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"One Person, One Vote, and the Constitutionality of the Winner-Take-All Allocation of Electoral Votes"

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ARTICLE: One Person, One Vote and the Constitutionality of the Winner-Take-All Allocation of Electoral College Votes *

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SUMMARY:
 ... It has been criticized as undemocratic, as denying individual liberty and the fundamental right to vote, and as no longer serving the purpose for which it was established. ... Recall that Bush defeated Kerry by a 286-252 electoral vote margin, and by 3.5 million popular votes. ... An indicator of the Electoral College disparity in each presidential election is the ratio of a swing vote's Electoral College impact in the top-ranked state to that of the bottom-ranked state. ... In 1960, a swing vote in Hawaii (HI), the state with the smallest popular vote margin relative to its number of Electoral College votes that year, carried 832 times the Electoral College impact of a swing vote in Massachusetts (MA), the largest-margin state. ... In that election, a swing-vote in Florida carried 2,905 times the impact of a swing-vote in Utah. ... If the election victor's popular-vote margin of victory was uniform across all fifty states and the District of Columbia, then there would be no Electoral College swing-vote disparity. ... Finally, as noted earlier, it seems unlikely that a state legislature could limit franchise rights in a presidential election to only whites, and it also seems absurd to think that it could state the same rule for determining who is chosen as an elector. ...

TEXT:

[*453] **I. Introduction**

The Electoral College is an American political and constitutional curiosity. The constitutional framers believed it would produce "extraordinary persons" as presidents because they would be selected by "men most capable of analyzing the qualities adapted to the station" of the presidency. n1 Its more recent defenders, such as Martin Diamond, have justified it as either a constitutional system meant to protect individual and minority rights or a mechanism to overcome regionalism. n2 In Diamond's view, along with the principles of separation of powers and checks and balances, it was necessary to thwart the dangers of factionalism that a popular government posed. n3 Some have noted that, with an Electoral College, national recounts are unnecessary, as only the votes cast in disputed jurisdictions would need to be recounted. n4

[*454] Yet, the Electoral College also has its detractors. It has been criticized as undemocratic, as denying individual liberty and the fundamental right to vote, and as no longer serving the purpose for which it was established. n5 Following the 2000 presidential election--where George Bush lost the national popular vote to Al Gore but won the Electoral College vote--those criticisms intensified. n6

The 2000 election was not the first to showcase these peculiar aspects of the Electoral College. In 1800, for example, Thomas Jefferson and Aaron Burr deadlocked with equal numbers of electoral votes. n7 The House of Representatives decided the election in favor of Jefferson. n8 In 1824, Andrew Jackson received the plurality of popular and electoral votes, yet lost to John Quincy Adams in the House of Representatives. n9 In 1876, Samuel J. Tilden [*455] received more of the popular vote than did Rutherford B. Hayes, but disputes in Florida regarding who to recognize as electors resulted in a compromise that awarded the presidency to Hayes. n10 Again, in 1888, Grover Cleveland received more popular votes than Benjamin Harrison, but Harrison became President with a majority of the electoral vote. n11 For some, these elections reveal the undemocratic character of the Electoral College. n12

Others maintain that the Electoral College depresses voter turnout n13 or creates a system of wasted votes. n14 Still others see the Electoral College as discouraging the formation and support of third parties. n15 Ralph Nader and Green Party backers articulated this criticism in recent presidential races. n16 A further criticism of the Electoral College arises from the practice of all states--except for Maine and Nebraska--to award all of their electoral votes to the presidential candidate receiving the plurality of the [*456] popular vote in their states. n17

In light of the history and criticism levied against the Electoral College, it is worth asking whether awarding electoral votes on a winner-take-all basis is unfair or, more importantly, unconstitutional. In the 1966 case *Delaware v. New York,* the Supreme Court refused to hear an original jurisdiction case that would have argued that question. n18 In particular, the Court was asked to decide whether the state winner-take-all method of allocating electoral votes violated the "one person, one vote" standard that had been articulated in *Reynolds v. Sims.* n19 Without comment, the Court declined review, leaving in doubt how to interpret the unexplained denial. n20

Since 1966, two conditions have changed, suggesting that the constitutionality or fairness of the winner-take-all method of allocating electoral votes should be revisited. First, in 1966, the reapportionment and "one person, one vote" jurisprudence was in its infancy. Four decades later, it is more constitutionally developed in terms of its application and scope. n21 Second, under the winner-take-all method, the occurrence of a scenario similar to what happened in Florida in 2000 was likely. That scenario very nearly happened in the 1960 election, when Texas and [*457] Illinois represented the margin of John F. Kennedy's victory over Richard M. Nixon, amid serious allegations of irregularities in both states. n22 When these allegations arose, they brought the inequities in the operation of the Electoral College to the forefront.

This article will present a new method of assessing the inequities of the winner-take-all method states use to allocate electoral votes, and will show that such a system produces significant inequities in the voting power of citizens across states. n23 In so doing, the article makes two claims. First, states do have broad power to choose electors, but that power must be read in light of the current voting rights and reapportionment jurisprudence. Second, the "one person, one vote" standard for reapportionment calls into question the fairness, if not the constitutionality, of the winner-take-all approach for awarding presidential electors.

In effect, this article argues for the repeal of winner-take-all methods for selecting electoral votes. It contends that if the Court were to hear a case like *Delaware v. New York* today, notwithstanding what Article II of the Constitution says, a candidate or state could make a case that the winner-take-all method of awarding presidential electors is unconstitutional. n24 In the alternative, this article [*458] advocates that states abandon winner-take-all systems on their own in the interest of fairness and enhancing, in many cases, the influence that their citizens have in the selection of the president.

To make these claims, this article briefly discusses the constitutional power that states have to select their presidential electors. n25 This article then provides a brief discussion of the right to vote in the context of reapportionment, especially as it is relevant to the Electoral College and presidential selection. n26 Next, it provides a new way to assess the relative weighting of electoral votes, making the case that the winner-take-all allocation of electoral votes leads to distortions. n27 Finally, the article argues that those distortions violate the "one person, one vote" constitutional standard. n28

Overall, this article contends that even if the Supreme Court is unwilling to address the constitutionality of the winner-take-all method, as a matter of law or public policy, states might wish to consider eliminating this method of

allocating electoral votes. While the winner-take-all method can have the effect of boosting the influence of some states' citizens in presidential elections, it does so by marginalizing the influence of voters from other states.

II. State Power and the Electoral College

From the text of the Constitution, state legislatures appear to have plenary power to determine the selection of their presidential electors. Article II, Sections 2 through 5 of the Constitution, read in conjunction with the Twelfth Amendment, describe the process for the selection of the President. According to Article II, "Each State shall [*459] 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." n29 Indeed, in the only two cases where the Supreme Court has adjudicated Article II, Section 2, the Justices have given states broad authority to determine how electors are selected. n30

In *McPherson v. Blacker,* n31 the State of Michigan enacted a law changing the selection of its electors. The Secretary of State challenged this law as a violation of the Fourteenth Amendment. In rejecting this challenge, the Court interpreted the Constitution as giving state legislatures "plenary authority to direct the manner of appointment" of its electors. n32 According to the Court, Michigan was free to determine how its electors would be chosen, subject to the limitations of its state constitution. n33

Bush v. Gore n34 is the only other case in which the Court has directly addressed the state power over the selection of electors. In this case, the Court considered whether the manner of counting the ballots in the disputed Florida 2000 presidential election violated the Equal Protection Clause of the Fourteenth Amendment. n35 In ruling that it did, the Court built upon its voting rights and reapportionment jurisprudence, indicating that the right to vote was "protected in more than the initial allocation of the franchise." n36 Specifically, the Court extended the right-to-vote protection to the counting of ballots. The Court limited this holding, however, by noting that while the [*460] Constitution does not grant individuals the right to vote in presidential elections, states do. n37 More importantly, the Court, quoting *McPherson,* reiterated that the State's power to determine the selection of their electors is plenary. n38

In addition to the *per curiam* opinion in *Bush v. Gore,* Justice Rehnquist, joined by Justices Scalia and Thomas, also discusses the authority of states to conduct presidential elections and select electors. n39 The Chief Justice first noted how the text of the Constitution imposes upon states a duty to select its electors. n40 In imposing that duty, Rehnquist cited *McPherson* for the proposition that the Constitution "convey[s] the broadest power of determination and leaves it to the legislature exclusively to define the method of appointment." n41 Thus, as with the per curiam opinion, the Chief Justice seems to suggest that state legislatures have broad discretion to select their electors and conduct presidential elections. In fact, as part of this deference, Congress enacted Title *3 U.S.C. § 5* to present state legislatures with a "safe harbor" for their determination of how electors are to be selected, if disputes over them are challenged in Congress. n42 This safe harbor provision, along with the text of the Constitution, necessitated that the Court review "postelection state-court actions" by the Florida Supreme Court to be sure that these judicial proceedings did not trample upon the power of the State Legislature to determine the manner of selection for its electors. n43 In effect, the power of legislatures to pick their electors is so plenary that it might alter or affect the normal separation of powers within a state such that their [*461] courts might not be able to second guess how they determine presidential selection. n44

Notwithstanding Article II, Section 2, *McPherson,* and *Bush,* the near plenary power of states to award their electoral votes does not mean that states can otherwise violate the Constitution. For example, could a state decide to let only women or whites vote in presidential elections or serve as electors? Discriminatory practices that use race or gender as a factor have been declared unconstitutional in many circumstances. n45 The use of race in reapportionment has also been found to violate the Constitution. n46 Legislation, such as the Voting Rights Act, n47 has declared discrimination in voting based on race illegal. Overall, the argument that the plenary power of states to allocate electoral votes must be qualified; such power cannot be exercised in violation of other constitutional and statutory limits. n48

The Supreme Court has also noted the uniqueness of the presidential selection process and has been willing to address how states conduct presidential elections. For example, in *Anderson v. Celebrezze* n49 the Supreme Court [*462] was willing to place limits on how states determine ballot access for presidential candidates. In *Burroughs v. United States,* n50 the Court considered whether the Federal Corrupt Practices Act applied to political committees seeking to influence the selection of presidential electors. Ruling that it did, the Court argued that, even though the power to select electors resided with the states, Congress has the authority to pass legislation to ensure that money does not corrupt the electoral process. n51

In *Moore v. Ogilvie,* n52 the Court held that the "one person, one vote" principle applied to petition gathering for the selection of presidential electors. At issue was an Illinois law regulating petition signatures for new parties, as it was

applied to "independent candidates for the offices of electors of President and Vice President of the United States from Illinois." n53 The law, which mandated a geographic dispersion for signers, was held to violate the "one person, one vote" standard because of the burden it created by mandating that signatures be obtained in at least fifty counties. n54 The Court noted that, because of the way the population was distributed in the state, residents in some counties would have an easier time securing signatures than in others. n55 If "one person, one vote" applies to petition gathering for electors, would it not also apply to how the electors are allocated?

Anderson, Burroughs, and *Moore* all demonstrate that the power of states to select their electors is not absolute. That power is subject to qualifications. While the Court in *Bush v. Gore* declared that individuals have no right to vote in presidential elections unless the states grant [*463] such a power, n56 the Court stipulated in *Moore* that: "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." n57 This prophylactic against discrimination must apply, as the Court stated in *Bush v. Gore--when* it extended the "one person, one vote" standard of *Reynolds* to presidential vote counting--to "more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." n58 Thus, in cases where states have granted individuals the right to vote in presidential elections, that right mandates that they not arbitrarily interfere with awarding that right or in counting the presidential ballots.

III. Voting Rights, Representation, and Reapportionment

The *Bush v. Gore* holding that the Constitution does not guarantee the right to vote in presidential elections cannot be applied in isolation. The Court has also held that voting is a fundamental right protected under the Constitution, n59 especially in the context of reapportionment. n60

Article I, Section 2 of the Constitution mandates that the federal government take a federal census every ten years for the purpose of apportioning representation in the House of Representatives. n61 The decennial census forms the basis for the reallocation of House members among the states based on population changes. Nothing in the plain text of the Constitution, however, requires states to draw House districts of equal population size or to redraw [*464] districts to reflect changes in population.

Therefore, elected officials often seek to manipulate the apportionment process to their benefit by drawing lines that will favor their re-election efforts. During the nineteenth century, the majority of the nation's population lived in rural areas, thereby giving those areas significant political representation both in Congress and the state legislatures. n62 By the early to mid-twentieth century, the population centers had shifted to the cities. n63 Yet state legislatures, still controlled by rural interests, refused to reapportion and redistrict, for doing so would diminish the power of the rural areas. n64 In addition, many states, particularly in the South, were reluctant to redistrict because urban areas were more heavily populated by Blacks. n65 Thus, efforts to forestall reapportionment sometimes had a racial motive. n66

In 1946, after efforts to challenge the malapportionment at the legislative level failed, the Supreme Court reviewed whether the numerical inequality in the apportionment of Illinois congressional districts was constitutional. n67 Writing for the Court, Justice Frankfurter stated that apportionment issues were nonjusticiable political questions best handled by the legislatures and not the courts. n68 Redistricting was a "political thicket" that the courts would do well to avoid. n69

In 1962, however, the Supreme Court reversed itself. In *Baker v. Carr,* n70 the Court rejected the *Colegrove* [*465] holding that reapportionment issues are political questions. Instead, the Court held that issues alleging malapportionment raise important constitutional questions that are within the purview of the judiciary. A few years earlier, the Court used the Fifteenth Amendment to strike down a districting scheme in Alabama meant to dilute African-American representation. n71 Race was not a permissible factor for the legislature to consider in reapportionment. n72

After *Baker,* the Supreme Court ruled on numerous reapportionment issues. In *Reynolds v. Sims,* n73 it held that the right to vote was diluted if some districts were more populous than others and that state legislative seats must be drawn according to a "one person, one vote" standard. In reaching this conclusion, the Court stated, "Legislators represented people, not trees or acres." n74

The Court has since extended the "one person, one vote" standard to other reapportionment contexts. For example, in *Westberry v. Sanders* n75 the Court mandated that congressional districts must be apportioned in a manner that achieves numerical equality. In *Avery v. Midland County,* n76 the Court applied the "one person, one vote" principle to local government units. Moreover, in *Lucas v. 44th General Assembly of Colorado,* n77 the Court rejected state analogies to the United States Congress where the Senate was apportioned by geography and the House by population.

The *Lucas* Court mandated that all legislative seats must respect the "one person, one vote" standard. n78 In more recent cases, such as *Karcher v. Daggett* n79 and *Brown v.* [*466] *Thomson,* n80 the Court demanded strict numerical equality for congressional districts while permitting a deviation of approximately five percent from equality at the state level to accommodate local governments and avert the breakup of political subunits.

The *Reynolds v. Sims* n81 line of cases establishes that within the context of voting rights and reapportionment, the "one person, one vote" standard is essential to the protection of franchise and that the unequal weighing of votes is unconstitutional. However, in *Delaware v. New York,* n82 the Supreme Court declined to consider the substantive merit of whether the "one person, one vote" standard applied to the Electoral College. Is there reason to think that the Court erred in not accepting the case and reviewing the question on its merits? Might the winner-take-all allocation of states' Electoral College votes violate the "one person, one vote" standard?

IV. A Statistical Analysis of the Inequities That Follow From Winner-Take-All

The events of the presidential election of 2000 left many uneasy with the Electoral College. In that election, the margin of victory for Republican George W. Bush over Democrat Albert Gore was a mere 537 popular votes in Florida. n83 Those votes--out of nearly six million cast in the state--swung the State's twenty-five Electoral College votes n84 to Bush, who ultimately defeated Gore by a mere [*467] four votes (271-267) in the Electoral College. n85 For five weeks after the polls closed, the election's outcome remained in doubt as the Bush and Gore camps battled in the courts over the disputed Florida electors. n86 It took the intervention of the United States Supreme Court to settle the battle and determine the outcome of the election in Florida, and thus, the nation. n87

While the exceedingly narrow margin in Florida in 2000 was atypical, the phenomenon of some states' small margins of victory disproportionately influencing an election's outcome was not. The winner-take-all allocation of each state's Electoral College votes ensures that it will happen in every election. Under winner-take-all, some states' votes will count for more than others in determining the outcome. This effect happens whether the election is a cliffhanger or a landslide. All that changes from one election to the next is the magnitude of its effect.

As noted earlier, the operation of the Electoral College in electing the President is provided for in Article II, Section 1 of the United States Constitution. Each state's Electoral College vote allotment is equal to the size of its congressional delegation. The total number of electors is equal to the total number of members of the Congress, plus two "shadow" Senators and one "shadow" Representative for the District of Columbia. At present, the United States Senate is comprised of 100 members and the United States House of Representatives is comprised of 435 members. Adding the three "shadow" D.C. electors gives the Electoral College its present total of 538 electors. n88 The [*468] Electoral College convenes in December following a November presidential election, where a majority of the electors is required to elect a President. n89 Therefore, for an Electoral College of 538 electors, 270 electors is the minimum number required to win the presidency. In the absence of a majority, the election is determined by the House of Representatives, with each state's delegation counting as one vote. n90

Others have noted how the Electoral College disproportionately weighs the votes of smaller states relative to larger states. n91 This disproportionate weighting occurs because each state's Electoral College votes are equal to the sum of its votes in the House of Representatives and the Senate. The House votes are apportioned on the basis of population, with each state guaranteed at least one representative, regardless of population. But the Senate votes are not; each state receives two Senate votes, regardless of its population. For example, California, which has 35 million residents, receives the same number of Senate votes as Wyoming, which has only 380,000 residents. As a result of the "plus-two" Senate bonus, smaller states pack a slightly larger Electoral College punch relative to their populations than do larger states.

More significant, though, is the effect of the winner-take-all allocation of each state's Electoral College votes. At present, in all but two states, Maine and Nebraska, the Electoral College votes are allocated to each state's popular-vote winner. Such a winner-take-all allocation is not mandated by the United States Constitution. Rather, [*469] the Constitution provides that each state's electors shall be appointed in a manner to be determined by its legislature. n92 The only stipulation is that a sitting member of Congress cannot also serve as an elector. n93

Because the Constitution allows state legislatures to determine how electors are appointed, it is not surprising that all of the states--with the exception of Maine and Nebraska--have opted for a winner-take-all allocation. At the state level, such a course of action is a rational one. Allocating electors on a winner-take-all basis boosts the likelihood that candidates will visit a state and pay attention to its concerns. For example, if Oregon, with its relatively small population, is shaping up as a swing state, a last-minute trip to the state might appear attractive to a candidate. If the trip went well, it could have the effect of swinging the full complement of the state's Electoral College votes come Election Day. Candidates would be less likely to court the state's voters if the state's Electoral College votes were allocated on

some other basis. Clamoring for national candidates' attention, almost every state ends up with a winner-take-all allocation.

What may be rational at the state level, however, can lead to distortions at the national level. n94 The winner-take-all effect ensures that small swings in state-vote margins can disproportionately influence the national Electoral College count. In a close election, such swings can even determine the winner. The extreme case is the 2000 presidential election, where 537 popular votes in Florida represented the difference in awarding the state's [*470] twenty-five Electoral College votes, and, ultimately, the election, to Bush over Gore. Four years later, in the presidential election of 2004, the margin of victory for Bush over Democrat John F. Kerry was the 119,000 votes in Ohio that swung that state's twenty Electoral College votes. n95 In the presidential election of 1976, the margin of victory for Democrat Jimmy Carter over Republican Gerald Ford amounted to 175,000 votes in three critical states: Ohio, Wisconsin, and Texas. n96 Nearly half of Carter's 297-240 Electoral College vote margin over Ford was attributable to his winning Ohio. n97 Carter won Ohio's allotment of twenty-five Electoral College votes by a margin of 11,116 popular votes. n98

Moreover, the winner-take-all effect holds irrespective of the "plus-two" bonus. When each state's electors are allocated on a winner-take-all basis, distortions can arise. The "plus-two" bonus only serves to magnify the effect of those distortions.

It is possible to quantify the magnitude of the distortion that arises in each presidential election from the winner-take-all allocation of each state's Electoral College votes. The critical element is the number of swing votes--the votes that represented the margin of victory for the winning candidate. This is the number of votes that swing a state to the winning candidate. n99 The rest of the votes for each major-party candidate offset each other. Thus, the [*471] swing votes are the ones that are of particular interest.

The key to this analysis is to determine the relative impact of each state's swing votes in an election. The impact of each state's swing votes is calculated by dividing the number of Electoral College votes at stake by the popular vote margin of victory for the winning candidate. Invariably, the margin of victory dwarfs the number of Electoral College votes, and the resulting fraction is tiny. For ease of interpretation, each state's fraction can be normalized with respect to the middle-ranking state for that election. The states can then be ranked in order of their swing voters' Electoral College impact for each election.

Begin with the most recent presidential election, which occurred in 2004. Recall that Bush defeated Kerry by a 286-252 electoral vote margin, and by 3.5 million popular votes. Table 1 presents the state-by-state Electoral College swing-vote impact rankings, for the fifty states plus the District of Columbia. The results are normalized with respect to that election's middle-ranking state, Alaska (AK).

Table 1: *Relative Electoral College Impact of a Swing Vote, 2004 Presidential Election.*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
WI	18.57	AR	1.28	TN	0.69
N.M.	13.34	AZ	1.27	WY	0.68
IA	11.38	MO	1.21	S.C.	0.64
N.H.	9.57	CA	1.18	GA	0.60
NV	5.09	W.V.	1.14	MS	0.58
PA	3.61	VA	1.07	N.Y.	0.57
OH	3.21	VT	1.05	KY	0.49
HI	2.36	R.I.	1.02	IN	0.47
DE	2.32	AK	1.00	KS	0.44
OR	2.28	CT	0.96	TX	0.44
MI	2.25	IL	0.90	NE	0.44
MN	2.23	MD	0.81	AL	0.41
CO	1.84	S.D.	0.79	D.C.	0.40
FL	1.55	N.D.	0.77	ID	0.39
N.J.	1.55	N.C.	0.77	MA	0.36
WA	1.38	MT	0.71	OK	0.34
ME	1.35	LA	0.70	UT	0.28

[*472] Wisconsin topped the list of states for the 2004 election. Its ten Electoral College votes were won by Kerry by a margin of 11,813 popular votes. Its popular-vote margin was smaller than that of any other state, relative to the number of Electoral College votes at stake. Only New Mexico (N.M.) and New Hampshire (N.H.) had smaller popular-

vote margins, and they both carried fewer Electoral College votes. Alaska (AK) was the median state. Bush won its three Electoral College votes by a margin of 65,812 popular votes. At the bottom of the list was Utah (UT). It gave Bush its five Electoral College votes by a margin, of 385,337 popular votes. Note the contrast between the top-ranking state and the bottom-ranking state. The popular-vote margin in Utah was over 30 times larger than that in Wisconsin, yet it swung only half as many Electoral College votes.

As the table shows, each swing vote in Wisconsin carried 18.57 times the Electoral College impact of a swing vote in Alaska. Each swing vote in Utah carried 0.28 times the Electoral College impact of a swing vote in Alaska. Therefore, Wisconsin's swing votes packed sixty-six times the punch of Utah's swing votes.

Next, consider the 2000 presidential election. Bush won 271 electoral votes, while Gore only received 267 electoral votes and lost the popular vote by 500,000 votes. Results for the presidential election of 2000 are presented in Table 2.

[*473] Table 2: *Relative Electoral College Impact of a Swing Vote, 2000 Presidential Election*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
FL	1115.40	MI	1.98	WY	0.82
N.M.	327.31	WA	1.90	KY	0.82
WI	40.47	LA	1.59	R.I.	0.81
OR	24.79	HI	1.42	CT	0.75
N.H.	13.29	VA	1.41	MD	0.73
NV	4.44	CO	1.32	N.J.	0.71
MN	4.09	GA	1.03	OK	0.71
MO	3.35	CA	1.00	MT	0.70
TN	3.28	S.D.	1.00	KS	0.64
OH	3.05	MS	1.00	NE	0.59
W.V.	2.92	IL	0.93	TX	0.56
ME	2.87	N.D.	0.90	ID	0.48
PA	2.87	N.C.	0.90	D.C.	0.47
AR	2.69	S.C.	0.87	N.Y.	0.46
VT	2.46	AL	0.87	MA	0.39
AZ	1.99	IN	0.84	UT	0.38

As those who recall the election of 2000, and its ensuing legal battles, it is not a surprise that Florida (FL) occupies the top spot. Bush won Florida's twenty-five Electoral College votes by the razor-thin margin of 537 popular votes. The median state was California (CA). The state of California had fifty-four Electoral College votes in 2000, the most of any state, but it also had the largest popular-vote margin--for Gore--of 1,293,774 popular votes. n100 Relative to other states, California's popular vote margin was not disproportionate given the number of Electoral College votes at stake. Finishing last again was Utah. Its five Electoral College votes went to Bush by a margin of 312,043 popular votes. *Id*.

The implications of the state-by-state ranking are [*474] striking. A swing vote in Florida carried over one thousand times the Electoral College impact of a swing vote in California. A California swing vote, in turn, carried nearly three times the Electoral College impact of a Utah swing vote. Again, the explanation pertains to the winner-take-all allocation of each state's electors. To the victor goes the spoils--no matter how small the margin of victory. The Florida-Utah comparison shows how great the disparities can be. In the case of a large state with a razor-tight margin versus a small state with a runaway victor, the disparities can be huge. In Utah, one-fifth as many Electoral College votes were at stake as in Florida; yet Utah's popular-vote margin was almost 600 times that of Florida. As a result, each of Florida's swing votes carried nearly 3,000 times the Electoral College impact of a Utah swing vote. What was already a close election came down to a mere 537 votes in one state due to the winner-take-all allocation of each state's electors.

Both the 2000 and 2004 presidential elections were closer than average. n101 Each election also featured a notable third-party candidate--Ralph Nader. n102 Now consider the presidential election of 1988, which was not a cliffhanger and lacked a major third-party candidate to siphon votes from the Republican and Democratic candidates. n103 In 1988, Republican George H.W. Bush [*475] defeated Democrat Michael S. Dukakis by an electoral-vote margin of 426-112. n104 Bush's popular-vote margin over Dukakis was seven million votes. n105 No third-party candidate received more than one percent of the vote. n106 The state-by-state rankings for the 1988 presidential election are provided in Table 3.

Table 3: *Relative Electoral College Impact of a Swing Vote, 1988 Presidential Election*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
VT	5.57	R.I.	1.34	TN	0.65
WA	5.35	N.D.	1.23	OK	0.65
IL	4.01	WY	1.20	N.J.	0.60
PA	3.78	CO	1.19	ID	0.60
MD	3.19	MI	1.10	N.C.	0.60
W.V.	3.08	MN	1.08	MS	0.57
N.M.	3.07	AK	1.02	NE	0.57
MT	2.96	IA	1.02	N.H.	0.54
S.C.	2.40	ME	1.00	S.C.	0.54
WI	2.20	MA	1.00	AL	0.54
N.Y.	2.15	LA	0.96	GA	0.52
CA	2.12	KY	0.93	AZ	0.45
MO	2.10	NV	0.87	IN	0.44
OR	1.98	KS	0.85	VA	0.42
HI	1.88	AR	0.81	D.C.	0.36
CT	1.73	OH	0.77	UT	0.36
DE	1.54	TX	0.67	FL	0.35

[*476] The 1988 election demonstrates that even in an election that was not a cliffhanger and lacked a major third-party candidate, the winner-take-all allocation of Electoral College votes can lead to distortions. In this case, Vermont (VT) was positioned at the top of the list. In Vermont, a popular-vote margin of 8,556 votes made the difference in assigning the state's three Electoral College votes to Dukakis. The middle state, and the one with respect to which the others were normalized, was Maine (ME). Its four Electoral College votes went to Dukakis, who won its popular vote by a margin of 63,562 votes. Florida (FL) held the last position. Although Florida had the smallest popular-vote margin of any state in 2000, it had the largest popular-vote margin in 1988. Its twenty-one Electoral College votes were won by Bush based on a 962; 184 popular-vote margin. n107

In the 1988 election, a swing vote in Vermont carried 5.57 times the Electoral College impact of a swing vote in Maine. It carried 16 times the impact of a swing vote in Florida. The ratio of the top-to-bottom state-was smaller for the 1988 election than for either the 2000 or 2004 elections. Still, the existence of a disparity for the 1988 election, and a sizable one at that, reinforces the finding that the winner-take-all allocation of Electoral College votes gives some states' voters a greater influence on an election's outcome than other states' voters.

Each presidential election is different; some are landslides, while others are cliffhangers. Some display more regional variation than others. Some feature significant third-party challenges. Yet, each of these three elections saw great variation across states in the magnitude of a swing vote's Electoral College impact. An indicator of the Electoral College disparity in each presidential election is the ratio of a swing vote's Electoral College impact in [*477] the top-ranked state to that of the bottom-ranked state. Again, the top-ranked state is the state with the smallest popular-vote margin relative to the number of Electoral College votes at stake, and the bottom-ranked state is the state with the largest relative popular-vote margin. In the preceding tables, the ratios were calculated for the 1988, 2000, and 2004 elections. Table 4 presents the ratios for every election dating back to 1960, the first presidential election in which the current number of 538 Electoral College votes were at stake.

Table 4: *Top-Ranked State/Bottom-Ranked State Ratios, 1960-2004 Presidential Elections*

Election	Top-Ranked State	Bottom-Ranked State	EC Impact Ratio
1960	HI	MA	832
1964	AZ	R.I.	63
1968	AR	MA	71
1972	MN	FL	7
1976	OH	UT	88
1980	MA	UT	288
1984	MN	UT	209
1988	VT	FL	16
1992	GA	D.C.	54
1996	NV	MA	59

Election	Top-Ranked State	Bottom-Ranked State	EC Impact Ratio
2000	FL	UT	2,905
2004	WI	UT	65

The table demonstrates that sizable disparities have been present in every presidential election since 1960. In 1960, a swing vote in Hawaii (HI), the state with the smallest popular vote margin relative to its number of Electoral College votes that year, carried 832 times the Electoral College impact of a swing vote in Massachusetts (MA), the largest-margin state. That election was a close one, with Democrat John F. Kennedy prevailing over Republican Richard M. Nixon by 303 to 219 in the [*478] Electoral College, and by 100,000 popular votes. n108 The election of 1972 was a landslide for Nixon over Democrat George McGovern, when Nixon received 521 Electoral College votes to McGovern's 17 and won 18 million more popular votes. n109 That election saw a swing-vote impact ratio of seven for the top-ranked state, Minnesota (MN), to the bottom-ranked state, Florida (FL). Its ratio was the smallest of any of the twelve elections since 1960. The largest Electoral College landslide occurred in 1984, with Republican Ronald W. Reagan prevailing over Democrat Walter F. Mondale by an electoral count of 525 to 13. n110 Reagan's popular-vote margin over Mondale was 16.9 million votes, slightly smaller than that of Nixon over McGovern in 1972. n111 In that election, the swing-vote impact ratio of the highest state, Minnesota (MN), to the lowest state, Utah (UT), was 209.

The Bush-Gore cliffhanger of 2000 was the outlier. It exhibited, by far, the largest swing-vote ratio of any of the last dozen elections. In that election, a swing-vote in Florida carried 2,905 times the impact of a swing-vote in Utah. The key was again the tiny margin in Florida, where a mere 537 popular votes swung the state's twenty-five Electoral College votes to Bush. Only two elections since 1960 saw smaller popular vote margins in any states--Hawaii in 1960 and New Mexico in 2000. But, neither [*479] state carried anywhere near the twenty-five Electoral College votes that Florida had in 2000. n112

In general, the closer elections saw larger disparities and the landslide elections saw smaller disparities. The two elections that saw the largest disparities, 1960 and 2000, were close elections. The two elections that saw the smallest disparities, 1972 and 1988, were landslides. The explanation is that a close election is likely to see more states decided by small margins than would be the case for a landslide election. Close elections tend to have more close states than landslide elections. Still, even a landslide election can have some states decided by narrow margins, like Minnesota in 1984. n113 The key is the variation between states. If the election victor's popular-vote margin of victory was uniform across all fifty states and the District of Columbia, then there would be no Electoral College swing-vote disparity. In that case, the nation's swing voters would be evenly distributed across the land. A swing vote in one state would carry the same Electoral College impact as a swing vote in another state. n114 It is when the distribution is uneven, and each state's Electoral College votes are allocated on a winner-take-all basis, that disparities arise. The uneven distribution means that small shifts in some states' swing votes can swing disproportionately large numbers of Electoral College votes from one candidate to another.

As long as there is variation in candidate preferences from one state to the next, the winner-take-all allocation of Electoral College votes ensures that there will [*480] be disparities. Of course, state-by-state variations in preference are inevitable in a large, diverse nation such as the United States. In a pluralistic nation of 300 million people scattered unevenly across fifty states, differences will exist from one state to the next. In the most recent election cycle, these differences have even spawned the shorthand of "red states" versus "blue states." The "red states" favor the Republicans, and the "blue states" favor the Democrats. The state-by-state differences are a fixture of the electoral landscape. Since they have persisted and will continue to persist, the winner-take-all allocation of Electoral College votes in presidential elections ensures that there will continue to be disparities in the value of each vote. These disparities have occurred in each of the last twelve presidential elections and will continue to occur;

V. Constitutional Concerns About the Winner-Take-All Allocation of Electors

Why are such disparities in the allocation of Electoral College votes problematic? They are suspect because of the Supreme Court's "one person, one vote" rulings in *Reynolds* and its progeny. "One person, one vote" does not really exist when one state's swing votes carry tens or hundreds or even thousands of times as much impact as another state's swing votes on a national election's outcome. Clearly, it is inequitable, but is it unconstitutional? To be able to articulate such a claim before the courts, three hurdles would have to be surmounted.

First, one would have to deal with the objection that Article II, Section 2 of the Constitution provides that state legislatures may direct how electors are selected. This clause, especially as interpreted by the Supreme Court in *McPherson v. Blacker* n115 and *Bush v. Gore,* n116 gives states [*481] plenary and almost absolute power to implement their presidential vote. There are several responses to this first objection.

What is being challenged is not the authority of states to allocate electoral votes, which is clearly provided for in the Constitution. Rather, the issue being challenged is the winner-take-all method of allocating those votes. As noted earlier, contrary to what the Court indicated in *Bush v. Gore* n117 and *McPherson v. Blacker,* n118 the power of state legislatures to allocate electoral votes is not unlimited. Cases such as *Anderson v. Celebrezze, n119 Burroughs v. United States,* n120 and *Moore v. Ogilvie,* n121 illustrate the Supreme Court's willingness to place some limits on the processes state legislatures implement in running their presidential elections, to draw limits on ballot access, political corruption, and most directly, to select presidential electors in conformity with the "one person, one vote" reapportionment standard. n122

Second, even within *Bush v. Gore,* n123 the logic of the majority opinion--that state legislatures cannot set up an arbitrary process for the counting of votes--seems to suggest limits on the power to select electors. Under the holding of *Bush v. Gore,* it is doubtful that a state legislature could enact a law indicating that in counting ballots, total discretion to ascertain voter intent is left up to election judges. *Bush v. Gore* stands for the claim that the Equal Protection clause limits state legislatures in then-discretion to count votes.

 [*482] Finally, as noted earlier, n124 it seems unlikely that a state legislature could limit franchise rights in a presidential election to only whites, and it also seems absurd to think that it could state the same rule for determining who is chosen as an elector. Overall, state legislatures may have broad authority to select their electors, but contrary to what *Bush v. Gore* and *McPherson* indicate, that power is not really plenary and beyond question.

A related hurdle or objection to challenging the winner-take-all method in court is to argue that if the winner-take-all method of awarding Electoral College votes is unconstitutional, it would follow that the equal allocation of senators to big states and small states is also unconstitutional. Here, one can respond by stating that the equal allocation of senators to all states is provided for under the Constitution, and the Court already ruled on that issue in *Lucas v. 44th General Assembly of Colorado.* n125

In addition, some may argue that if one can challenge the winner-take-all method of selecting presidential electors as unconstitutional under the "one person, one vote" standard, then why is the representational schema of allocating two senators and at least one house member to each state, regardless of population, not also subjected to the same argument. Two responses are in order. First, unlike the representational schema for the House and Senate, which is constitutionally mandated and clearly described in Article I, Sections 2 and 3 of the Constitution, the winner-take-all method is not constitutionally mandated or specified in the text. Instead, Article II, Section 1 of the Constitution, and the Twelfth Amendment merely delegate to state legislatures the power to select their electors without specifying a format. Second, in *Reynolds, n126 Baker,* n127 and *Lucas,* n128 the Court [*483] discussed the relationship between state representation schemes and the "federal analogy" to the Senate. In these cases, the Court noted the historical differences between state and federal representation, the purposes behind the federal system, and why they are different. n129 In effect, the Court rejected the analogies based upon constitutional text and history. Similarly, if one were to challenge the Article I, Sections 2 and 3 congressional representational plan as violating the "one person, one vote" standard, the Court would dismiss the claim because the text of the Constitution provides for such a system.

A third objection or hurdle to address is that even if one could show that state legislative authority to select electors is not unlimited, a question still exists whether the "one person, one vote" standard would apply. Would challenging the allocation of electors be different from simply questioning the constitutionality of the means by which states are initially awarded electors?

Thus, a challenge to one method that a state legislature uses to allocate electoral votes is not a challenge either to their overall authority to determine a method or to the constitutionally explicit language determining the size of a state's total number of elector votes. Yet, in terms of whether one could raise a "one person, one vote" challenge to the winner-take-all method, a few responses are also possible. First, the Court already ruled in *Moore v. Ogilvie* that "one person, one vote" applied within the context of selecting presidential candidates at the state level. n130

Second, *Delaware v. New York* establishes neither a precedent that review of presidential elector selection is non-justiceable nor that the "one person, one vote" standard does not apply. Instead, *Delaware v. New York* arose at a [*484] time early in the reapportionment jurisprudence. Now, nearly two generations later, one could argue in the same way *Bush v. Gore* pushed this line of cases to apply to the counting of votes, the same logic of "one person, one vote" should extend to the winner-take-all method of allocating electoral votes. After all, allocating votes, or assigning them to a particular candidate, is essentially the same as the counting of votes, or they are at least conceptually related.

Third, if winner-take-all systems create disincentives for some to vote, n131 especially if these non-voters are in a racial minority, and a voter could show that a state retained this type of electoral vote allocation system for

discriminatory reasons, one might be able to argue that the right to vote is being diluted in ways no different than in situations found in the early reapportionment cases of the 1960s. n132

Finally, if the courts still do not wish to address the constitutionality of winner-take-all systems, is the matter dead? Not necessarily. States could on their own change their own systems. The argument here is that winner-take-all systems effectively either disenfranchise some of their own cities vis-a-vis others within the state, or that such a system contributes to a practice across forty-eight states that hurts their own citizens' influence in the selection of the President.

On balance, winner-take-all systems for the allocation of presidential electors raise serious constitutional questions that the courts should address. Winner-take-all systems weigh votes differently. Some voters' decisions end up counting much more toward the outcome of a presidential election than votes of other people under winner-take-all. Such systems would, thus, seem to violate the "one person, one vote" standard that the Court has held to govern the allocation and exercise of the [*485] franchise.

IV. Conclusion

The Electoral College was instituted as a presidential selection system to give small states more political influence and to offset regional factionalism that might occur if the Chief Executive were selected by popular vote. The Constitution permits state legislatures to award electors in the manner of their own choosing. The winner-take-all method that forty-eight states currently use to select their electors evolved largely as a way to help states maximize their influence in presidential elections. Yet, such a system unfairly weighs the preferences of some voters more than others. This violates the one-person, one-vote standard articulated in *Reynolds v. Sims,* n133 and subsequently applied to aspects of presidential contests such as in *Moore v. Ogilvie* n134 and *Bush v. Gore.* n135

Despite claims that the state power over selection of presidential electors is absolute, case law suggests the contrary. Instead, claims contesting the constitutionality of some forms of state allocation of electoral votes should be entertained by the courts, or at least by legislatures. While the Court in *Delaware v. New York* was unwilling to adjudicate "one person, one vote" claims in the context of how electors are selected, subsequent maturity of the reapportionment and right to vote case law, as well as the continuing debate over what happened in Florida in the presidential election of 2000, make it ripe to revisit this issue, either judicially or in the alternative, in the state legislatures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersElectionsTime, Place & MannerConstitutional LawElections, Terms & VotingElectoral CollegeGovernmentsFederal GovernmentElections

FOOTNOTES:

n1 THE FEDERALIST NO. 68, at 444 (James Madison) (Modem Library 1937).

n2 Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers' Intent,* 53 AMER. POL. SCI. R. 52 (1959).

n3 *Id.*

n4 RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 224-27 (2001). *See also* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections, 29 FLA. ST. U. L. REV. 377, 396 (2001)* (examining the various issues surrounding the administration of presidential elections, including state recounts).

n5 *See generally* MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION (1992).

n6 *See* VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 22-26 (2001) (REVIEWING CRITICISMS OF THE ELECTORAL COLLEGE); DOUGLAS KELLNER, GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION (2001); POSNER, *supra* note 4, at 224-27 (reviewing criticisms of the Electoral College); Jack N. Rakove, *The E-College in the E-Age, in* THE UNFINISHED ELECTION OF 2000 201, 221-27 (Jack N. Rakove ed., 2001).

n7 Thomas Jefferson and Aaron Burr were running as a team. At the time, each elector could cast two votes. The candidate receiving the most votes was elected president, and the number-two vote recipient was elected vice president.

n8 DUMAS MALONE & BASIL RAUCH, EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA 323-327 (1960).

n9 *Id.* at 430-32.

n10 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Henry Steele Commager & Richard B. Morris, eds., 1988); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

n11 *GREENE, supra* note 6, at 22 (for a review of the historical problems with the Electoral College).

n12 For a review of these claims, *see generally GREENE, supra* note 6; POSNER, *supra* note 4.

n13 Alexander Keyssar, *The Right to Vote and Election 2000, in* THE UNFINISHED ELECTION OF 2000 75, 96 (Jack N. Rakove ed., 2001).

n14 An example cited is a situation where an overwhelming majority of the population in a state has one preference, causing some in the minority in that state to abstain from voting. *See* GEORGE C. EDWARDS, IN, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2004) (arguing that the Electoral College serves to disenfranchise many voters not living in competitive states).

n15 Thomas M. Durbin, *The Anachronistic Electoral College: The Time For Reform,* 39 FED B. N.J. 510 (1992).

n16 *Nader Brushes Off Spoiler Role,* Lubbockonline (November 15, 2000), *available* at http://quest.lubbockonline.com/stories/111500/nad_1115006860.shtml (last visited on September 7, 2006).

n17 *GREENE, supra* note 6, at 25; POSNER, *supra* note 4, at 231, 239; GERALD M. POMPER, *The Presidential Election, in* THE ELECTION OF 2000 125, 150 (Gerald M. Pomper ed., 2001). During the 2004 presidential election, voters in Colorado rejected a state ballot measure to amend the state constitution to award that state's electoral votes proportional to the popular-vote vote breakdown. *See* Colorado Secretary of State, Colorado Amendment 36: Selection of Presidential Electors, *available at* http://www.sos.state.co.us/pubs/elections/tbfinal99.htm (last visited July 10, 2006).

n18 *Delaware v. New York, 385 U.S. 895 (1966).*

n19 *377 U.S. 533 (1964).*

n20 *385 U.S. at 895, reh'g denied.*

n21 Specifically, by the time *Delaware v. New York* was filed, it was not clear how far the one person, one vote jurisprudence would be legally applied.

n22 THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1960, 350-65 (Atheneum 1961).

n23 *See* Hasen, *supra* note 4, at 396 ("The need for uniformity itself is echoed in the Constitution, which requires a uniform day for choosing presidential electors. On the other hand, each state picks its own electors for the Electoral College, so equality in the weighting of votes across states is affirmatively rejected in the Constitution.").

n24 Whether the Court would entertain and accept the argument is a matter of debate. Even if it did not, one can still argue that the inequities in voter strength across states created by the winner-take-all method contribute to the existing criticisms of the Electoral College, and thereby add more fuel to why states should abandon this presidential election selection system in the interest of protecting the voting rights of their citizens.

n25 *See infra* Part II.

n26 *See infra* Part III.

n27 *See infra* Part IV.

n28 *See infra* Part V.

n29 U.S. CONST, art. II § 1, cl. 2.

n30 *McPherson v. Blacker, 146 U.S. 1 (1892); Bush v. Gore, 531 U.S. 98 (2000).*

n31 *146 U.S. at 1.*

n32 *Id. at 25.*

n33 *Id.*

n34 *531 U.S. at 98.*

n35 *Id. at 105.*

n36 *Id. at 104.*

n37 *Id.*

n38 *Id.*

n39 *Id. at 111* (Rehnquist, C.J., Scalia, J. and Thomas, J. concurring).

n40 *Id. at 112.*

n41 *Id. at 113* (quoting *McPherson, 146 U.S. at 27)* (internal quotation marks omitted).

n42 *Id.* at 113-14.

n43 *Id.* at 114.

n44 *Id.* at 112-13.

n45 *See Washington v. Davis, 426 U.S. 229 (1976)* (holding that the Fourteenth Amendment bars the intentional use of race by governments); *Frontiero v. Richardson, 411 U.S. 677 (1973)* (ruling by a four person plurality that classifications on the basis of gender are suspect); *Gormillion v. Lightfoot, 364 U.S. 339 (1960)* (holding that the use of race in districting violates the Fifteenth Amendment); *Korematsu v. United States, 323 U.S. 214 (1944)* (holding classifications on the basis of race are suspect).

n46 *Shaw v. Reno, 509 U.S. 620 (1993); Gormillion, 364 U.S. at 339. See also infra* Part III.

n47 *See also Smith v. Allwright, 321 U.S. 649 (1944).*

n48 *See generally* Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors, 29 FLA. ST. L. REV. 535, 536 (2001)* (arguing the Constitution should be interpreted to place some limits on the ability of states to deny citizens the right to select presidential electors).

n49 *460 U.S. 780 (1983).*

n50 *290 U.S. 534 (1934).*

n51 *Id. at 545.*

n52 *394 U.S. 814, 819 (1969).*

n53 *Id. at 815.*

n54 *Id.*

n55 *Id at 819.*

n56 *531 U.S. at 104.*

n57 *394 U.S. at 818* (citations omitted).

n58 *531 U.S. at 104.*

n59 *Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).*

n60 *Reynolds, 377 U.S. at 533.*

n61 U.S. CONST, art. I, § 2.

n62 DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 228-248 (2004).

n63 *Id.*

n64 *Id.*

n65 *Id.*

n66 *Id. See also Gomillion, 364 U.S. at 339.*

n67 *Colegrove v. Green, 328 U.S. 549 (1946).*

n68 *Id. at 554-55.*

n69 *Id. at 556.*

n70 *369 U.S. 186 (1962).*

n71 *Gormillion, 364 U.S. 339.*

n72 *Id.*

n73 *377 U.S. at 533.*

n74 *Id. at 562.*

n75 *376 U.S. 1 (1964).*

n76 *390 U.S. 474 (1968).*

n77 *377 U.S. 713 (1964).*

n78 *Id. at 738-39.*

n79 *462 U.S. 725 (1983).*

n80 *462 U.S. 835 (1983).*

n81 *377 U.S. at 533.*

n82 *385 U.S. 895 (1966).*

n83 ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001).

n84 In 2000, Florida cast twenty-five Electoral College votes. By the 2004 presidential election, Florida was allotted twenty-seven Electoral College votes.

n85 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001). The final margin when the Electoral College convened was 271-266, as one of Gore's electors refrained from voting for Gore.

n86 *See generally GREENE, supra* note 83.

n87 *531 U.S. at 1046.*

n88 The District of Columbia is allotted three Electoral College votes to compensate for its lack of a congressional delegation.

n89 *3 U.S.C. § 7* (2006).

n90 *See* U.S. CONST, amend. XII (detailing the presidential selection process in the House of Representatives should no candidate receive a majority of the electoral votes).

n91 *See, e.g.,* John F. Banzhaf, III, *One Man:3.312 Votes: A Mathematical Analysis of the Electoral College, 13 VILL. L. REV. 303 (1968).*

n92 U.S.CONST. amend. XII.

n93 *Id.*

n94 An analogue is the states' competition for "pork-barrel" spending in the United States Congress. Each state's congressional delegation serves as an advocate for that state's spending priorities. To the extent that they are successful, they boost the size of the federal budget. Either taxes must be raised or deficits must accrue to finance the added spending.

n95 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2004 (U.S. Gov't Printing Office 2005).

n96 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1976 (U.S. Gov't Printing Office 1977).

n97 *Id.* One of Ford's electors defected to vote for Ronald W. Reagan when the Electoral College convened.

n98 *Id.*

n99 The swing votes have also been called "wasted votes." JAMES P. LEVINE & DAVID W. ABBOTT, WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE 22-24 (1991); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 TEX. L. REV. 1589, 1606 (1993).*

n100 California cast fifty-five Electoral College votes in the 2004 presidential election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001).

n101 In Electoral College terms, they were the two closest of the last twelve presidential elections since the size of the Electoral College increased to 538 electors when Alaska and Hawaii joined the union. The last twelve elections saw the winning candidate receive an average of 388 Electoral College votes.

n102 Nader received 2.7% of the popular vote in 2000 and 0.4% in 2004, but received no Electoral College votes in either election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001); STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2004 (U.S. Gov't Printing Office 2005).

n103 The 1992 and 1996 elections saw Democrat William J. Clinton prevail over Republicans George H.W. Bush and Robert J. Dole, respectively, by comfortable Electoral College margins. Both elections also saw a significant third-party challenge from H. Ross Perot, who received 19% of the popular vote in 1992 and 8.4% in 1996. His candidacy helped keep Clinton from receiving more than 50% of the popular vote in either election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1992 (U.S. Gov't Printing Office 1993); STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1996 (U.S. Gov't Printing Office 1997).

n104 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1988 (U.S. Gov't Printing Office 1989).

n105 *Id.*

n106 *Id.*

n107 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1988 (U.S. Gov't Printing Office 1989).

n108 Third-party candidate Harry F. Byrd received fifteen Electoral College votes in Alabama and Virginia. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1960 (U.S. Gov't Printing Office 1961).

n109 McGovern won only the Electoral College votes of Massachusetts (fourteen) and the District of Columbia (three). STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1972 (U.S. Gov't Printing Office 1973).

n110 Mondale's thirteen Electoral College votes came from Minnesota (ten) and the District of Columbia (three). STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1984 (U.S. Gov't Printing Office 1985).

n111 *Id.*

n112 In 1960, a margin of 115 popular votes swung Hawaii's then-three Electoral College votes to Kennedy over Nixon. In 2000, a margin of 366 popular votes was the difference in awarding New Mexico's five Electoral College votes to Gore over Bush.

n113 STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1984 (U.S. Gov't Printing Office 1985).

n114 It would not be precisely the same, due to the "plus-two" bonus in the distribution of electors among the states, but it would be very close.

n115 *146 U.S. at 1.*

n116 *531 U.S. at 98.*

n117 *Id.*

n118 *146 U.S. at 1.*

n119 *460 U.S. at 780.*

n120 *290 U.S. at 534.*

n121 *394 U.S. at 814.*

n122 *See supra* Section II.

n123 *531 U.S. at 98.*

n124 *See supra* Section II.

n125 *377 U.S. at 713.*

n126 *Id.* at 571-76.

n127 *369 U.S. at 302-07.*

n128 *377 U.S. at 738.*

n129 *462 U.S. at 738-9.*

n130 *See supra* notes 52 to 55 and accompanying text.

n131 *See supra* note 13 and accompanying text.

n132 *See supra* Section III.

n133 *377 U.S. at 533.*

n134 *394 U.S. at 814.*

n135 *531 U.S. at 98.*