January 19, 2011

Aliens Would Have Cost Bush the Election: The Fragility of Narrow Electoral College Victories

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1. **INTRODUCTION**

Defenders of the Electoral College frequently assert that victory in the Electoral College requires a winning candidate to “produce a coalition of states with wide and diverse interests”\(^1\) thereby producing “a broadly based electoral victory.”\(^2\) For the defenders of the College, simply winning the popular vote is not sufficient.

Not just any majority will do in a government dedicated to protecting the equal rights of all. One must pay heed not only to the numerical size of a winning coalition, but to the manner of its composition.\(^3\)

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In elections such as 2000, in which the candidate who captures the largest share of the national popular vote lost the vote in the Electoral College, “the candidate who did a better job of building a national coalition and generating support nationally was sent to the White House.”

“In each case the victor was able to succeed because his opponent did not build the national coalition that is required by the Electoral College.” None of these supporters of the Electoral College ever pauses to consider the fragility of the narrow Electoral College victories such as the one achieved George W. Bush in 2000.

In 2003 Neubauer and Zeitlin showed that Bush’s victory over Gore depended on the House size being not too large. Assuming that state-by-state election results remain unchanged,

- The minimum House size for a Gore victory is at 492. (There is a dead heat when the House size is 491 and Bush wins for all House sizes up to 490.)
- The maximum House size for a Bush victory is 596. (There is a dead heat when the House size is 597 and Gore wins for all larger House sizes except 655, which also produces a dead heat.)

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5 Id. at 170. This statement explains nothing. It simply states that the winning candidate won the Presidency by winning the Electoral College.

6 The recently released 2010 census will result in a total of 12 House seats changing from one state to another. Electoral College proponents never seem to acknowledge that a popular vote coalition sufficient for a close electoral vote victory in 2012 based on the incoming House could be insufficient for an electoral vote victory based on the outgoing House. For the statutory choice of the outgoing House rather than the incoming House see infra section 4.


8 Id. In 1979 testimony to the Senate Subcommittee on the Constitution, James E. Shaw demonstrated that by changing the size of the House “Ford could have won the 1976 presidential election without the switch of a single state, without any change in defecting electors and without Congress’ rejecting any electoral votes. So too could have Richard Nixon won in 1960, Samuel Tilden in 1876, John Adams in 1800 and Thomas Jefferson in 1796. Winfield Hancock in 1880 and Lewis Cass in 1848 could have achieved ties in the electoral college, forcing the election into the House of Representatives.” James Evan Shaw, The Electoral College and Unstable Apportionment, A Summary, in Direct Popular Election of the President and Vice President of the United States: Hearings on S. J. Res. 28, 96th Congress, 1st session, March 27, 30, April 3, and 9, 1979 463, 464 (Government Printing Office 1979).

The outcomes cited for 1976, 1960, 1880, 1848, and 1800 result from extremely small House sizes. The election of 1876 demonstrates the same sort of pattern as the 2000 election.
Not surprisingly, Bush’s victory also depended on the precise number of Senators per state. If there were only one Senator per state, then Bush would have received 30 fewer electoral votes and Gore 21 fewer. This would have resulted in a 246-241 electoral vote victory for Gore!

1.1 What If Al Gore Had Carried New Hampshire?

On August 9, 2000 The New York Times reported that Al Gore had seriously considered Massachusetts Senator John Kerry and New Hampshire Governor Jeanne Shaheen as running mates. Had Gore chosen Kerry or Shaheen as his running mate he might well have won the state of New Hampshire’s four electoral votes and thereby have won the electoral vote by a margin of 271-267.

- The first Hayes-Tilden tie occurs with a House size of 222.
- The first Tilden victory occurs with a House size of 231
- The last Hayes victory occurs with a House size of 321.
- The last Hayes-Tilden tie occurs with a House size of 344.

(Spreadsheet on file with the author. The actual House size was 293.)

My research has demonstrated that if the Second Congress had passed the first apportionment bill it considered, dividing each state’s apportionment population by 30,000 and rounding down, thereby resulting in seven additional House seats, then the 1796 election between Adams and Jefferson would have come down to the electoral votes of the additional elector in Maryland. (In 1796 Maryland’s ten electors cast seven electoral votes for Adams and four for Jefferson!) If the additional Maryland elector had cast one of his votes for Jefferson and the other for someone other than Adams then the election would have likely resulted in these two Founders each receiving 73 electoral votes, a bare majority of the 145 electors who would have cast votes. As a result, the lame duck fourth House would have decided the election of 1796-7!

9 Or, more precisely, if there were only one Senate-based electoral vote per state. No one at the Constitutional Convention ever proposed that there be only one Senator per state. Nevertheless, as Seth Barrett Tillman has noted (in his review of Ross’s book) “So the size of the bonus matters. But if any bonus, 2 votes, 3 votes, 4 votes, or 50,000 votes, is consistent with federalist principles, would not a bonus of one vote – rather than two – have worked too?” Seth Barrett Tillman, Betwixt Principle and Practice: Tara Ross’s Defense of the Electoral College. 1 NYU Journal of Law & Liberty 922, 930 (2005). (Reviewing: Enlightened Democracy: The Case for the Electoral College (2004)).


11 In 2000 Bush defeated Gore in New Hampshire by 1.27%, running 1.78% ahead of his nationwide margin of -0.51%. Jeanne Shaheen was reelected Governor of New Hampshire with a margin of 4.98% in 2000, running 6.25% ahead of Al Gore in the state.
In this scenario Gore would have won 22 states totaling 271 electoral votes and Bush would have won 29 states totaling 267 electoral votes. Table 1 classifies this electoral vote.

<table>
<thead>
<tr>
<th>Electoral Votes</th>
<th>Bush</th>
<th>Gore</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>267</td>
<td>&lt; 271</td>
<td>538</td>
</tr>
<tr>
<td>Senate based</td>
<td>29*2</td>
<td>&gt; 22*2</td>
<td>102</td>
</tr>
<tr>
<td>House based</td>
<td>209</td>
<td>&lt; 227</td>
<td>436</td>
</tr>
</tbody>
</table>

Table 1 - Electoral Vote Classification, Gore Wins NH

Once again, the outcome of the electoral vote would have depended on the size of the House and the number of Senators per state.

Four years later John Kerry defeated George W. Bush in New Hampshire by 1.37%, running 3.83% ahead of his nationwide margin of -2.46%.

Thus, it seems quite reasonable to infer that a Gore/Kerry ticket or a Gore/Shaheen ticket would have carried New Hampshire in 2000. Another likely consequence is that some number of Jewish voters in Florida (and elsewhere) would have voted for Bush rather than Gore. As a result, many fewer of us would have any idea what a chad is!

12 Provided, of course, that litigation in New Mexico would not have overturned Gore’s razor thin margin 366 votes out of a total of 598,605, thereby switching New Mexico’s five electoral votes from Gore to Bush. For the contingencies of Gore’s victory in New Mexico see infra section 2. And, of course, a close popular vote in New Hampshire might well have led to protracted litigation in that state as well!
- The minimum House size for a Gore victory is at 312. (There is a dead heat when the House size is 311 and Bush wins for all House sizes up to 310.\textsuperscript{13})

- The maximum House size for a Bush victory is 390. (There is a dead heat when the House size is 391 and Gore wins for all larger House sizes.)\textsuperscript{14}

If each state had three senators\textsuperscript{15}, then Bush would have won 296 electoral votes and Gore would have won 293 electoral votes!

<table>
<thead>
<tr>
<th>Electoral Votes</th>
<th>Bush</th>
<th>Gore</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>Total</td>
<td>296</td>
<td>&gt;293</td>
<td>589</td>
</tr>
<tr>
<td>Senate based</td>
<td>29*3</td>
<td>&gt;22*3</td>
<td>153</td>
</tr>
<tr>
<td>House based</td>
<td>209</td>
<td>&lt;227</td>
<td>436</td>
</tr>
</tbody>
</table>

Table 2 - Electoral Vote Classification, Gore Wins NH, 3 Senators per State

\textbf{1.2 Other Factors Determining the Outcome of the Electoral Vote}

House size and Senate size are not the only critical parameters on which the fragility of a narrow Electoral College victory may depend. The following parameters may also come into play.

1. The precise boundaries of a state.
2. The precise number of states.
3. The age of the House apportionment underlying the Electoral College.
4. The choice of the forward-looking House apportionment rather than the backward-looking House apportionment in the Presidential election immediately following the completion of a census and reapportionment process.
5. The population basis used to apportion the House.
6. The method used to apportion the House.

\textsuperscript{13} In 1995 Pennsylvania Democrat Paul McHale introduced H.R. 2068 which would have reduced the size of the House to 295 members! This bill was the House Judiciary Committee’s Subcommittee on the Constitution from which it never emerged. See Cong. Record 104\textsuperscript{th} Congress, 1\textsuperscript{st} Sess. 7256, July 19, 1995.

\textsuperscript{14} Spreadsheet on file with the author.

\textsuperscript{15} This would provide a means for each state to vote for a senate seat every two years! On July 23, 1787 Gouverneur Morris proposed that the Senate have three members per state. This appears to be the only Convention debate on Senate size after the Great Compromise of July 16. The Convention defeated Morris’s proposal by a vote of 1-8 with only Morris’s state of Pennsylvania voting aye. See Max Farrand, 2 The Records of the Federal Convention of 1787 94 (Yale 1937).

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Amazingly, each of the first five of these parameters\textsuperscript{16} comes into play \textit{individually} in the “Gore wins New Hampshire” variation to the 2000 election.\textsuperscript{17}

In this analysis we suppose that no one outside of New Hampshire changed his or her popular vote.\textsuperscript{18} Electoral College proponents such as Judith Best object to critics who

\textsuperscript{16} Although not a factor in our “Gore wins NH” scenario, the method used to apportion the House may also be added to the list just given. In 1979 Shaw noted that the outcome of the close 1876 election between Tilden and Hayes depended critically on the method used to apportion the House of Representatives. Shaw, \textit{supra} note 8, at 467.

\textsuperscript{17} Amar and Amar have noted “But federalism fails most egregiously as a normative rationale for the alternative outcome in which Gore wins the electoral college but loses the popular vote. In this scenario, Bush would have won twenty-nine jurisdictions to Gore’s twenty-two (which would have included many of the big states whose domination the Framers wanted to prevent in the first place). And to the extent that the Framers sought to guard against regionalism, who could be more regional than Gore, who would have won only the Northeast, the West Coast, half of the Midwest, and Florida? In fact, if Gore had carried New Hampshire instead of Florida in this alternative scenario, the regional divisions would have become even sharper.” Note, \textit{Rethinking The Electoral College Debate: The Framers, Federalism, and One Person, One Vote} 114 Harvard Law Review 2526, 2542 (2001).

In contrast, Michael Uhlmann seems to suggest that such a narrow Gore victory would have somehow been less legitimate than Bush’s actual narrow victory.

A quick glance at the electoral map helps to explain why the public is not alarmed by President Bush’s lack of “legitimacy”: His electoral-vote majority was razor-thin, but he carried 30 states and five-sixths of the nation’s counties. Conversely, the geographic pattern of Mr. Gore’s state victories was far less dispersed. Although he appears to have won the national popular vote by a slim margin, the map makes clear that his base of support was far less representative of the nation than Mr. Bush’s. His heaviest vote came precisely from those areas dominated by big-city machines and mass television markets. Under direct election, that geographically skewed pattern, dominated by areas of heavy population density, may be sufficient to carry the country, but will it truly reflect the rich diversity of the nation’s interests? Direct election seeks to guarantee that a popular majority will be a relatively accurate microcosm of the country. The Electoral College, by contrast, almost always does. Uhlmann, \textit{supra} note 3.

Presumably, if Gore had carried New Hampshire, the Electoral College would not have provided a relatively accurate Uhlmannian microcosm of the country. But this begs the question of why Uhlmann’s microcosm of the country matters at all.

\textsuperscript{18} This is actually a much stronger hypothesis than necessary. For the analyses based on the census and the population basis of House apportionment (see \textit{infra} sections 3 through 5) we need only assume that the rank ordering of popular votes in the other states does not change. However, given our focus on the precise boundaries of New Mexico in the section 2, we must assume that no popular vote changes in New Mexico or any of the states neighboring it.
make the opposite hypothesis.

All of them assume an exact number of votes that would shift, and then to compound this nonsense, they assume that the shifts in this precise number of votes only would occur in some specific states and not in any others. They move these numbers of votes around in a political vacuum as if votes were cast randomly and arbitrarily. They do not give a political reason … for his imagined shift in votes.\textsuperscript{19}

Surely, we must be allowed to frame some hypothesis to motivate our analysis. Perhaps some future historian will be able to demonstrate that Joe Lieberman’s Vice-Presidential candidacy was critical to Gore’s narrow victory in New Mexico, a state that will feature prominently in our analysis. However, in the absence of such counter-evidence our hypothesis about New Hampshire and the rest of the nation seems reasonable. In any case, our purpose is not to demonstrate who would have won the election had Gore chosen Kerry or Shaheen to be his running mate. Instead, it is to demonstrate the extreme fragility of a narrow Electoral College victory.

2. THE IMAGINARY BEINGS CALLED STATES
Before the Philadelphia Convention agreed to the Great Compromise James Wilson asked

Can we forget for whom we are forming a Government? Is it for men, or for the imaginary beings called States? Will our honest Constituents be satisfied with metaphysical distinctions?\textsuperscript{20}

Of course, the Constitution recognizes “the imaginary beings called States” as well as persons.\textsuperscript{21} An entire clause of the original text deals with the admission of new states and the creation of new states from portions of one or more states or the conjunction of two states.\textsuperscript{22} Indeed, as late as September 10, 1787, the almost final draft of the Representation clause began

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{19}] Best, \textit{supra}, note 2, at 26.
\item[\textsuperscript{20}] Farrand, 1 \textit{supra} note 15, 483. (June 30, 1787).
\item[\textsuperscript{21}] “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. Amend. X.
\item[\textsuperscript{22}] “New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.” U.S. Const. Art. IV, §3, cl. i. For discussion of the issues involved see Vasan Kesavan and Michael Stokes Paulsen, \textit{Is West Virginia Unconstitutional?} 90 Cal. L. Rev. 291 (2002) and Vasan Kesavan and Michael Stokes Paulsen, \textit{Let’s Mess with Texas}, 82 Tex. L. Rev 1587 (2004).
\end{itemize}
\end{footnotesize}
Art IV, Sect. 4. As the proportions of numbers in the different states will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States…

Perhaps, we take the realities of the 50 states, their boundaries, and their populations too much for granted.

No state demonstrates this better than New Mexico, which, along with its twin Arizona, endured territorial childhoods of over 61 years, the longest of any states in the Union. New Mexico also has the distinction of being the only state west of the Mississippi-Missouri river system and east of the Pacific coast states to have voted for Al Gore in 2000. It did this by a margin of only 366 votes, a smaller margin in absolute numbers than George W. Bush’s winning margin in Florida. Given the narrowness of Gore’s margin and New Mexico’s isolation as a Gore state, it is not surprising that redrawing New Mexico’s boundaries in many other ways would have put it into the Bush column as would fusing it with its twin Arizona.

Congress organized the New Mexico Territory as part of the Compromise of 1850. During the debates Henry Clay described setting Texas’ boundary with New Mexico as the third of five wounds “bleeding and threatening the well being, if not the existence of the body politic.”

Prior to Mexico’s independence from Spain this boundary was a matter of Spanish law. From Mexico’s independence from Spain in 1821 until Texas’ independence from Mexico in 1836 it was a matter of Mexican law. When Texas declared its independence

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24 How many American readers, except for residents of Hawaii, know why their state has the boundaries it has? For a popular treatment providing answers to these questions see, generally, Mark Stein, *How the States Got Their Shapes* (Smithsonian/Collins 2008).

25 All five of the states bordering New Mexico voted for Bush. Here is a summary of how their counties bordering New Mexico voted.

<table>
<thead>
<tr>
<th>State</th>
<th>Bush Counties</th>
<th>Gore Counties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>13</td>
<td>3</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Colorado</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Utah</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Arizona</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>22</strong></td>
<td><strong>6</strong></td>
</tr>
</tbody>
</table>

26 *Cong. Globe*, 31st Cong., 1st Session, App. 612. May 21, 1850. “First, there is California; there are the territories second; there is the question of the boundary of Texas the third; there is the fugitive slave bill the fourth; and there is the question of the slave trade in the District of Columbia fifth.”
from Mexico it became a matter of international law between Mexico and Texas when Texas declared that its boundary with Mexico ran from “the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude.”[27]

Following Texas’ annexation by the United States in 1845 this boundary remained a matter of international law, now between Mexico and the United States. The annexation resolution made no explicit statement about any of Texas’ boundaries.\textsuperscript{28} However, it included the proviso that

\begin{quote}
Said State to be formed, subject to the adjustment by this government [the United States] of all questions of boundary that may arise with other governments.
\end{quote}

This proviso became inoperative only three years later when the United States acquired the Mexican Cession following the Treaty of Guadalupe-Hidalgo, which concluded the Mexican War.\textsuperscript{30} The boundary was now a matter of American law. As a sovereign state of the Union no territory could be taken from Texas without its consent.\textsuperscript{31}

When the 31\textsuperscript{st} Congress finally set the boundary in 1850 there were many proposals. It will be useful to present the ultimate statutory resolution of Texas’ boundaries before reviewing the alternate proposals.

The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich, thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two

\begin{tabular}{ll}
\textsuperscript{27}AN ACT To define the Boundaries of the Republic of Texas, December 19, 1836 in H. P. N. Gammel (ed.) 1 The Laws of Texas, 1822-1897 1193-4 (Gammel 1898). Available at http://Texashistory.unt.edu/ark:/67531/metapth5872/m1/1/. (Last visited January 19, 2011.)\\
\textsuperscript{28}Joint Resolution for annexing Texas to the United States §2. 5 Stat. 797. March 1, 1845. Nor had the original treaty signed between Texas and the United States providing for Texas’ annexation as a territory made any explicit statement about boundaries. See A Treaty of Annexation, concluded between the United States of America and the Republic of Texas, April 12, 1844. Reproduced in Cong. Globe, 28\textsuperscript{th} Cong., 2\textsuperscript{nd} Session, 191-2. January 25, 1845.\\
\textsuperscript{29}Joint Resolution §2, supra note 28, at 797.\\
\textsuperscript{30}For the treaty see 9 Stat. 922. For ratification see Senate Exec. J. 28\textsuperscript{th} Cong. 340. March 10, 1848.\\
\textsuperscript{31}Indeed, in the Joint Resolution Congress gave its consent for Texas to partition itself into as many as five states. Joint Resolution §2, supra note 28, at 798.
\end{tabular}
degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.\textsuperscript{32}

Space does not allow us to do more than merely catalogue them here.\textsuperscript{33} We present the alternate proposals for the Texas-New Mexico boundary from the most expansive conception of Texas to the least expansive.

- **Foote’s Proposal** – Mississippi Democrat Henry Foote proposed adopting the boundaries set by the Republic of Texas in 1836. The Rio Grande would have formed the entire boundary between Texas and New Mexico.\textsuperscript{34}

- **Douglas’s Proposal** – Stephen A. Douglas proposed setting the Rio Grande as Texas’ western boundary as far north as 34º (about 85 miles south of present day Albuquerque) at which point it would turn due east running along the 34\textsuperscript{th} parallel until it intersected the Red River. Presumably the area north of the 34\textsuperscript{th} parallel would become part of the New Mexico Territory.\textsuperscript{35}

- **McLernand’s Proposal** – Illinois Democrat John McLernand made a slight variation to Douglas’s proposal. McLernand would have run the proposed boundary from the Rio Grande at 34º north to the intersection of the Red River with 100º west, a line running slightly north of east.\textsuperscript{36}

\textsuperscript{32} *An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and all her Claims upon the United States, and to establish a territorial Government for New Mexico*, 9 Stat. 446. September 9, 1850. §2 created the New Mexico Territory. Id. at 447.

\textsuperscript{33} The interested reader may wish to consult Mark J. Stegmaier, *Texas, New Mexico, and the Compromise of 1850: Boundary Dispute & Sectional Crisis* 85-295 (Kent State 1996) or the original sources themselves. A map showing some of the proposals may be found at [http://en.wikipedia.org/wiki/File:Texas_proposed_boundaries.svg](http://en.wikipedia.org/wiki/File:Texas_proposed_boundaries.svg). Last visited January 19, 2011.

\textsuperscript{34} S. 55, 31\textsuperscript{st} Congress, January 16, 1850. President Polk made a similar proposal in his valedictory message to Congress. *Cong. Globe*, 30\textsuperscript{th} Cong. 2\textsuperscript{nd} Session, 5. (December 5, 1848). Foote’s bill (§55) would have also enabled the populace south of the Brazos to form itself into the state of Jacinto.

\textsuperscript{35} S. 170, 31\textsuperscript{st} Congress, March 25, 1850. I say presumably because Douglas bill created the New Mexico territory out of “territory … the United States acquired from Mexico[,]” (Id. §17) while “Texas cedes to the United States all her territory exterior to the limits to which she reduces herself[,]”. Id. at §33.

\textsuperscript{36} Amendment to H.R. 1, 31\textsuperscript{st} Congress, April 3, 1850. The 100\textsuperscript{th} meridian crosses the South Fork of the Red River about 40 miles north of the 34\textsuperscript{th} parallel. Texas would later assert that the North Fork of the Red River constituted its boundary. The North Fork crosses the 100\textsuperscript{th} meridian about 55 miles north of the South Fork’s crossing point. In 1892 the Supreme Court would hold that the South Fork constituted the true boundary. *United States v. Texas* 143 U.S. 621.
Clay’s Proposal – Henry Clay made what may appear to be the most radical proposal. It ran the boundary on a diagonal, southwesterly from the intersection of 100º west with the Red River to a point on the Rio Grande twenty miles upstream from El Paso.\(^{37}\)

Benton’s First Proposal – Thomas Hart Benton proposed a boundary that would have greatly curtailed Texas’ western claims. It set Texas’ boundary at 102º west as far north as the main fork of the Red River.\(^{38}\)

Benton’s Second Proposal – Benton also proposed a slight variation in which the 102\(^{nd}\) meridian remained Texas’ western boundary but only as far north as the 34\(^{th}\) parallel. At this point Benton’s proposal called for the boundary to turn slightly north of east so that it would terminate at the point where the Red River crosses the 100\(^{th}\) meridian.

The New Mexico Convention’s Proposal – The people of New Mexico were not idle while all of these proposals were being made in Washington. Encouraged by President Taylor’s endorsement for statehood,\(^{39}\) a convention met in Santa Fe in May 1850 to draft a state constitution for New Mexico. It made the boldest claims yet for New Mexico’s boundaries. It set the boundary at the 100\(^{th}\) meridian.\(^{40}\) Here is a map of the proposed boundaries.

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\(^{37}\) Amendment to S. 225, 31\(^{st}\) Congress. May 8, 1850. The present day Texas-New Mexico boundary turns due east from the Rio Grande at the 32\(^{nd}\) parallel, approximately 20 miles upstream from El Paso. Indiana Whig Caleb Smith had made a similar proposal a year earlier. H. R. 711, 30\(^{th}\) Congress, January 3, 1849.

\(^{38}\) S. 54, 31\(^{st}\) Congress, January 16, 1850. The northwestern corner of this state would have been very near to present day Amarillo, Texas. Benton was partly motivated by a desire to ensure that the trade route originating in Santa Fe and Taos on the west not be diverted from Missouri to Texas on the east. Stegmaier, supra note 33, at 14. Benton’s bill extended an offering to the South in the form of a promise of statehood to the part of Texas that would remain west of the 98\(^{th}\) meridian once it reached a population of 100,000. Of course, there was no need for Congress to make this offer to Texas since the Annexation Resolution had already authorized Texas to partition itself into as many as five states.


What would have been the consequences for the 2000 election if Congress had chosen one of these alternate Texas-New Mexico boundaries? In the analyses that follow we suppose that only this boundary and the placement of the present day Oklahoma panhandle would have been different\textsuperscript{41} and that all other western state boundaries would have been the same. Of course, this is a highly speculative assumption. Our concern here is not to predict how western boundaries would have been set had Congress set the Texas-New Mexico boundary differently. Nor are we making any conjectures about how voters in the affected areas would have voted in any of these alternate universes. Rather, our concern is to demonstrate the contingency of the history that actually happened in 1850 and its impact on the 2000 election.\textsuperscript{42}

We have identified seven alternate proposals for drawing the Texas-New Mexico boundary. Analysis common to 2000 election scenarios for each of these alternatives begins with the assumption that Gore won New Hampshire’s four electoral votes and that one electoral vote shifted from Oklahoma, a Bush state, to Massachusetts, a Gore state. As a result of these changes the baseline for all of these scenarios has Gore with 272 electoral votes and Bush with 266. Our task will be to allocate House seats and popular votes between New Mexico and Texas with the alternate boundaries considered herein.

Although the popular votes cast in the actual states of New Mexico and Texas must remain in one or the other of these states with a redrawn boundary between them that is not the case for all of their House seats. The actual states of New Mexico and Texas had 33 House seats between them following the 1990 census. However, there is no guarantee that the 33\textsuperscript{rd} and last of these House seats would have been awarded to either New Mexico or Texas with a boundary redrawn between them. Massachusetts and New Jersey were the states in line for the 436\textsuperscript{th} and 437\textsuperscript{th} seats in the actual House following the 1990 census. Oklahoma received the 434\textsuperscript{th} seat in the actual House. Shifting the Oklahoma panhandle to Texas demotes Oklahoma’s claim to a sixth seat from a claim to the 433\textsuperscript{rd} seat to a claim for the 437\textsuperscript{th} seat. In this scenario Massachusetts receives the 435\textsuperscript{th} seat and New Jersey is next in line, for the 436\textsuperscript{th} seat just in front of Oklahoma. As we will see, there are two alternate boundary proposals that reallocate population between the

\textsuperscript{41} Our analysis of all of the alternative proposals supposes that the Oklahoma panhandle would have become part of Texas or New Mexico. This methodological exception merits a brief discussion. The 1990 census counted 25,743 persons in the three counties that form the Oklahoma panhandle: Beaver, Cimarron, and Texas counties. Oklahoma received the next to last House seat apportioned following the 1990 census. Oklahoma would have lost its sixth and final House seat had these three counties been part of Texas rather than Oklahoma and this House seat would have been allocated to Massachusetts, a Gore state! (Spreadsheet on file with the author.) Thus, even this small change, which would have resulted from Congress having made the smallest compromise on the Missouri Compromise line, would have halved the electoral vote margin of the 2000 election as it actually happened. (These three counties cast 8,826 votes for Bush and 1,650 votes for Gore.)

\textsuperscript{42} Considering possible variations in other western state boundaries or further partitioning of Texas would introduce many more degrees of variation to the analysis thereby demonstrating the increased fragility of the history that actually happened.
alternate versions of New Mexico and Texas in such a way that New Jersey receives what had been the 33rd seat apportioned between the actual New Mexico and Texas.\textsuperscript{43}

Consequently, the scenarios that follow all begin at a baseline in which Gore has 252 electoral votes and Bush has 234.

<table>
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<tr>
<th></th>
<th>Bush</th>
<th>Gore</th>
</tr>
</thead>
<tbody>
<tr>
<td>By assumption</td>
<td>266</td>
<td>272</td>
</tr>
<tr>
<td>Deduct actual New Mexico</td>
<td>-5</td>
<td></td>
</tr>
<tr>
<td>Deduct actual Texas</td>
<td>-32</td>
<td></td>
</tr>
<tr>
<td>Deduct actual New Jersey</td>
<td></td>
<td>-15</td>
</tr>
<tr>
<td>Baseline</td>
<td>234</td>
<td>252</td>
</tr>
</tbody>
</table>

Table 3 - Electoral Vote Baseline

Foote’s S. 55 proposal made the Rio Grande the boundary between Texas and New Mexico. We make the following assumptions for this analysis.

- The Arizona Territory is not created out of the New Mexico Territory.
- The resulting state of New Mexico coincides with the present day state or New Mexico west of the Rio Grande plus all of the present day state of Arizona.
- Texas extends as far west as the Rio Grande and as far north as 37º north including the Oklahoma panhandle.

In this scenario we must also deduct the eight electoral votes belonging to the actual state of Arizona and George W. Bush before putting them and Arizona’s 1990 census count into the pot. This results in a revised baseline for this scenario only with Gore having 252 electoral votes and Bush 226.

We begin the analysis by assigning counties actually belonging to the actual states of New Mexico and Texas (including the Oklahoma panhandle) and in this case Arizona to one of the following:

- the alternate state of New Mexico
- the alternate state of Texas
- divided between the alternate states of New Mexico and Texas

Here is the result of that assignment for both the 1990 census count and the popular vote for Gore and Bush in 2000.

\textsuperscript{43} For a description of the Method of Equal Proportions currently used to apportion House seats see Michael L. Balinski and H. Peyton Young, \textit{Fair Representation: Meeting the Ideal of One Man, One Vote} 46-78 (Brookings 2d 2001) or Laurence F. Schmeckebier, \textit{Congressional Apportionment} 21-33 (Brookings 1941).
Table 4 - Population and Popular Vote Assignment, Foote S.55 Proposal, Step 1

Examination of the Equal Proportion priority lists for alternate New Mexico, alternate Texas, and actual New Jersey indicates that the 39 actual House seats apportioned among actual Arizona, actual New Mexico, and actual Texas are apportioned as follows in this alternate boundary scenario: alternate New Mexico 7 (recall that it includes all of actual Arizona), alternate Texas 32, with actual New Jersey not receiving an additional 14th House seat. 44

Not surprisingly, Bush’s margin of over 1 million popular votes in the counties entirely contained in alternate Texas far outstrips the total number of votes cast in the counties divided between alternate New Mexico and alternate Texas. Thus, we can definitively conclude that Bush wins alternate Texas’ 34 electoral votes.

In contrast, Bush’s popular vote margin in the counties entirely included in alternate New Mexico does not exceed the total popular vote cast for Gore in the counties divided between alternate New Mexico and alternate Texas. This is the one case in which we must analyze the popular vote below the county level to demonstrate with certainty a Bush victory in an alternate state of New Mexico.

Of the 311,489 votes cast in the seven counties split between alternate New Mexico and alternate Texas, 194,710 were cast in Bernalillo County, whose county seat is Albuquerque. Bush and Gore almost evenly split the 80% of Bernalillo County’s presidential votes cast east of the Rio Grande in alternate Texas. By itself this leaves too few Gore votes west of the Rio Grande for Gore to win alternate New Mexico. 45

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44 Spreadsheets for this and all alternate House seat apportionment schemes in this section and APPENDIX A on file with the author. Schmeckebier explicitly uses the term priority list. Id. at 8. Balinski and Young do not use this term.

45 Not surprisingly Bernalillo County classifies its election data according to a scheme that satisfies its real life political boundaries rather than the ones hypothesized here. Its election data is tallied by (1) votes cast at the precinct polling site, (2) early electronic votes, and (3) absentee votes. Each of these “precinct-level” tallies is complemented by legislative district assignment. Votes cast at a precinct polling site fall east or west of the Rio Grande according to the precinct map. Absentee and early ballots are tallied by legislative district but not by precinct. With the exception of the 10th and 16th legislative districts, absentee and early ballots can be placed east or west of the Rio Grande according to whether the precincts assigned to a legislative district all fall east or west of the River. New Mexico election data available on compact disk provided by New Mexico Secretary of State’s office. Bernalillo County precinct map provided by Bernalillo County Clerk’s office. Both on file with the author.
Bush Gore margin

| Bernalillo County allocated to alternate Texas | 75,848 | 75,351 |
| Bernalillo County allocated to alternate New Mexico | 17,506 | 21,988 |
| Alternate New Mexico, Step 1 | 830,609 | 733,887 |
| Alternate Mexico, Revised | 848,115 | 755,875 | 92,240 |
| Remaining unallocated between alternate New Mexico and alternate Texas | 58,022 | 62,774 |

Figure 1 – Popular Vote Assignment, Foote S.55 Proposal, Step 2

Reassembling the electoral vote for this scenario leads to a narrow 269-267 Bush victory! (There are two fewer electoral votes in this scenario since there are only 49 states.)

<table>
<thead>
<tr>
<th></th>
<th>Bush</th>
<th>Gore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baseline</td>
<td>234</td>
<td>252</td>
</tr>
<tr>
<td>Deduct actual Arizona</td>
<td>-8</td>
<td></td>
</tr>
<tr>
<td>Add alternate New Mexico</td>
<td>+9</td>
<td></td>
</tr>
<tr>
<td>Add alternate Texas</td>
<td>+34</td>
<td></td>
</tr>
<tr>
<td>Add actual New Jersey</td>
<td></td>
<td>+15</td>
</tr>
<tr>
<td>Result</td>
<td>269</td>
<td>267</td>
</tr>
</tbody>
</table>

Table 5 - Electoral Vote Reconstruction, Polk Proposal

Detailed analyses of each of the impacts of the remaining boundary proposals may be found in APPENDIX A. Each of these analyses makes the following assumptions:

- The Arizona Territory is created out of the New Mexico Territory as it was.
- The alternate states of New Mexico and Texas taken together coincide with the actual states of New Mexico and Texas plus the Oklahoma panhandle.
- The alternate states of New Mexico and Texas are divided by the alternate boundary proposal.

Bush defeats Gore in each of the alternate New Mexicos and alternate Texases and as a result he wins the electoral vote resulting from each of the other alternate Texas-New Mexico boundary proposals.

<table>
<thead>
<tr>
<th></th>
<th>Douglas</th>
<th>McLernand</th>
<th>Clay</th>
<th>Benton (first)</th>
<th>Benton (second)</th>
<th>NM Conv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bush EV</td>
<td>271</td>
<td>271</td>
<td>271</td>
<td>270</td>
<td>270</td>
<td>270</td>
</tr>
<tr>
<td>Gore EV</td>
<td>267</td>
<td>267</td>
<td>267</td>
<td>268</td>
<td>268</td>
<td>268</td>
</tr>
<tr>
<td>Bush margin</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 6 - Electoral Vote Summary, Other Boundary Proposals

On every one of the seven alternate boundary proposals considered Bush wins alternate New Mexico, enough to overcome the hypothetical Gore victory in New Hampshire underlying this analysis.
New Mexico (and Arizona) would have to wait more than 60 years to be admitted to
statehood. In 1854 the Gadsden Purchase added nearly 30,000 square miles of territory
to the United States. Congress quickly added the Gadsden Purchase to New Mexico
Territory and in 1862 Congress created the Arizona Territory out of the New Mexico
Territory.

When the 59th Congress convened in December 1905 it heard President Theodore
Roosevelt recommend that New Mexico and Arizona be admitted as one state. When
the House Committee on Territories held hearings specifically focused on jointure many
witnesses from Arizona explicitly expressed their opposition to joint statehood in terms
of fear of “Mexican” or “greaser” domination. Thanks to the efforts of Ohio Republican
Senator Joseph Foraker the final bill required each Territory’s electorate to approve joint
statehood.

On Election Day 1906 the Arizona electorate resoundingly rejected the offer of joint
statehood by a vote of 16,265 to 3,141. The thirteen thousand vote margin in Arizona
exceeded the smaller margin by which New Mexico’s voters had approved the offer. Four years later Congress finally offered separate statehood to New Mexico and Arizona
and they were admitted into the Union in 1912.

Had Al Gore won New Hampshire he would have owed his Electoral College victory in
part to the voters of Arizona who had soundly defeated jointure in 1906. In 2000
Arizona’s voters preferred George W. Bush to Al Gore by a margin of 96,311, more than
250 times larger than Gore’s miniscule margin of 366 in New Mexico.

46 See, generally, Robert W. Larson, New Mexico’s Quest for Statehood, 1846-1912
(New Mexico 1968).
47 10 Stat. 1031. June 30, 1854
48 Id. at 575. August 4, 1854
49 12 Stat. 664. February 24, 1863.
50 Theodore Roosevelt, 4 Presidential Addresses and State Papers and European
51 See, for example, the testimony of witnesses Harvey Shields and Roy Goodrich
Committee on the Territories Statehood for Arizona and New Mexico House Hearings
1906, Hearings January 16, 17, 18, 19, 20, 1906 75, 103 (GPO 1906) (Hereinafter
52 For Foraker’s amendment see Cong. Record 59th Cong. 1st Sess., 3591. March 9, 1906.
For the act see Omnibus Statehood Act §24, 34 Stat. 267, 278. June 16, 1906.
53 Larson, supra note 46, at 250. The vote in New Mexico was 26,195 to 14,735.
54 For the Enabling Act see 36 Stat. 557. June 20, 1910. For the New Mexico and Arizona
Statehood proclamations see, respectively, 37 Stat. 1723, January 6, 1912, and Id. at
1728, February 14, 1912.)
<table>
<thead>
<tr>
<th>Electoral Votes</th>
<th>Bush</th>
<th>Gore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual result</td>
<td>538</td>
<td>271</td>
</tr>
<tr>
<td>Gore wins NH</td>
<td>4</td>
<td>267</td>
</tr>
<tr>
<td>Less NM</td>
<td>5</td>
<td>267</td>
</tr>
<tr>
<td>Less AZ</td>
<td>8</td>
<td>259</td>
</tr>
<tr>
<td>Bush wins Combined State</td>
<td>11</td>
<td>270</td>
</tr>
</tbody>
</table>

**Table 7 - Impact of Joint Arizona-New Mexico Statehood on 2000 Election**

If the voters of Arizona accepted Congress’s offer of joint statehood with New Mexico George W. Bush would have won the combined state’s 11 electoral votes giving him a four vote margin in an Electoral College with 536 electors.\(^{55}\)

But, of course, none of these alternate histories actually happened. New Mexico and Arizona are distinct states and Congress enacted a statute setting the Texas-New Mexico boundary at 103° west of Greenwich.\(^{56}\) As a result Al Gore won the actual state New Mexico defined by that boundary by the slim margin of 366 votes. Or did he?

In 1890 Congress enacted the Oklahoma Organic Act creating the Oklahoma Territory out of the western half of what was then known as the Indian Territory combined with what was then known as the Public Land Strip, i.e. the present day Oklahoma panhandle.\(^{57}\) The statute defined the Public Land Strip as being bounded on the west by New Mexico.\(^{58}\) Since New Mexico was bounded on the east by the 103\(^{rd}\) meridian this meant that the Public Land Strip was bounded on the west by the same line, just like Texas.

Or so one would think. However, even a cursory examination of a map of the junction of New Mexico, Oklahoma, and Texas shows that the New Mexico-Oklahoma boundary is not an extension of the long north-south boundary between Texas and New Mexico.

It took eight years for Congress to get around to authorizing the marking of Texas’ 1850 boundaries.\(^{59}\) A year later John Clark made the survey largely using land based

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\(^{55}\) The post-1990 census apportionment allocated six House seats to Arizona and three to New Mexico. A combined state of Arizona and New Mexico would have been allocated nine seats in a 435 seat House following the 1990 census. (Spreadsheet on file with the author.) Congress set the size of the House at 435 following the 1910 census. 37 Stat. 13, August 11, 1911. This was the minimal size for a new House in which no state would lose any seats following reapportionment. Had a combined state of Arizona and New Mexico had the same 1910 census count as the two Territories 435 would still have been the minimum size so that no state would lose any seats.

\(^{56}\) 9 Stat. 446, 446-7, §§1-2.

\(^{57}\) 21 Stat. 82. May 2, 1890.

\(^{58}\) Id. at 82. Nothing in the Oklahoma Enabling Act changed this boundary. 34 Stat. 267, June 16, 1906.

trigonometric methods rather than astronomical methods, which would have been more accurate but more time consuming. As a result the long north-south boundary between Texas and New Mexico is two to three miles west of the 103rd meridian! In 1903 Arthur D. Kidder, the U. S. examiner of surveys, described Clark’s line as “perhaps the most incorrect of any land line in the United States.”

In 1891 Congress reaffirmed the Clark line as the boundary between Texas and New Mexico. Nevertheless, when New Mexico submitted its state constitution for congressional approval in 1910 that document declared that the state’s boundaries began at the point where the thirty-seventh parallel of north latitude intersects the one hundred and third meridian west from Greenwich; thence along said one hundred and third meridian to the thirty-second parallel of north latitude.

Congress immediately responded by reaffirming the Clark line and declaring that any provision of the New Mexico Constitution to the contrary “shall be of no force or effect.” Six months later Congress made this a condition of New Mexico’s admission to statehood.

Texas voted for native son George W. Bush in 2000 by a margin of better than 2-to-1. The ten counties on Texas’ long north-south border with New Mexico voted even more overwhelmingly for Bush, by 19,739 to 5,547 or more than 3½-to-1. Nowhere was this truer than in the two Texas towns located in the Clark strip: Texline and Farwell. They voted for Bush by a margin of better than 6-to-1.

<table>
<thead>
<tr>
<th>Town</th>
<th>County/Precinct</th>
<th>Bush</th>
<th>Gore</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texline</td>
<td>Dallam/1</td>
<td>249</td>
<td>32</td>
<td>217</td>
</tr>
</tbody>
</table>

60 Ralph H. Brock, “Perhaps the Most Incorrect of Any Land Line in The United States”: Establishing the Texas–New Mexico Boundary Along the 103rd Meridian, 109 Southwestern Historical Quarterly 431, 455 (April 2006). Brock gives a very complete account of Clark’s survey of the Texas-New Mexico boundary and subsequent challenges to it.

61 Clark did not even survey the boundary between the 33rd and 34th parallels, a gap of 69 miles. Id. at 456.


63 26 Stat. 948, 971. March 3, 1891. This provision was buried 24 pages into a 41 page, end of session, omnibus appropriations bill!

64 New Mexico Const. Art. I.

65 Joint Resolution Reaffirming the boundary line between Texas and the Territory of New Mexico. 36 Stat. 1454. February 16, 1911.

66 Joint Resolution to admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States. 37 Stat. 39, §2. August 21, 1911.
Table 8 - Impact of Clark Strip

If Al Gore had won New Hampshire John Clark’s surveying errors in 1859 would have cost George W. Bush the 2000 election!

3. THE IMPACT OF CENSUS AGING

Had Gore won New Hampshire for a 271-267 electoral vote victory, it is likely that many Bush partisans would have soon come to realize that Bush would have won the election had it been based on the House apportionment based on the 2000 census that was taken on April 1 of that year.

The tiny hamlet of Bledsoe is also in the Clark Strip. The 1990 census counted 125 souls in Bledsoe. The 2000 census did not count Bledsoe. Bledsoe forms a part of Bailey County’s 4th precinct which cast 143 votes for Gore and 137 for Bush. Even in the unlikely event that Bledsoe cast 143 for Gore and none for Bush there would still not be enough to tip the balance back in Gore’s favor.


Ralph Brock cautions that Bush was a very popular governor in Texas and the voters in the Clark Strip might not have voted so overwhelmingly for Bush had they been citizens of New Mexico rather than Texas. Once again it is worthwhile to note that our purpose here is not to predict what would have happened had the past unfolded differently. Instead, it is to demonstrate the fragility of what actually did happen.

Had Gore defeated Bush 271-267 he would have owed half of his four electoral vote margin to undercounting in the 1990 census. Had these undercounts been corrected California, Georgia, and Montana would have each gained one House seat and Oklahoma, Pennsylvania, and Wisconsin would have each lost one House seat. Barry Edmonston, Using U.S. Census Data to Study Population Composition 77 North Dakota Law Review 711, 729 (2001) citing Jeffrey S. Passel, What Census Adjustment Would Mean, Population Today, June 1991, at 7

<table>
<thead>
<tr>
<th>Bush States</th>
<th>Gore States</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>Net Change 2000 to 2004</td>
</tr>
<tr>
<td>Arizona</td>
<td>+2</td>
</tr>
<tr>
<td>Colorado</td>
<td>+1</td>
</tr>
<tr>
<td>Florida</td>
<td>+2</td>
</tr>
<tr>
<td>Georgia</td>
<td>+2</td>
</tr>
<tr>
<td>Indiana</td>
<td>-1</td>
</tr>
<tr>
<td>Mississippi</td>
<td>-1</td>
</tr>
<tr>
<td>Nevada</td>
<td>+1</td>
</tr>
<tr>
<td>North Carolina</td>
<td>+1</td>
</tr>
<tr>
<td>Ohio</td>
<td>-1</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>-1</td>
</tr>
<tr>
<td>Texas</td>
<td>+2</td>
</tr>
<tr>
<td>Total</td>
<td>+7</td>
</tr>
</tbody>
</table>

Table 9 - 2000 Census Impact on Electoral Votes

It would be unrealistic to suppose that a census could be taken on April 1 and all state reapportionment work completed at the federal and most importantly at the state level in time for an election seven months later. Had a Gore/Kerry (or Gore/Shaheen) ticket carried New Hampshire Bush supporters would have been left to gnash their teeth and bemoan the fact that the census hadn’t taken place a year or two earlier.

A quarter century before the Bush-Gore election, Judith Best noted census aging impacts of four, ten, and four electoral votes respectively on the elections of 1940, 1948, and 1960.71 From this data she concluded that “The effect [of decennial reapportionment] on presidential elections is apparently also slight.”72

Joy McAfee, a post-Bush-Gore defender of the Electoral College asserts

Critics argue that states that receive growth before a census yet after an election year will not be truly represented in the election. The population growth in a state is a valid concern because population trends are inevitable and could have an effect upon the number of electors a state receives. The basis for population representation is a vital part of a republic with each state represented in the federal government according to its population. If this is a change that critics urge hampers fair representation, these critics should also try to change the number of years between a census instead of blaming the Electoral College for the unaccounted growth of population in the states.73

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71 Best Case, supra note 2, at 127-8. Best makes no mention of the election of 1876 in this analysis.

72 Id. at 128.

73 Joy McAfee, Should the College Electors Finally Graduate? The Electoral College: an American Compromise From Its Inception To Election 2000, 32 Cumberland Law Review 643,652 (2002). (Emphasis added. Footnote omitted.) The first sentence should
Thanks to the interim population estimates made by the Census Bureau we can project the outcome of a Gore/Kerry versus Bush/Cheney race based on interim census data for each of the years between 1990 and 2000.\textsuperscript{74}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{fig2.pdf}
\caption{Gore/Kerry Margin versus Bush/Cheney Based on Year by Year Interim Census Data}
\end{figure}

In our hypothetical scenario the Gore/Kerry ticket wins for all census data prior to 1994 while the Bush/Cheney ticket defeats them for all census data after 1994.\textsuperscript{75} An election based on a 1994 interim census ends in an Electoral College dead heat.


\textsuperscript{75} While wrangling with the problem of reapportioning the House for the first time the second Congress considered taking a census in 1795 that would have been used to reapportion the House of Representatives that convened in 1797. See 1 \textit{House Journal} 489 (January 6, 1792) and 3 \textit{Annals of Congress} 331 (January 24, 1792). For a discussion of a 1796 proposal for an interim census to apportion direct taxes fairly see David P.
House seats are apportioned in integer numbers. Therefore a state’s apportionment must be a step function that changes discontinuously with respect to time. Consequently, the Electoral College outcome must also be a step function that changes discontinuously with respect to time. So long as there is any lag in apportionment basis there is no way to avoid the impact of census aging, even if the census is taken annually.

The following tables show the states whose apportionment would have varied with annual reapportionments between 1990 and 2000.

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>6</td>
<td>7</td>
<td>7</td>
<td>7</td>
<td>7</td>
<td>7</td>
<td>7</td>
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<td>Colorado</td>
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<td>Mississippi</td>
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<td>4</td>
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<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>North Carolina</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>Nevada</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>3</td>
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<tr>
<td>Ohio</td>
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<td>19</td>
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<td>18</td>
<td>18</td>
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<tr>
<td>Oklahoma</td>
<td>6</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Texas</td>
<td>30</td>
<td>30</td>
<td>30</td>
<td>30</td>
<td>31</td>
<td>31</td>
<td>31</td>
<td>31</td>
<td>32</td>
<td>32</td>
<td>32</td>
</tr>
<tr>
<td>Total House Seats, these states</td>
<td>131</td>
<td>131</td>
<td>131</td>
<td>132</td>
<td>133</td>
<td>134</td>
<td>134</td>
<td>135</td>
<td>136</td>
<td>137</td>
<td>138</td>
</tr>
</tbody>
</table>

Table 10 - Bush States with Variable House Apportionment Based on Annual Census (Estimates), 1990-2000


On June 8, 1844, just before voting on the treaty to annex Texas, the Senate briefly considered and then rejected a resolution from the Massachusetts legislature calling for a constitutional amendment that would apportion the House on just the number of free persons in each state. This proposal called for a census to be taken within two years of the amendment’s ratification. (Cong. Globe, 28th Cong., 1st Session, 652.)

On February 5, 1866 future presidential candidate James Blaine introduced a bill (H. R. 220) calling for a special census to be held no later than October 1 of that year. It was read twice and referred to the Select Committee on Reconstruction. (Cong. Globe, 39th Cong., 1st Session, 644.)
Table 11 - Gore States with Variable House Apportionment  
Based on Annual Census (Estimates), 1990-2000

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>California</td>
<td>52</td>
<td>52</td>
<td>53</td>
<td>52</td>
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<td>Connecticut</td>
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<td>155</td>
<td>154</td>
<td>153</td>
<td>152</td>
<td>152</td>
<td>151</td>
<td>150</td>
<td>149</td>
<td>148</td>
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</table>

The fact that California and Montana have House apportionments that increase and then decrease (and then increases again in the case of California) suggests that there is no guarantee that the Electoral College outcome will shift from one candidate to the other only once over a decade.

4. ELBRIDGE GERRY’S SUSPICIONS AND ELECTORAL COLLEGE ENTITLEMENT

Every twenty years the handiwork of Elbridge Gerry, fifth Vice-President, member of the first and second House, and Constitutional Convention refusenik,\(^{76}\) comes into play in a way that could determine the outcome of the electoral vote. Thanks to Elbridge Gerry presidential elections in years ending in a 2, e.g. 1792 and 2012, are contested with an Electoral College based on the newly apportioned, incoming House of Representatives rather than the previously apportioned, outgoing House. It didn’t have to be that way.

The Elector clause of Article II states

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.\(^{77}\)

---

\(^{76}\) Madison recorded Gerry’s choice not to sign the Constitution. 2 Farrand, note 15, at 649. (September 17, 1787) He also recorded Gerry’s September 17 speech on the Convention floor explaining his reasons for not signing the document. Id. at 647-8. Two months prior to the Massachusetts ratifying convention Gerry explained that “there is no adequate provision for a representation of the people” and “The Constitution proposed has few, if any federal features, but is rather a system of national government.” Hon. Mr. [Elbridge] Gerry’s objections to signing the National Constitution (November 3, 1787), in Herbert J. Storing (with the assistance of Murray Dry), 2 The Complete Anti-Federalist 6-7 (Chicago 1981) and Jonathan Elliot (ed.) 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 493 (2d 1836).

\(^{77}\) U.S. Const. Art. II, §1, cl. 2.
To how many electors would each state be entitled for the election of 1792? Would Rhode Island\textsuperscript{78} be entitled to three electors based on its one member in the current House then in session, or to four electors based on its two members in the House that would convene in 1793?

The \textit{Elector} clause first appears in the Convention records for September 4, 1787 in the report from the Committee on Postponed Matters.

\begin{quote}
Each State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature.\textsuperscript{79}
\end{quote}

It underwent only minor stylistic changes over the next 13 days\textsuperscript{80} and there was no recorded debate whether the number of electors to which states were entitled was forward looking and based on a newly apportioned, incoming House, or backward looking and based on the outgoing House. During the Convention’s final fortnight there was simply too much else to resolve about filling the presidency.\textsuperscript{81}

Nor during all of the debate about congressional selection of the President was there any recorded debate about whether the incoming Congress or the outgoing Congress would make the choice. Perhaps the delegates simply assumed that it would be the incoming Congress that selected the President. That was the model in all of the states whose legislature chose their governor.\textsuperscript{82}

\textsuperscript{78} I use Rhode Island as an example because it was the only one of the original states whose House representation remained constant across the various reapportionment proposals confronting the Congress at the same time it was also considering the Presidential Succession Act of 1792 that will be discussed presently.

\textsuperscript{79} 2 Farrand, \textit{supra} note 15, at 497.

\textsuperscript{80} For the text provided to the Committee of Style and Arrangement on September 10 see Id. at 572. For the Committee’s minor revisions reported back on September 12 see Id. at 597.

\textsuperscript{81} Most prominently the details of the contingency election in case the Electoral College failed to produce a winner.

\textsuperscript{82} The following states explicitly mandated that the new legislature choose the governor.

\begin{itemize}


\item New Jersey: “That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the
As James Madison noted, “The text of the Constitution was not decisive” on the question of which House should serve as the basis of apportionment. Indeed, the Constitution did not mandate that Congressional terms and Presidential terms expire on the same day. That was a question taken up by the first Congress.

The first Congress convened on March 4, 1789. The House achieved a quorum on April 1, the Senate on April 6. With a quorum of both chambers in place the Congress was finally able to elect a President pro tempore “for the sole purpose of opening and counting the votes for President of the United States” as required by the Constitution. With that bit of housekeeping out of the way the two chambers were able to meet in joint session to certify the election of George Washington as President and John Adams as Vice President of the United States. They took their oaths of office on April 30.

A year later Congress faced the issue of determining

Colony, to be Governor for one year[.]” N.J. Const. (1776) Art. VII, 5 Thorpe, supra, at 2596.

- North Carolina: “[T]he Senate and House of Commons, jointly at their first meeting after each annual election, shall by ballot elect a Governor for one year[.]” N.C. Const. (1776) Art. XV, 5 Thorpe, supra, at 2791.

- South Carolina: “That as soon as may be after the first meeting of the senate and house of representatives, and at every first meeting of the senate and house of representatives thereafter, to be elected by virtue of this constitution, they shall jointly in the house of representatives choose by ballot from among themselves or from the people at large a governor and commander-in-chief.” S.C. Const. (1778) Art. III. 6 Thorpe, supra, at 3249.

The following states had constitutions that implied that the new legislature chose the Governor.

- Delaware: The president’s term continues “until the sitting of the next general assembly and no longer[.]” Del. Const. (1776) Art. 7, 1 Thorpe, supra, at 563.

- Pennsylvania: “The president and vice-president shall be chosen annually by the joint ballot of the general assembly and council, of the members of the council.” Penna. Const. (1776) sec. 7, 5 Thorpe, supra, at 3087.

Virginia’s constitution made no specification.

85 Id. at 100.
86 Id. at 16.
87 Id. at 17.
88 U.S. Const. Art. II, §1, cl. iii.
89 1 Annals of Congress 17.
when, according to the Constitution, the terms for which the President, Vice President, Senators, and Representatives have been respectively chosen, shall be deemed to have commenced. 90

The joint committee formed to study the topic reported back two weeks later that

That the terms for which the President, Vice President, Senators, and Representatives, of the United States, were respectively chosen, did, according to the constitution, commence on the 4th day of March, 1789; and so the Senators of the first class, and the Representatives, will not, according to the constitution, be entitled, by virtue of the same election by which they hold seats in the present Congress, to seats in the next Congress, which will be assembled after the 3d day of March, 1791; and further, that, whenever a vacancy shall happen in the Senate or House of Representatives, and an election to fill such vacancy, the person elected will not, according to the constitution, be entitled, by virtue of such election, to hold a seat beyond the time for which the Senator or Representative in whose stead such person shall have been elected, would, if the vacancy had not happened, have been entitled to hold a seat. 91

The Senate agreed to the report with no recorded debate. 92 In the House an unidentified member argued

that the Constitution was explicit in declaring that the members of the House should be chosen every second year, plainly implying that they were elected for two years; … the State of North Carolina will not, in all probability, be represented in next Congress; as the circumstances of that State do not admit of their assemblies being convened more than once a year. 93

After a short debate the House agreed to the report “and ordered a bill to be prepared in conformity thereto.” 94 No such bill would be forthcoming from the first Congress. 95

Issues relating to presidential succession were left to the next Congress. On November 24, 1791 the Senate began what would become a four month ordeal working on the apportionment of the House following the receipt of census data. Six days later the Senate passed an initial version of the Presidential Succession Act. 96 It did not address

90 1 House Journal 207 (April 30, 1790). 1 Senate Journal 136 (May 3, 1790).
91 Id. at 140-1. (May 14, 1790).
92 2 Annals of Congress 1011 (May 14, 1790).
93 Id. at 1637. (May 18, 1790). Given the North Carolina focus the argument was probably made by Hugh Williamson who is recorded as having opposed the report.
94 Id. at 1638. There is no record that anyone realized that even slightly staggered House terms would create immense difficulties for reapportioning the House.
95 The day before the term ended the President signed a bill declaring that “after the third day of March next, the first annual meeting of Congress shall be on the fourth Monday of October next.” Act of March 2, 1791, 1 Stat. 198.
96 1 Senate Journal 346, November 30, 1791.
the question of whether the Electoral College for the upcoming presidential election should be based on the outgoing House or the incoming House.97

The House took up the Presidential Succession Act in the middle of February, by which time it had been embroiled in the apportionment problem for over three months. At that time the House narrowly backed a 112 seat apportionment that was perceived as favoring the South while the Senate narrowly backed a 105 seat apportionment plan that was perceived as favoring the North.

On February 13 an unidentified member moved that the upcoming presidential election be based on the outgoing House.98 After this motion was defeated

Mr. Gerry moved to insert a clause which specified that “the Electors shall be equal to the number of Senators and Representatives to which the several States may by law be entitled at the time when the President and Vice President thus to be chosen should come into office.”99

Only William Vans Murray from Maryland made a recorded comment, one that reflected many of the concerns that Gerry had expressed at the Philadelphia Convention.100

[H]e was in favor of the whole, both the proposition and the proviso: the first meditates a more equal representation of the wishes of the people of America in the election of the two great officers of the State; the proviso guards against a confusion which might take place without the provision. The present representation in Congress is by no means equal; the States in their conventional deliberation, produced the present proportion of Representatives more from compromise than from authenticated data; no census had then measured to the public the proportions of population which one State bore to another; and Representatives, including Senators and Electors of President and Vice President, being the same in number, and the scale of Representatives being unfounded in facts and evidence, the inequality, which is evident, is not to be wondered at.101

The Annals records that the motion was adopted “with very little objection.”102 There might have been very little argument against the motion, but as Madison wrote to Pendleton “the Northern interest was strongly in favor of the latter interpretation”103

97 See §1 of the bill. Id.
98 3 Annals of Congress 405.
99 Id. (Emphasis added.)
100 For Gerry’s concerns over the initial apportionment of the House and his proposal that direct taxes initially be apportioned according to House members rather than populations 1 Farrand, supra note 15, at 600-3 (July 13, 1787) and 2 Id. at 356 (August 20, 1787).
101 Id. at 406.
102 Id. at 405.
103 Madison to Edmund Pendleton, February 21, 1792, 14 Madison Papers, supra note 83, at 435.
(basing the Electoral College on the outgoing House). Gerry’s amendment passed by a vote of 29-21\textsuperscript{104} revealing a fissure at the Mason-Dixon line.

<table>
<thead>
<tr>
<th></th>
<th>Aye</th>
<th>Nay</th>
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<tbody>
<tr>
<td>North</td>
<td>10</td>
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<tr>
<td>South</td>
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<td>3</td>
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<tr>
<td>Total</td>
<td>29</td>
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Table 12 - Northern/Southern Voting on Gerry's Amendment

This break down suggests that North/South sectional interests reflecting the struggle over apportionment strongly influenced many votes. Nearly all of the southern Representatives, viewing the 112 seat plan as favorable to their region, voted in favor of basing the Electoral College on the incoming House.\textsuperscript{105} A majority of the northern Representatives, viewing the 112 seat plan as unfavorable to their region, voted against basing the Electoral College on the incoming House. Had four more of their northern colleagues not seen the “intrinsic rectitude”\textsuperscript{106} of the forward looking Electoral College, the Presidential Succession Act of 1792 might have been passed mandating a retrospective Electoral College based on the outgoing House of Representatives and that provision might still be in the statute books today.\textsuperscript{107}

5. ALIENS WOULD HAVE COST BUSH THE ELECTION!

If Al Gore won New Hampshire then *aliens would have cost George W. Bush the 2000 election!* Not aliens voting illegally.\textsuperscript{108} Not aliens illegally present within our borders. Not space aliens. But aliens counted in the 1990 census as required by the constitution!\textsuperscript{109}

\textsuperscript{104} 1 *House Journal* 508.

\textsuperscript{105} Delaware representative George Read’s negative vote can be explained as a vote against diluting Delaware’s strength in the Electoral College from three out of 99 to three out of 142 (or 135). The other two nay votes from south of the Mason-Dixon line came from South Carolina whose third voting Representative voted for Gerry’s amendment.

\textsuperscript{106} Madison described Gerry’s amendment as having “intrinsic rectitude.” Madison to Edmund Pendleton, February 21, 1792, 14 *Madison Papers, supra* note 83, at 435

Had four members shifted their votes from Aye to Nay Speaker Jonathan Trumbull would have come out of his chair to vote. Presumably, he would have joined his four colleagues from Connecticut and voted “Nay”.

\textsuperscript{107} The Senate approved Gerry’s amendment without a roll call vote being taken. 1 *Senate Journal* 393 (February 20, 1792).

Gerry’s amendment is still on the books as 3 U.S.C. 3. Had Gerry’s amendment been defeated it is possible that the forward-looking Electoral College would have been mandated in an enhanced version of the Twentieth Amendment. In the absence of an enhanced Twentieth Amendment Gerry’s amendment can be statutorily repealed in favor of an Electoral College based on the outgoing House.

The constitution’s original representation clause from Article I, section 2, reads:

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.\(^{110}\)

in *Perez v. Brownell*, 356 U.S. 44, 77 n.38 (1958). See also *Minor v. Happersett*, 88 U.S. 162, 177 (1874), (holding that the Privileges and Immunities clause of the Fourteenth Amendment does not guarantee women the right to vote.)

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

According to Keyssar, 30 states granted some form of alien suffrage between 1870 and 1926. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* Table A.12 357-9 (Basic 2000). Several forerunners of the 12th amendment contained provisions that explicitly excluded aliens from voting for presidential electors. See 11 *Annals of Congress* 603, February 19, 1802; 13 Id. at 381, October 20, 1803, proposal of Benjamin Huger.

\(^{109}\) As late as 1969 New York State’s constitution excluded aliens from the apportionment basis for its legislature. See N. Y. Const. Art. III, §5-a (“For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons.”) Chief Justice Warren noted this exclusion without comment in his opinion in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 641, 642 (1964). Two years later Justice Brennan wrote:

Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. *Burns v. Richardson*, 384 U.S. 73,92 (1966).

He was, of course, referring to apportionment of state legislatures rather than the House of Representatives.

\(^{110}\) U.S. Const. Art. I, §2, cl. iii.
When the Constitutional Convention drafted this text it never considered excluding aliens from the apportionment population.\textsuperscript{111}

Section 2 of the 14\textsuperscript{th} amendment eliminated the notorious three-fifths clause from the apportionment basis.\textsuperscript{112} When the 39\textsuperscript{th} Congress drafted the 14\textsuperscript{th} amendment in 1866 it also considered basing apportionment on the number legal voters in each state rather than the number of inhabitants (excluding Indians not taxed.)\textsuperscript{113} Realizing that such a change

\begin{itemize}
  \item \textsuperscript{111} Prior to the ratification of the Fourteenth Amendment national citizenship depended on state citizenship. Thus, it would have been remarkable for the Framers to allow states the power to determine the basis of their own representation in the House! Indeed, the notes from the Convention employ the term “alien” only once. During a discussion of qualifications for the Senate, future Chief Justice Oliver Ellsworth urged that aliens not be disqualified from serving in the Senate. 2 Farrand, \textit{supra} note 15, at 235 (August 9, 1787).
  \item \textsuperscript{112} U.S. Const. Amend. XIV, §2. (“Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”)
  \item \textsuperscript{113} On December 5, 1865 Representative Thaddeus Stevens (Rep-PA) introduced a proposed constitutional amendment stating that

  
  \begin{quote}
  Representatives shall be apportioned among the States which may be within this Union according to their respective legal voters; and for this purpose none may be named as legal voters who are not either natural-born citizens or naturalized foreigners. Congress shall provide for ascertaining the number of said voters. A true census shall be taken at the same time with the regular census. (\textit{Cong. Globe}, 39\textsuperscript{th} Cong., 1\textsuperscript{st} Session, 10)
  \end{quote}

  
  Similar amendments were proposed in terms of “voters” (Id. at 9) and “electors” (Id. at 10) respectively. These amendments were proposed as the newly convened 39\textsuperscript{th} Congress began deliberation on what would become the 14\textsuperscript{th} amendment. For the evolution of section 2 of that amendment see, generally, Mark S. Scarberry, \textit{Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District}, 60 Alabama Law Review 783 (2009).

  Stevens’ proposed amendment clearly limited suffrage to citizens, in contrast to Congress’s then current practice of not limiting the right to vote to citizens in newly formed territories. For example, the act creating the Nevada Territory gave the right to vote in the first territorial election (and the right to hold office) to

  
  \begin{quote}
  every free white male … above the age of twenty-one years … \textit{Provided}, That the right of suffrage and of holding office shall be exercised only by citizens of the United State \textit{and those who have declared on oath their intention to become such}. (\$5 Act of March 2, 1861, 12 Stat. 209, 211. Emphasis added.)
  \end{quote}

  The acts creating the Dakota Territory (\$5 Act of March 2, 1861, 12 Stat. 239,241) and the Montana territory (\$5 Act of May 26, 1864, 13 Stat. 85, 87-88) made similar provisions offering the franchise to citizens and those intending to become citizens. In
would reduce their states’ representation in the House, the Congressional leadership from
the immigrant-laden northeast quickly withdrew the proposal and reinserted text
paralleling the original Representation clause of Article I.

These decisions to include census-counted aliens in the apportionment basis impacted 16
House seats distributed among 12 states following the 1990 census. The most dramatic
contrast, the act creating the Idaho Territory offered the franchise to all free white male
inhabitants at least 21 years of age. (See §5 Act of March 3, 1863, 12 Stat. 808,810.) The
Wyoming Organic Act granted the franchise to all male inhabitants age 21 or older regardless of race or color who were citizens of the United States or had declared there
intention to become a citizen. (§5 Act of July 25, 1868, 15 Stat. 178, 179-180) (The act
creating the Colorado Territory limited the franchise to free white male citizens at least
21 years of age including “those recognized as citizens by the treaty with Mexico.” §5
Act of February 28, 1861, 12 Stat. 172, 173.) Each of these acts granted the territorial
legislature the power to specify suffrage in subsequent elections.

Future Speaker of the House and Republican presidential candidate James G. Blaine
raised the most detailed objections. He informed the House that

The ratio of voters to population differs very widely in different sections, varying
in the States referred to from a minimum of nineteen percent. to a maximum of
fifty-eight percent., and the changes which this fact would work in the relative
representation of certain States would be monstrous. (Cong. Globe, 39th Cong., 1st
Session, 141. Percentages italicized in original. Emphasis added to monstrous clause.)

Blaine concluded that “Basing representation on voters – unless Congress should be
empowered to define their qualifications – would tend to cheapen suffrage everywhere.”
(Id.) Blaine’s side won the argument.

On January 22, 1866 Republican Samuel Shellabarger of Ohio, a member of the Joint
Committee on Reconstruction, told the House

It has been insisted that “citizens of the United States” and not “persons” should
be the basis of representation and apportionment. These words were in the
amendment as I originally drew it and introduced it, but my own judgment was
that it should be “persons,” and to this the committee assented. … [T]he
committee has adhered to the Constitution as it is, proposing to add to it only so
much as is necessary to meet the point aimed at. Id. at 359.

Apportionment spreadsheets on file with the author. Citizen/alien data taken from U.S.
Department of Commerce, Bureau of the Census, Economics and Statistics
Administration, 1990 Census of Population, Social and Economic Characteristics,
United States (1990 CP-2-1) 173-9, Table 143, “Nativity, Citizenship, Year of Entry,
Area of Birth, and Language Spoken at Home”, (Available at
Census-counted alien impact on apportionment was even greater following the 2000
census. It impacted 20 seats distributed among 14 states. (Spreadsheet on file with the
impact was on California which received five additional House seats as a result. The following table presents all of the states impacted by changing the apportionment basis for House seats from all census counted persons to only census counted citizens.

<table>
<thead>
<tr>
<th>Bush States Apportionment Basis</th>
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<tr>
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<td>-------</td>
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</tr>
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<td>23</td>
</tr>
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<td>Texas</td>
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</tr>
<tr>
<td>Ohio</td>
<td>19</td>
</tr>
<tr>
<td>Total</td>
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</table>

Table 13 – States Impacted by Changing House Apportionment Basis from All Census Counted Persons to Citizens Only, Post-1990 Census

Of course, electoral votes are impacted to exactly the same extent. The net impact of these changes is that four electoral votes would shift from Gore to Bush if the House had been apportioned on citizens only rather than all persons counted in the census. In an election as close as the one hypothesized here, that could be enough to tip the balance from one candidate to the other.117

author.) Unfortunately, the 2010 census did not include any questions concerning citizenship status. See infra note 123.

117 In the middle of September 2008, just before the financial meltdown began in earnest, the Obama-McCain race appeared to be very close. On September 19, 2008 the website fivethirtyeight.com projected a 3.2% chance of a dead heat in the Electoral College. (http://www.fivethirtyeight.com/search/label/12th%20amendment, last visited January 19, 2011.) One very possible outcome would have been for Obama to carry the 22 states won by either Gore in 2000 or Kerry in 2004 plus Colorado for a 273-265 electoral vote win over McCain. Had that been the outcome then the 2008 race would have also turned on the inclusion of aliens in the apportionment basis for the House. Changing the apportionment basis from all census-counted persons to just citizens would have impacted 20 seats distributed among 14 states following the 2000 census. (Spreadsheet on file with the author.) The net impact on the Obama-McCain race hypothesized here would have been to shift five electoral votes from Obama to McCain thereby turning a 273-265 Obama victory into a 270-268 McCain victory.
Whether aliens should be counted in the House apportionment basis is a subject far beyond the scope of this study.\footnote{118} Under our current constitutional scheme aliens are counted in the House apportionment basis and, consequently, in the apportionment basis for the Electoral College.\footnote{119}

The 2010 census counted just over 308 million persons in the 50 states for an average House district size of 708,377 following the next 435 seat apportionment. For the sake of argument, we use 700,000 as the actual average district size. Consider two states ALPHA and OMEGA. The census counts 5.6 millions persons in ALPHA all of whom are citizens. OMEGA’s population is 6.3 million of whom 5.6 million are citizens and 700,000 are aliens. OMEGA’s 5.6 million citizens have exactly the same proportion of voting age population as ALPHA’s.

As a result of the census count ALPHA receives 8 House seats and 10 electoral votes while OMEGA receives one more of each. In the two and a half years between Census day 2010 and election day 2012 the populations of ALPHA and OMEGA grow in unison and their alien populations remain at the same levels. On election day an equal number of voters turn out in ALPHA as in OMEGA. ALPHA casts its 10 electoral votes for the Stripe Party candidate while OMEGA casts its 11 electoral votes for the Solid Party candidate.

Defenders of the Electoral College recognize that the constant Senatorial bonus of two additional electoral votes per state dilutes the power of large states relative to small states.\footnote{120} Indeed, this is cited as a means of protecting the small states in our federal

\footnote{118} For an introduction to this topic see, generally, Robert W. Bennett, \textit{Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy}, 94 Northwestern University Law Review 503 (2000) and the many references cited therein.

\footnote{119} In \textit{Federation for American Immigration Reform (FAIR) v. Klutznick}, 486 F. Supp. 564 (1980) and \textit{Ridge, et al. v. Verity}, 715 F.Supp. 1308 (1989) plaintiffs sought to have illegal aliens identified in the census and excluded from the apportionment basis for the House following the 1980 and 1990 censuses respectively. In both cases the courts granted summary judgment for the defendants finding that the plaintiffs lacked standing because they could not demonstrate an injury that the courts could correct.

In \textit{FAIR} the court opined in dicta that the plaintiff had a weak constitutional argument even if it could demonstrate such an injury. 486 F. Supp. at 576. In a footnote the \textit{FAIR} court noted that it “need not decide whether Congress could, consistent with the fifth amendment, require the Census Bureau to directly ascertain the resident status of individual aliens under threat of punishment should answers be refused.” Id. at 575, n.14.

Interestingly, in \textit{Ridge} “Plaintiff's claim[ed] that the inclusion of illegal aliens in census figures for apportionment purposes violates Article I, § 2 and Article II, § 1 of the Constitution.” 715 F. Supp. at 1311. (Emphasis added.)

\footnote{120} See, for example, McAfee, \textit{supra} note 73, at 658.
system. No defender of the Electoral College faith has come close to arguing that voters in our hypothetical OMEGA should have greater power than voters in our hypothetical ALPHA. Now that this question has surfaced, they owe us an explanation for what some might view as a contemporary analogue of the three-fifths rule. If the Electoral College is preserved as it is, aliens may determine the outcome of a future presidential election!

6. THE INVARIENCE OF A NATIONAL POPULAR VOTE AND THE FRAGILITY OF ELECTORAL COLLEGE COALITIONS

The Electoral College scheme transforms the popular vote by

121 "Votes are cast by state delegation in the Electoral College for the same reason that states are given two extra electoral votes, regardless of population. These devices ensure that small states are not forgotten in the process of selecting a chief executive." Ross, supra note 4, at 131.

122 Defenders of the Electoral College frequently compare the largest states with the smallest states. ("California has more than 68 times as many people as Wyoming, but only 18 times as many electoral votes." Id. at 83. McAfee compares California with Montana. McAfee, supra note 73, at 657.) None of them ever attempt to explain the disparity in power of the largest and smallest of the small states. The 2010 census counted 563,626 persons in Wyoming and 989,415 persons in neighboring Montana, more than 75% more. I am unaware of any Electoral College proponents recognizing, much less defending, the 75% disparity in the power between a Wyoming voter and a Montana voter.

This 75% disparity is far from being the greatest disparity at the low end of representation. Nevada entered the Union in 1864. The 1870 census counted 42,491 Nevadans. This increased to 62,265 in 1880 but then fell to 45,761 in 1890 and 40,670 in 1900. Nevada received one seat in the House and three electoral votes following each of these census counts. (It would not receive a second seat until the apportionment following the 1980 census.) The 1900 census counted 275,277 persons in neighboring Utah. That only entitled Utah to a single seat in the House and three electoral votes, in spite of the fact that Utah was nearly seven times larger than Nevada!

123 On September 17, 2009 Senator Bob Bennett (R-UT) introduced S.1688, the Fairness in Representation Act, which would have required the Census Bureau to include questions about citizenship status and legal presence in the 2010 and subsequent censuses. When introducing this bill he noted that “[b]y counting citizens, legal residents and illegals alike [in the apportionment basis], we are in effect eroding the power of the vote of those citizens who live in areas with fewer non-citizens.” Cong. Record 111th Congress, 1st Sess, S9564.
partitioning the body politic into districts, \(^{124}\)

- assigning an integer weight\(^ {125}\) to each of these districts,
- and allocating the integer weight assigned to each district to the candidate receiving the most popular votes in that district. \(^ {126}\)

The outcome of this scheme is a set of integer weight totals by candidate. Whichever candidate amasses a majority of the integer weights assigned wins the Electoral College.

The assignment of integer weights to the districts and the allocation of those integer weights in integer amounts, especially on a winner take all basis in each district, ensures that the assignments are disproportionate to all of the following

- the size of the body politic in the district,
- the size of the total vote in the district,
- and especially disproportionate to the size of the vote margin between the first and second place finisher in the popular vote in the district.

Given all of the tunable parameters required to partition the nation into districts and assign integer weights to those districts with the inherent disproportionalities involved, it is always possible to find nationwide popular vote distributions whose winner is not invariant to changes in the tunable parameters. The analyses presented above have demonstrated that changing any of the following tunable parameters can change the outcome of an electoral vote without changing a single popular vote. \(^{127}\)

\(^{124}\) There is no constitutional requirement that each state be an Electoral College district in its entirety. The constitutional requirement is that an Electoral College district must be wholly contained within a single state.

In the early days of the Republic several states such as Maryland chose their electors by a districting scheme with no statewide electors chosen. 1795 Md. Session Laws, Ch.73, secs. 1, 5, available at http://www.msa.md.gov/megafile/msa/speccol/sc4800/sc4872/003181/html/m3181-0958.html. (Last visited January 19, 2011.) As late as 1892 Michigan had no electors chosen on a statewide basis. McPherson v. Blacker, 146 U.S. 1, 4-7 (1892).

\(^{125}\) A state’s electoral vote is, of course, the integer weight assigned.

\(^{126}\) Two caveats are in order. First, this step in the argument assumes that the electorate rather than the state legislature chooses presidential electors. The second is that a winner take all rule is employed in each district rather than some sort of proportional allocation of electors within an Electoral College district (such as a state) as was proposed in Colorado in 2004 by “Amendment 36.” (For the text of Amendment 26 see http://www.lawanddemocracy.org/pdffiles/COamend36.pdf. Last visited January 19, 2011.)

\(^{127}\) I am not asserting that replacing the Electoral College by a direct popular vote in a given election among a set of candidates would not result in changing any popular votes. What I am asserting is that the national popular vote in a given direct election is invariant to tunable parameters such as state boundaries or House size.
How the nation is partitioned into Electoral College districts, i.e. states.\textsuperscript{128}

The size of the House of Representatives.

The number of Senators per state.

The apportionment basis for the House of Representatives.

The method used to apportion the House of Representatives.

How out of date the apportionment of the House is.

Winning coalitions of electoral votes accumulated at the district, i.e. the state, level, can be extremely fragile because they are not invariant to changes in the tunable parameters. The election of 1884\textsuperscript{129} demonstrates that electoral vote coalitions are also subject to outcome change based on extremely small, narrowly focused shifts in the popular vote whose impacts are greatly magnified by the unit rule.\textsuperscript{130}

\textsuperscript{128} Creating Electoral College districts below the state level compounds districting decisions about one hundred-fold. The map of the lower 48 states can be modeled as a two-dimensional graph with 48 vertices. A two-dimensional map with N(>2) vertices can have a maximum of 3N-6 edges, i.e. state boundaries. (My thanks to Michael Neubauer for informing me of this.) Thus, there could be as many as 144 boundaries of positive length in the lower 48 states. In fact, there are 107 interstate land or river boundaries of positive length in the United States. (This excludes the open water boundaries between Rhode Island and New York, and Michigan and Illinois.) Following the post-2000 census apportionment of the House a total of 1,028 intrastate congressional district boundaries is possible. Staring at apportionment maps it appears that there are 777 intrastate congressional district boundaries in the 111\textsuperscript{th} Congress. If the entire Electoral College were elected by district with no electors chosen statewide the maximum number of intrastate Electoral College district boundaries (including the District of Columbia) would be 1,305!

\textsuperscript{129} Not to mention the elections of 1876, 1916, and 2000.

\textsuperscript{130} Thanks to a longstanding feud between Republican presidential candidate James G. Blaine, former New York Senator Roscoe Conkling’s Oneida County Stalwarts stayed away from the polls in droves giving Grover Cleveland a 33 vote margin over Blaine. In 1880 Republican candidate James Garfield carried Oneida County by 1,946 votes. In 1888 Oneida County gave Benjamin Harrison a 1,965 vote margin. The loss of approximately 2,000 votes in Oneida County was enough for Blaine to lose New York’s 36 electoral votes to Cleveland. These 2,000 votes constituted approximately 0.02\% of the 10 million votes cast nationwide. They determined the outcome of 9\% of the electoral vote. The impact of Blaine’s Oneida County Stalwarts in the Electoral College exceeded their impact in the popular vote by a factor of 450! (For Oneida County election results see Walter Dean Burnham, \textit{Presidential Ballots, 1836-1892}, 640-1 (Johns Hopkins 1955). For a brief description of the Blaine-Conkling feud see Kenneth D. Ackerman, \textit{Dark Horse: The Surprise Election and Political Murder of President James A. Garfield} 7-19, 448-453 (Carroll & Graf 2003). For the role of Conkling and the Oneida County Stalwarts in 1884 see David M. Jordan, \textit{Roscoe Conkling of New York: Voice in the
In contrast, the outcome of a national popular vote, the expression of the sovereign people, would be invariant to changes to any of the tunable parameters mentioned above. The outcome of a national popular vote critically depends on the candidates and their campaigns, as it should!  

More popular votes may have been cast for Al Gore than George W. Bush, however, Gore did not win the national popular vote. There was no national popular vote election in 2000. Instead, there were 51 statewide races (and 5 congressional district wide races in Maine and Nebraska) that were the focus of the Bush and Gore campaigns. Had the 2000 presidential election been run with the national popular vote determining the outcomes both candidates would have likely run very different campaigns. No doubt Bush would have spent more time and money in California, the state in which he amassed his largest popular vote totals in both 2000 and 2004. A better political scientist than me could suggest how Gore would have altered his campaign and, perhaps, who would have won an election decided by the national popular vote. We will never know for sure.

131 Of course, the outcome of a national popular vote may depend on whether the minimum voting age is 18 or 21, or whether ex-felons have the right to vote. Notice that the voting age parameter, like the citizenship parameter, determines scope of and possession of power in the body politic.

132 The possibility of a long ballot listing presidential electors individually can allow voters to split their votes across party lines or not to vote for the maximum number of electors possible further complicates matters. In 2000 Louisiana, Mississippi, and South Carolina presented their electorates with just such a long ballot. Lawrence D. Longley and Neal R. Peirce The Electoral College Primer 2000 107 (Yale 1999). For the complexities of counting votes cast by long ballot and how that affects the count of the 1960 presidential election see Brian J. Gaines, Popular Myths About Popular Vote-Electoral College Splits, 34 PS: Political Science and Politics 70 (2001).

The National Popular Vote Initiative recognizes that “The continued use of the short presidential ballot is an essential precondition for a nationwide popular vote because it permits the aggregation, from state to state, of the popular votes that have been cast for various presidential slates.” John R. Koza, Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, Joseph S. Zimmerman Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote 252 (National Popular Vote Press 2005). This Initiative binds its member states to using a short ballot. Id. at 251. However there is no way that the Initiative can bind non-member states. Id. at 254. How the Initiative intends to cope with long ballots remains a subject for further research.

133 Nor would the McCain campaign have made news by abandoning its efforts in Michigan, the eighth largest state in the Union! David Barstow with Katharine Q. Seelye, “McCain Abandons His Efforts to Win Michigan”, The New York Times, October 2, 2008. Available at http://www.nytimes.com/2008/10/03/us/politics/03michigan.html?_r=1&scp=1&sq=MCCain+Michigan&st=nyt. Last visited January 19, 2011,
what would have happened in 2000, we can only speculate. We should not have to speculate in the future.
APPENDIX A. DETAILED ANALYSES OF REMAINING ALTERNATIVE TEXAS-NEW MEXICO BOUNDARY IMPACTS ON 2000 ELECTION

This appendix provides more detailed analyses of how alternate proposals for the Texas-New Mexico boundary would have impacted the 2000 election. Each of these analyses makes the following assumptions:

- The Arizona Territory is created out of the New Mexico Territory as it was.
- The alternate states of New Mexico and Texas taken together coincide with the actual states of New Mexico and Texas plus the Oklahoma panhandle.
- The alternate states of New Mexico and Texas are divided by the alternate boundary proposal.

Douglas’ S. 170 proposed that the Rio Grande form the boundary between Texas and New Mexico to 34° at which point the boundary turns due east along the 34th parallel until it intersects the Red River. This results in the following assignment of population and popular votes.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush Vote</th>
<th>Gore Vote</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,536,271</td>
<td>Entirely in alternate NM</td>
<td>322,546</td>
<td>264,000</td>
<td>58,546</td>
</tr>
<tr>
<td>16,690,532</td>
<td>Entirely in alternate TX</td>
<td>3,694,958</td>
<td>2,408,930</td>
<td>1,286,028</td>
</tr>
<tr>
<td>380,524</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>76,838</td>
<td>49,249</td>
<td></td>
</tr>
</tbody>
</table>

Table 14 - Population and Popular Vote Assignment, Douglas Proposal

In this scenario Bush’s margins in the counties entirely included in the alternate states of New Mexico and Texas exceeds Gore’s vote in the counties divided between these two alternate states. Consequently, we can infer with certainty that Bush wins each of these two alternate states.

Examination of the Equal Proportion priority lists indicates that the 33 actual House seats apportioned among actual New Mexico, and actual Texas are apportioned as follows in this alternate boundary scenario: alternate New Mexico 3, alternate Texas 32, with actual New Jersey not receiving an additional 14th House seat. This leads to the following electoral vote reconstruction.

<table>
<thead>
<tr>
<th></th>
<th>Bush</th>
<th>Gore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baseline</td>
<td>234</td>
<td>252</td>
</tr>
<tr>
<td>Add alternate New Mexico</td>
<td>+5</td>
<td></td>
</tr>
<tr>
<td>Add alternate Texas</td>
<td>+32</td>
<td></td>
</tr>
<tr>
<td>Add actual New Jersey</td>
<td>+15</td>
<td></td>
</tr>
<tr>
<td>Result</td>
<td>271</td>
<td>267</td>
</tr>
</tbody>
</table>

Table 15 - Electoral Vote Reconstruction, Douglas Proposal

McClerand’s amendment to H. R. 1 is similar to Douglas’ proposal except that the boundary originating at the intersection of 34° North with the Rio Grande is inclined
slightly to the north of east so that it intersects the Red River at 100º west. This results in
the following population and popular vote assignments.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush Vote</th>
<th>Gore Vote</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,497,574</td>
<td>Entirely in alternate NM</td>
<td>313,150</td>
<td>260,845</td>
<td>52,305</td>
</tr>
<tr>
<td>16,861,128</td>
<td>Entirely in alternate TX</td>
<td>3,734,321</td>
<td>2,427,873</td>
<td>1,306,448</td>
</tr>
<tr>
<td>248,625</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>46,871</td>
<td>33,461</td>
<td></td>
</tr>
</tbody>
</table>

Table 16 - Population and Popular Vote Assignment, McClernand Proposal

These assignments result in Bush popular vote victories in both alternate states, the same
electoral vote allocations, and the same Bush 271-267 Electoral College victory as
Douglas’ S. 170 proposal.

Clay’s amendment to S. 225 proposed that the Texas-New Mexico boundary run along a
diagonal from the Rio Grande just north of El Paso to the intersection of the Red River
with 100º west. Although Clay’s boundary proposal is radically different from Douglas’
and McClernand’s, its population and popular vote assignments result in the same
electoral vote reallocation and the same 27-1267 Bush victory.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush Vote</th>
<th>Gore Vote</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,582,099</td>
<td>Entirely in alternate NM</td>
<td>335,079</td>
<td>269,440</td>
<td>65,639</td>
</tr>
<tr>
<td>16,593,969</td>
<td>Entirely in alternate TX</td>
<td>3,678,645</td>
<td>2,400,484</td>
<td>1,278,161</td>
</tr>
<tr>
<td>431,259</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>80,618</td>
<td>52,255</td>
<td></td>
</tr>
</tbody>
</table>

Table 17 Population and Popular Vote assignment, Clay Proposal

Benton’s first proposal (S. 54) set Texas’ western boundary at 102º west as far north as
the Red River, which formed its northern boundary. This proposal shifts significantly
more population from Texas to New Mexico than the ones just presented.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush Vote</th>
<th>Gore Vote</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,793,502</td>
<td>Entirely in alternate NM</td>
<td>501,270</td>
<td>421,461</td>
<td>79,809</td>
</tr>
<tr>
<td>15,407,810</td>
<td>Entirely in alternate TX</td>
<td>3,482,395</td>
<td>2,267,189</td>
<td>1,215,206</td>
</tr>
<tr>
<td>406,015</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>110,677</td>
<td>33,529</td>
<td></td>
</tr>
</tbody>
</table>

Table 18 Population and Popular Vote assignment, First Benton Proposal

As a consequence alternate New Mexico has two more House seats (5) than actual New
Mexico (3) and alternate Texas has three fewer House seats (27) than actual Texas (30)
with New Jersey receiving an additional seat. Nevertheless, with Bush winning both
alternate New Mexico and alternate Texas he still wins the electoral vote, albeit by only
270-268.
<table>
<thead>
<tr>
<th>County Assignment</th>
<th>Bush</th>
<th>Gore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baseline</td>
<td>234</td>
<td>252</td>
</tr>
<tr>
<td>Add alternate New Mexico</td>
<td>+7</td>
<td></td>
</tr>
<tr>
<td>Add alternate Texas</td>
<td>+29</td>
<td></td>
</tr>
<tr>
<td>Add revised New Jersey</td>
<td></td>
<td>+16</td>
</tr>
<tr>
<td>Result</td>
<td>270</td>
<td>268</td>
</tr>
</tbody>
</table>

**Table 19 - Electoral Vote Reconstruction, First Benton Proposal**

Benton’s second proposal (made as an amendment to S. 225) also set Texas’ western boundary at 102° west but only as far as 34° north where it turned slightly north of east on a line to the intersection of the Red River with 100° west. This moves slightly more of actual Texas from alternate Texas to alternate New Mexico than Benton’s first proposal.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush</th>
<th>Gore</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,885,649</td>
<td>Entirely in alternate NM</td>
<td>536,179</td>
<td>429,272</td>
<td>106,907</td>
</tr>
<tr>
<td>15,400,831</td>
<td>Entirely in alternate TX</td>
<td>3,480,893</td>
<td>2,266,381</td>
<td>1,214,512</td>
</tr>
<tr>
<td>320,847</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>77,270</td>
<td>26,526</td>
<td></td>
</tr>
</tbody>
</table>

**Table 20 Population and Popular Vote assignment, First Benton Proposal**

Shifting this additional population from alternate Texas to alternate New Mexico makes no changes in the popular vote outcome in the alternate state or the electoral vote allocation. Once again, Bush wins a narrow 270-268 Electoral College victory.

The New Mexico Constitutional Convention’s made the most radical proposal, pushing the long north-to-south boundary between Texas and New Mexico three degrees eastward. However, it leaves El Paso (1990 population 515,342) in alternate Texas so it shifts less population than either of Benton’s proposals.

<table>
<thead>
<tr>
<th>Population</th>
<th>County Assignment</th>
<th>Bush</th>
<th>Gore</th>
<th>Bush Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,415,924</td>
<td>Entirely in alternate NM</td>
<td>510,881</td>
<td>355,731</td>
<td>155,150</td>
</tr>
<tr>
<td>15,812,110</td>
<td>Entirely in alternate TX</td>
<td>3,488,068</td>
<td>2,335,591</td>
<td>1,152,477</td>
</tr>
<tr>
<td>379,293</td>
<td>Divided between alt. NM &amp; alt. TX</td>
<td>95,393</td>
<td>30,857</td>
<td></td>
</tr>
</tbody>
</table>

**Table 21 Population and Popular Vote assignment, New Mexico 1850 Constitutional Convention Proposal**

This population shift leaves alternate New Mexico with 4 House seats, alternate Texas with 28, and revised New Jersey with 14. With Bush winning both alternate New Mexico and alternate Texas he retains his 270-268 electoral vote victory.