioned, legislation has already been introduced in Illinois. For some reason the faithless elector problem has never attained comparable visibility. The most important difference that support of the National Commission would make would be to provide a measure of visibility so that seemingly indifferent states might pay attention to the issue. But consideration by the Commission is likely to be more protracted, so that state legislative attention would lag behind that given to the nationwide vote possibility.

This timing difference need not be fatal to either measure, of course. The one could be adopted and then, a few years later, the other. Whether the first measure would take some of the steam out of the movement for the second is anybody’s guess, but for those like myself who view the faithless elector problem as (by far) the more serious of the two, there would remain a concern that the nationwide vote effort might drain the reformist zeal from the faithless elector cause.

This timing difference might be dealt with by cutting short the National Commission effort and going to the simple expedient of incorporating a new faithless elector provision into the nationwide vote compact. A faithless elector provision might not add any measurable controversy to the compact. Indeed if I have been at all persuasive that the faithless elector problem is the more serious, the addition of a faithless elector provision could conceivably enhance the appeal of the overall package.

Still, for a variety of interrelated reasons the backers of each might be wary of consolidation with the other. First, the target states for the two efforts would be quite different. As mentioned, a number of states already have laws dealing with faithlessness, but those laws

vary greatly. Some require pledges of faithfulness, others purport to punish faithlessness in one way or another, while still others stipulate that faithlessness results in resignation from the office of elector. Particularly given the constitutional doubts that are sometimes expressed, some of the laws might be interpreted simply to punish faithlessness, but not to forbid it. This would leave the danger of faithless votes that change an election outcome. And some laws might be held to nullify the appointment of a faithless elector, while others corrected his vote. This difference alone might affect an election outcome, where the Constitution provides that the electoral college required majority is of “appointed” electors. For these reasons, uniformity and universality among the states—assuring that all votes are cast and cast faithfully—is important to the effort to corral the faithless elector problem. And if pursued separately it should ultimately be attainable, since, as suggested above, there is no substantial interest that seems to be served by elector faithlessness.

Adoption of the nationwide vote measure, in contrast, would not require unanimous, or even near unanimous, adoption among the states. Nor would unanimity be at all likely, given the variety of states that might conclude that they are advantaged by the electoral college. One of the beauties of the proposal is precisely that it could be accomplished by fewer states than would be necessary to amend the Constitution—at the extreme as few as eleven. That in itself hardly assures passage, however. The states most likely to be sympathetic to the proposal are the mid-population states that lean decidedly toward one political party or the other. Of course, even they face the problem that they would be asked to award their electoral votes to a nationwide winner who might have lost the state vote quite decisively. The important point for the moment is that widespread adoption of the measure would be both unlikely and unnecessary. Incorporation of a faithless elector provision into the nationwide vote compact would thus bring faithless elector uniformity among adopting states, but it would not by itself provide the very important universality. For this reason, proponents of faithless elector action might be wary of entanglement with a nationwide vote measure.

At the same time, nationwide vote proponents might wonder whether there was much point to including a faithless elector provision in the proposal for a compact. For if the Every Vote Equal proposal were to succeed, the faithless elector problem would be much less urgent, as close electoral college contests would become considerably less likely. The apparent electoral college winner, after all, would start out with a minimum of 270 votes seemingly secured. That is before counting the votes from any state that was not a party to the compact, and the seeming winner would also have won the nationwide popular vote. In such a setting, it would seem all but certain that the winner would command additional electoral votes beyond the 270, by virtue of victory in states not party to the compact. In all likelihood, there would be a large number of those additional votes, and the electoral vote count would not be at all close. For this reason, even if convinced of its independent importance, proponents of the nationwide vote proposal might view the addition of a faithless elector provision as a distraction at best and at worst as a threat to their success, given the constitutional question about reining in elector faithlessness.

The seemingly obvious solution might then seem to be to forego any separate faithless elector effort and concentrate on achieving the nationwide vote compact, for once successful it would essentially deal with the faithless elector problem by its own force. The trouble with this solution is that in its present form adoption of the nationwide vote compact is a decided longshot. Not only would near universal adoption of the nationwide vote initiative be unattainable, the measure would be very hard pressed to gain agreement from states with that 270 vote electoral college majority. By my generous count, the thirty mid-population states which are the most likely (but by no means certain) to be sympathetic to the proposed compact command about 170 electoral votes. It would be an heroic achievement to get all those states on board, but even that would leave the compact well short of the required electoral college majority.

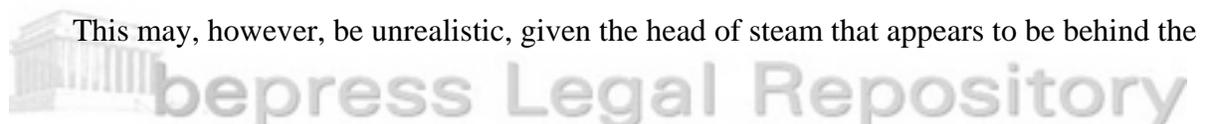
It is for this reason that the proponents of a compact would do well initially to lower their sights. In my earlier excursions into the possibilities, I argued that states with 270 votes would

not be necessary to start a process that holds out real hope of eventual victory. If states with 100 to 125 electoral votes—more or less evenly balanced in partisan terms—were to bind themselves initially, the dynamics of campaigning would shift dramatically toward concern with the nationwide vote. For a candidate who lost that vote would start out 100 or more votes behind, and that is a hurdle that would be very hard to overcome. In such an environment, any state electoral college advantage—and the perception of it—would start to fade, and over time opposition to a constitutional amendment instituting a nationwide vote might just fade away. Signing up states with 100 or so electoral votes would be a lot easier than insisting on 270 electoral votes.

At the same time, this variant brings disadvantages. It might actually generate more controversy within some states, because it would forego assignment of a state's electoral votes to the statewide vote winner without guaranteeing that the winner of the nationwide vote would be victorious. And it would also increase the prospects for a close electoral college contest, with the attendant danger that elector faithlessness would pose a more realistic danger. Perhaps of even more concern, if this variant were to make a nationwide vote initiative more attractive, it might also cause supporters to put the faithless elector problem—the more urgent one, in my view—aside.

Bringing the two efforts together, in other words, will not be easy. My own preferred solution would be to move ahead as expeditiously as possible with faithless elector reform, and pursue the nationwide vote possibility after that effort is underway, and at least reasonably under control. This would not require universal adoption of a faithless elector provision, for in my view eventual action among all the states is quite likely once the problem—and the solution—gain a good measure of political visibility. Thus an agreed formulation of a faithless elector provision, and action by a few states, might provide assurance that the problem would not be forgotten in what is likely to be a protracted struggle to institute a nationwide vote for president.

This may, however, be unrealistic, given the head of steam that appears to be behind the

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movement for a nationwide vote compact. The next best option would then be to push for incorporation of a faithless elector provision into the compact, accompanied by a strong severability provision, so that nationwide vote enthusiasts would feel little threat from the possibility that the faithless elector provision would be held unconstitutional. In the note below, I offer one formulation of a strong faithless elector provision.⁴ This would forego an initial push for universal adoption of the faithless elector provision, but it would provide a formulation that non-compacting states could emulate.

Finally, if this seems unworkable, the faithless elector effort might have to be put aside for the time being. The fate of the nationwide vote effort might then come into reasonably clear focus in the next three or four years. If it should be successful in the 270 vote version, the faithless elector problem would no longer be serious. If unsuccessful or successful in a more

⁴Section 1. As used in this Act,

A) “Winning presidential candidate” means the candidate for President of the United States for whom a qualified slate of presidential electors was properly submitted at the immediately preceding election for that office, whose name thus appeared on presidential election ballots in the state, and who received the highest number of votes in the state for that office.

B) “Winning vice-presidential candidate” means the candidate for Vice-President of the United States who received the highest number of votes in the state for that office as the running mate of the winning presidential candidate.

Section 2. Except as provided in [here insert reference to any exceptions] at the meeting of presidential electors for the state, each elector shall vote for the winning presidential candidate and, by separate ballot, for the winning vice-presidential candidate. If for any reason, an elector is unable to cast votes on one or both of those ballots, or marks the presidential ballot for a candidate for that office other than the winning presidential candidate, or the vice-presidential ballot for a candidate for that office other than the winning vice-presidential candidate, the presiding officer will record the votes associated with those ballots as cast for the winning presidential and vice-presidential candidates respectively. The presiding officer will then transmit the total number of electoral votes to which the state is entitled as cast for the winning presidential and vice-presidential candidates respectively.

modest version, perhaps the faithless elector problem could then take center stage with a decent chance of success.

