CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

ELECTION LAW HANDBOOK

For Legislators and State Policymakers

Summer 2017 Edition

About the Center for Competitive Politics

The Center for Competitive Politics was founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith. Its work has been cited in both the United States Congress and in the United States Supreme Court, and it regularly provides testimony and expertise to Congress, the Federal Election Commission, and many state legislators.

The Center for Competitive Politics is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code and is the only organization dedicated solely to protecting First Amendment political rights. Through strategic litigation, communication, activism, training, research, and education, the Center for Competitive Politics works to promote and defend the First Amendment's rights to free political speech, assembly, and petition. We seek to do this by educating the public and government leaders on the costs of campaign finance regulation, the real impact of money in politics, and the benefits of a more free and competitive political system.

Acknowledgments

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Introduction

This handbook is intended to introduce state lawmakers to general campaign finance and election administration issues. State elected officials are tasked with ensuring that citizens can enjoy the full breadth of their First Amendment rights, while providing fair and open elections. Campaign finance regulation is a complex issue with a long judicial history, requiring lawmakers to legislate within certain legal boundaries.

The arguments and topics presented in this guide are supplemented by additional recommended sources of information. Each section also contains general policy suggestions, and the Center for Competitive Politics looks forward to working with individual legislators on important issues and policy solutions specific to a state.

This guide covers traditional campaign finance topics including contribution limits, pay-to-play legislation, and disclosure requirements. The idea of taxpayer financing of political campaigns is explored as well, along with issues unique to states that hold judicial elections. This handbook also covers more recent hot topics such as the 2012 Supreme Court decision in *Citizens United v. Federal Election Commission*[1] and the corporate governance and political expenditure issues that states have been working with in recent years.

This guide also reviews important points related to common election administration subjects such as voter registration and identification.

"This guide covers traditional campaign finance topics including contribution limits, pay-to-play legislation, and disclosure requirements. "

Finally, a recent effort to convince states to pass legislation to change the way a state's electoral votes are allocated (commonly called the National Popular Vote plan) is analyzed so legislators are prepared to address this issue in their own state.

The Center for Competitive Politics hopes this guide serves as a helpful introduction to the many issues state lawmakers will face in political regulation.

1 *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

Campaign Finance

Background

Political speech is protected by the United States Constitution as well as state constitutions, and is central to democracy and a free society. But the role of money in campaigns and politics often raises concerns about corruption. Legislatures and courts can regulate political contributions to reduce corruption or the appearance of corruption, and can require disclosure when it gives voters useful information.[2] Pursuant to U.S. Supreme Court rulings, corruption should be understood as the *quid pro quo* exchange of campaign financial support for official action.[3]

"Regulations must be narrowly tailored to restrict only that conduct necessary to serve the state interest. "

Regulations must be narrowly tailored to restrict only that conduct necessary to serve the state interest. Moreover, they cannot burden political speech to serve an interest in "equality" or "fairness."[4] These objectives may be furthered by offering subsidies to candidates, but candidates must have the right to opt out of the subsidies and finance a campaign the traditional way. Subsidies may not burden the speech of others. Beyond that, lawmakers cannot generally prevent individuals and groups from spending money to express opinions about candidates and issues.[5] Nor can they limit contributions if those limits are so low they cripple political debate and association.[6] Additional restrictions, however, may be applied when the individual or group is a government contractor[7] or foreign national,[8] provided those restrictions further an anti-corruption agenda and are not a pretext for limiting protected speech.

Advocates of increased campaign finance restrictions contend that greater regulation of political spending increases the quality of our government. However, there is little connection between campaign finance regulation and any observable public well-being or confidence in government. For instance, there is no correlation between measurements of general welfare and whether or not a state prohibited corporate expenditures prior to the Supreme Court's *Citizens United* decision. In general, heavily regulated states do not rank higher on good governance ratings than states with less regulation.[9] Nor do the residents of heavily regulated states feel their state governments are more

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2 *Buckley v. Valeo*, 424 U.S. 1 (1976).
3 Id.
4 Id.
5 Id; see also *Speechnow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).
6 *Randall v. Sorrell*, 548 U.S. 230 (2006).
7 *Wagner v. Federal Election Commission*, Case NO. 11-1841, Nov. 2, 2012, (D.D.C.).
8 *Blumen v. Federal Election Commission*, 565 U.S. __ (2012).
9 "Measuring State Performance: Grading the States," Pew Charitable Trusts and Governing Magazine, March 2, 2008.

ethical or more responsive then those in less regulated states.[10]

Issues

Political Spending by Corporations and Unions: The Supreme Court has consistently held that restrictions on political speech must serve the state's interest in fighting corruption, or in reducing the appearance of corruption. In the 2010 opinion in *Citizens United*, the Supreme Court concluded that a complete federal ban on any corporate independent spending did not sufficiently serve this state interest, since independent speech does not corrupt officeholders or candidates through *quid pro quo* exchanges, and imposes greater limits on speech than restrictions on contributions. When *Citizens United* was handed down, less than half the states had enacted laws that prohibit corporate expenditures, but it follows that more than half had *not*. There is no observable difference in the potential for corruption or the public's confidence in their politicians between those states that permit and prohibit corporate and non-corporate expenditures. After *Citizens United*, across-the-board bans on corporate or union expenditures are unconstitutional. The federal ban on contributions or expenditures by foreign nationals in all elections – federal, state, or local – remains the law.[11]

Limits

Spending Limits*:* The Supreme Court, in *Buckley v. Valeo*[12] and subsequent cases, has also held that spending limits are unconstitutional, since limits directly burden the amount of speech and ration a candidate or group's ability to reach the public with their message. In *Randall v. Sorrell*,[13] the Court rejected arguments that justify limits as a means to equalize political influence, or preserve politicians' time for policymaking rather than fundraising.

"...the Court rejected arguments that justify limits as a means to equalize political influence, or preserve politicians' time for policymaking rather than fundraising. "

Contribution Limits*:* Under present constitutional interpretation, laws can limit contributions to candidates, parties, and political committees. They cannot limit independent expenditures, or contributions to groups that only make independent expenditures. In *Buckley v. Valeo*, the Court let stand a federal $1,000 candidate contribution limit per individual donor per election (counting the primary and general elections separately). But the Supreme Court, and at least one state court, have overturned contribution limits that were set so low that they impeded free speech and association. Thus, in *Randall v. Sorrell*, the Court held that contribution limits ranging from $200-400 per two-year cycle were so low as to unconstitutionally burden speech and association. How low is too low? That question is subject to debate as well as court challenges, but state limits that disproportionately

10 "Citizens United, Citizens' Lives: A Comparison of States With and Without Prohibitions on Corporate Independent Expenditures," Center for Competitive Politics, July 14, 2010.
11 2 U.S.C. 441e.
12 *Buckley v. Valeo*, 424 U.S. 1 (1976).
13 *Randall v. Sorrell*, 548 U.S. 230 (2006).

burden candidates and committees without adequate justification could be challenged. Courts will scrutinize particular characteristics of a jurisdiction, and thus there is no "safe harbor" that ensures a limit will pass scrutiny.

Who Can (and Can't) Contribute: Federal law and the laws in many states prohibit certain sources from contributing to campaigns. Foreign nationals, national banks, and Congressionally chartered corporations (like Fannie Mae) may not make contributions in any elections – federal, state, or local.[14] Corporations and unions are prohibited from contributing in some states, and certain kinds of corporations, such as public utilities, gaming and liquor licensees, and insurance companies may face special restrictions. Lawmakers have also proposed restrictions on contributions made by donors residing outside a candidate's state.

As noted, contributions are presently more easily regulated under the Constitution than expenditures. Nevertheless, state restrictions must still serve a valid anti-corruption interest, and legislation singling out a particular industry for additional restrictions, or completely banning contributions rather than imposing a limit, must be able to justify that special burden. While it may be popular to restrict contributions from out-of-state donors, campaigns are also the means by which citizens direct their government, and officeholder's acts can affect people who may not be able to vote for or against that lawmaker but would like voters to know their perspectives.

Pay-to-Play: This approach to campaign finance regulation prevents individuals or groups who have made contributions or expenditures from then participating in government contracts. Here, the state's interest in battling corruption or the appearance of corruption is served when otherwise donors to officeholders might receive contracts because of their financial support, rather than on merit. Thus, pay-to-play restrictions are often applied in the "no-bid" contracting arena, but some jurisdictions extend them to contracting generally. The restriction is sometimes also extended not just to the contracting entity or individual, but family members as well, such that a contribution by an executive's spouse or child could bar a company from contracting with the government.

In some jurisdictions, these laws have been interpreted so broadly as to bar medical professionals who have made contributions from treating Medicaid patients through a contract with a local governmental agency. In any case, pay-to-play limits that are not justified by an adequate anti-corruption purpose could be challenged in court. It is difficult to justify pay-to-play restrictions on contractors who win contracts through a competitive bidding process, on family members, or on professionals (like doctors) who service the public through government programs. Alternatives to onerous and confusing pay-to-play restrictions would include reforming government contracting and reducing the occasions when elected officials can award or influence contracts made outside the competitive bidding process.

Disclosure

Reports: States generally require candidates, political parties, and committees formed to make

14 2 U.S.C. 441b(a).

contributions and expenditures to file registration and disclosure reports. Registration paperwork requires the group to disclose its existence, individual contacts, location, and other information such as bank accounts. Disclosure forms list the names and addresses of donors (and other information like occupation and employer) as well as vendors and other recipients of committee funds. These requirements serve the state interest in providing voters with information about a politician's supporters, thus helping voters assess that candidate. The thresholds for reporting this information can vary widely.

However, disclosure can also burden the rights of privacy and association. How many – and what kind – of groups and individuals can be swept into these paperwork requirements is hotly debated. Groups that engage in political speech as part of a wide range of other activities resist disclosing all their donors, since many may not have given to further the political mission specifically, or did not know about that mission. Supporters may also wish to remain anonymous to allow more focus on the specific message, or to avoid retaliation from opponents and their supporters. Moreover, in other contexts the Supreme Court has protected group membership lists from disclosure, recognizing that disclosure can burden the right to free association and subject members to harassment. Thus, *in NAACP v. Alabama*, the Court protected the Alabama chapter of the NAACP from a state requirement that it disclose its members.[15] If a political group can show that its supporters will face public threats or recriminations if identified, it may request to be exempt from disclosure. So the Socialist Workers Party, after demonstrating that members would be harassed by public and private actors if identified, gained an exemption from disclosure requirements.[16]

Reporting requirements must be tailored to serve the government's interest in enforcement and the public's interest in identifying sources of political funding. Thresholds that are set too low burden small grassroots groups that form spontaneously during a campaign.[17] Low thresholds also expose small donors to harassment and violations of their privacy, but the public learns little useful about funding from the names of these small contributors. Legislators should be sensitive to these tradeoffs. If a candidate has the support of a union, an environmental group, or a pro-life organization, what more will the public learn from identifying those groups' members or donors?

Disclaimers: States also generally require that the source's identity be included in mass communications about campaigns, such as television advertising and mailings. Senders can be required to include their name and contact information on such communications. That way, some believe, the public will know who is behind the message, and can better evaluate its credibility. However, lengthy or onerous disclaimer requirements designed to thwart a group's ability to communicate (without providing useful public information) would lack constitutional justification. At that point, disclaimers can impose an unconstitutional burden on the right to speak about politics without serving the state's information interest. Similarly, the Court has required that disclaimer requirements fulfill some real state interest. Accordingly, the Court has found that disclaimer requirements imposed

15 *NAACP v. Alabama*, 357 U.S. 449 (1958).
16 *Brown v. Socialist Workers Party*, 459 U.S. 87 (1982).
17 *Sampson v. Buescher*, No. 08-1389, 2010 WL 4456970 (10th Cir. 2010).

on an individual who failed to include her name on hand-distributed flyers were unconstitutional in *McIntyre v. Ohio Elections Commission*.[18] Similarly, in *Buckley v. American Constitutional Law Foundation*,[19] name badge requirements for petition gatherers were found unconstitutional, because of the chilling effect on protected activity, and the fact that the state has a less burdensome means to protect the public.

What is a Contribution? An Expenditure? A Political Committee?: Because limits, prohibitions, and disclosure requirements pivot on the definitions of "contribution," "expenditure," and "political committee," broadening any of these fundamental terms will increase regulation on political speech. If drawn too broadly, the impact will be to restrict activity without an adequate legitimate interest to justify these burdens. A related problem is whether any definition is sufficiently clear so that activists know when they are subject to campaign finance law. Vague laws are unconstitutional if they provide insufficient notice of what is legal and thus chill speech.

"Some state laws impose a committee requirement at even lower thresholds, but if set too low, these restrictions may be found unconstitutional..."

Presently, an expenditure generally must contain "express advocacy" of the election or defeat of a clearly identified candidate.[20] Other spending close to an election can also be restricted if the restrictions only apply to the "functional equivalent" of express advocacy. Regulations need be sufficiently clear so that people know what speech is regulated. Expenditures coordinated with candidates or party committees become in-kind contributions to them, and can be subjected to contribution limits. The degree of contact necessary to find "coordination" varies among jurisdictions. Coordination should involve contacts about the specific spending, and should not be triggered merely from past connections, relationships, coincidence in timing, or the use of public information.

Political committees under federal law are groups that raise contributions or make expenditures over $1,000, and have as their major purpose the influencing of federal elections. How "major purpose" is measured is controversial, since it is unclear what activities indicate "purpose," what time period should be considered, and how to treat groups with a number of different "purposes." Some state laws impose a committee requirement at even lower thresholds, but if set too low, these restrictions may be found unconstitutional,[21] and it is not obvious that requiring groups spending just a few hundred, or even a few thousand, dollars serves any valid public purpose.

Points in Summary

- Campaign finance restrictions must serve a valid anti-corruption purpose and should only restrict as much political activity as necessary to fulfill that purpose.

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18 *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

19 *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

20 *Buckley v. Valeo*. See also *Colorado Ethics Watch v. Senate Majority Fund*, No. 10SC276 (Colo. 2012).

21 See *Sampson v. Buescher*, supra (striking down $200 committee threshold).

- Contribution limits should be set at a level that deters real corruption or the appearance of corruption, and not so low that they injure political association.
- States that have allowed corporations and unions to participate fully in politics rate just as highly in quality of life measures as those that do not.
- State should improve government contracting procedures rather than restrict the right to contribute to a candidate of one's choice.
- Disclosure and disclaimer requirements can be a source of useful information for voters, but must be tailored to avoid burdening political activity.

Further Reading on Campaign Finance

Books

Anthony Corrado, et al., *The New Campaign Finance Sourcebook* (2005).

Roderick P. Hart, *Campaign Talk: Why Elections are Good for Us* (2000).

Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (1998).

John Samples, *The Fallacy of Campaign Finance Reform* (2006).

Bradley A. Smith, *Unfree Speech* (2001).

Court Decisions

Buckley v. Valeo, 424 U.S. 1 (1976).

Citizens United v. Federal Election Commission, 558 U.S. 50 (2010).

Randall v. Sorrell, 548 U.S. 230 (2006).

Articles

Stephen Ansolabehere, John de Figueiredo, and James M. Snyder, Jr. "Why is there So Little Money in U.S. Politics?," 17 Journal of Economic Perspectives 105 (2003).

Dale Carpenter, "Disclosure Costs," Institute for Justice (March 2007).

Jason Farrell and Nima Veiseh, "Public Perception and the 'Appearance of Corruption' in Campaign Finance," Center for Competitive Politics (December 2011).

Jeffrey Milyo, "Keep Out: How State Campaign Finance Laws Erect Barriers to Entry for

Political Entrepreneurs," Institute for Justice (2010).

Jeffrey Milyo and David Primo, "Campaign Finance Laws and Political Efficacy: Evidence from the States," 5 Election Law Journal 23 (2006).

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Government Funding of Campaigns

Background

In addition to the rules and regulations outlined above, a few jurisdictions also fund political campaigns through the government, often called "clean elections" "fair elections," "public financing" or, most accurately, "tax-financed campaigns." Some states have instituted full governmental funding for all state elective offices, some have provided money for select offices, and some have established partial funding systems. At the Presidential level, the government provides matching funds for participating candidates in the primary and full funding for the general election, but archaic restrictions have rendered this system unpopular among truly viable primary candidates, and in 2012 both the Democratic and Republican candidates for president opted to run their general election campaigns on individual donations rather than with tax funding, the first time this has happened since the law went into effect.

Whether full or partial, these programs must be voluntary. Candidates must be able to raise funds through traditional private financing if they so choose. Thus, even in states with tax funding programs, traditionally funded candidates will not face the additional campaign finance restrictions imposed on government-funded candidates. Moreover, government-funding programs cannot add burdens to nonparticipating candidates or their supporters, even in the interest of equalizing financial resources. In 2011, the U.S. Supreme Court ruled that a matching provision in Arizona's tax-funded campaign system was unconstitutional.[22] This provision provided additional funds to tax-financed candidates if their opponents ran their campaigns on private donations or if an independent expenditure was made in the race. The ruling has forced several states with such programs to repeal or discontinue such matching provisions. A 2012 decision by the Nebraska State Supreme Court found that state's tax-financed campaign system was unconstitutional under the First Amendment due to provisions that considered funds raised by candidates running against tax-funded candidates.[23] While that ruling does not bind other states, it could influence the outcome of other legal challenges in other states.

Issues

Do Programs Achieve Their Goals?: Tax-funding programs seek to achieve several goals. First, by removing at least some private money from the political system, these programs hope to reduce the corruption that could follow from donors demanding favors from officeholders; or officeholders extorting funds from donors. Since fundraising requirements may be an obstacle to running for office, these programs hope to encourage a greater diversity of candidates, which by extension could result in a more representative or responsive government. As more candidates run, campaigns and elections might become more competitive, and insulated incumbents would either become more responsive or face losing their seats. These programs also attempt to improve public perception of politics and politicians by improving confidence in the system and encouraging greater participation.

22 *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. (2011).
23 State ex rel. *Bruning v. Gale*, 284 Neb. 257.

Does government funding of campaigns improve campaigns or legislatures, once elected? Do these programs reduce the influence of special interests? Empirical social scientists have been eager to measure the effect of tax-financing on campaigns and elections. Thus far, the record is at best mixed and inconclusive. Campaign spending is lower in some jurisdictions and higher in others. Government funding does not appear to increase diversity, make campaigns more competitive, or change the voting records of legislators once elected. Nor has it had any effect on reducing corruption. One effect of the matching funds provision has been to push private campaign funding to the end of the campaign, which may mean that voters who vote early will not hear some arguments before voting.

Fairness in Operations: Full funding programs require that participating candidates first show some base level of public support, such as by raising a qualifying amount in small contributions. Once qualified, candidates receive a grant to use for campaigning, and are forbidden from raising or spending other funds – thus the grant acts as a de facto expenditure limit in many races. In other programs, candidates receive matching funds for donations to the participating candidate's campaign on a dollar for dollar basis up to a certain amount.

Prior to the 2011 Supreme Court ruling in the *Arizona Free Enterprise Club PAC* case, some state programs allowed a participating candidate to receive more money if opposed by a privately funded candidate who spent more than the tax-financed campaign grant or if independent expenditures were made in the race. Such matching funds provisions are now clearly unconstitutional.

Practical Challenges: Government funding programs have experienced some challenges in ensuring that candidates who qualify spend the government money on bona fide campaign expenses. In some jurisdictions, candidates have used public money for their own personal benefit, or to entertain friends. When the state intervenes to recover misspent public money, government bureaucrats are faced with deciding what expenditures are "proper" for a campaign and which are not. This can be an invasive process, and places the government in the role of second-guessing campaign decisions made during the heat of an election season. In privately funded campaigns, there is little reason to investigate wasteful campaign spending, since a campaign only injures itself when it spends its funds unwisely. These programs have also found it difficult to calibrate a level of funding that is enough for competitive races in high cost districts, but does not prove to be a wasteful windfall in other races.

Points in Summary

- Studies of existing programs have not been able to establish that government-funding programs serve their promised goals.
- Government funding cannot be made mandatory, and cannot burden nonparticipating campaigns as a way to equalize resources.
- Subsidies like matching payments that attempt to equalize spending in a race between a tax-financed and privately financed candidate or to partially or fully match independent expenditures made in a race are unconstitutional.

Further Reading on Government Funding of Campaigns

Court Decisions

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Matt Nese and Tom Swanson, "Clean Elections and Scandal: Case Studies from Maine, Arizona and New York City," Center for Competitive Politics Issue Review (August 2013).

Matt Nese and Luke Wachob, "Do Tax-Funded Campaigns Increase the Percentage of Women in State Legislatures," Center for Competitive Politics Issue Analysis No. 3 (August 2013).

Matt Nese and Luke Wachob, "Do Taxpayer-Funded Campaigns Reduce Lobbyist and Special Interest Influence?," Center for Competitive Politics Issue Analysis No. 1 (August 2013).

Matt Nese and Luke Wachob, "Legislator Occupations – Change or Status Quo After Tax-Funded Campaigns," Center for Competitive Politics Issue Analysis No. 2 (August 2013).

Judicial Elections

Background

Some states hold judicial elections for at least some of their state and/or local judges, and others fill judgeships through some form of appointment. Both merit selection of judges and judicial elections have benefits and drawbacks. On the one hand, electing judges subjects these powerful individuals to popular review, yet when judges are appointed they are insulated from political pressure. In judicial elections, in response, some jurisdictions place onerous restrictions on what judicial candidates can fundraise, with whom they can associate while campaigning, and even restrictions on what they can say.

Issues

Speech Restrictions: A number of jurisdictions place additional restrictions on what a judicial candidate can say during the campaign, or whether other political bodies, such as political parties, can endorse them. In *Republican Party of Minnesota v. White*, the Supreme Court struck down a state law that prohibited judicial candidates from announcing their positions on controversial issues.[24] The Court found that the rule did not preserve the impartiality of the court, but instead prevented useful information from getting to voters. Other restrictions, such as on a candidate's ability to solicit money for his campaign, are also suspect.[25]

Government Funding: Some jurisdictions have tried to resolve the ethical issues surrounding elected judges by providing government funding. As noted before, public financing of campaigns must be voluntary, and the incentives offered to candidates cannot burden the speech rights of candidates who choose instead to fund their campaigns through traditional means. These programs also must permit independent spending, so any concerns about how independent spending might bias a judge would remain.

Conflict of Interest: In a 2009 case, *Caperton v. Massey*, the Supreme Court found that a state judge who had benefited from very large independent expenditures (over $3 million) made in his favor by a company's CEO should recuse himself from cases involving the company.[26] Thus, even when state law permits a judge to hear a case, in some very extreme situations judicial ethical standards may require the judge to recuse. It is not necessary for elected judges to recuse themselves from any case involving any contributor or supporter. When legal contributions are properly disclosed, it is usually unnecessary to regulate further.

Points in Summary

- If jurisdictions hold elections for judicial positions, they must allow candidates to exchange a full range of views with voters.

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24 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).
25 *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010).
26 *Caperton v. Massey*, 129 S. Ct. 2252 (2009).

- Judicial ethics rules may impose additional restrictions on a judge's eligibility to hear a particular case.

Further Reading on Judicial Elections

Books

Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections (Controversies in Electoral Democracy and Representation)* (2009).

Matthew Streb, ed., *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections* (2009).

Election Administration

Background

Under the U.S. Constitution, running elections is a state responsibility. Yet in recent years, federal law has imposed requirements on state election administrators in voter registration and vote tabulation for federal elections, which in many jurisdictions are held with state and local elections. Moreover, a series of voting rights statutes and cases have generated another source for federal oversight and restrictions on state legislative action. Nevertheless, states remain the organizers and implementers of election practices in voter registration, voter qualifications, polling locations, forms of balloting and tabulating returns. Changes in any of these policies, however well-meaning, can have political consequences and are inevitably controversial.

Issues

Voter Qualifications: Federal law prohibits limiting the right to vote based on race or sex. States must also allow individuals 18 years of age or older to register and vote if otherwise qualified. States may limit the voting rights of felons, non-citizens, individuals under 18 years of age, and persons suffering from limited mental capacity. Within these categories, different states have structured a variety of ways to ascertain a voter's qualifications, and how (or whether) a voter who has been disqualified, for example as a felon, can have voting rights restored.

Voter Registration: Federal law requires states to make registration material available in state offices, and "postcard" voter registration is now ubiquitous.[27] Private groups and political parties may also register voters using these materials. In recent years, voter registration practices have raised questions, especially when groups pay bounties or set quotas for registrations, and policymakers have imposed limits on the incentives these groups can offer registration workers. Large volumes of questionable voter registration forms burden state and local officials, who must reallocate staff to review forms, or cope with the confusion and potential fraud these registrations could allow. Even so, private registration efforts are an important supplement to a state's registration program, and when run well, they reach voters who might otherwise not register. States are not required to register voters in advance, so some jurisdictions have tried same-day voter registration as a way to encourage turnout.

Ballots: States are also responsible for printing and distributing ballot materials, and most states guarantee the right to a secret ballot. Ballot design may seem mundane, but some of the most controversial moments in recent election law involved complaints about ballot design. The most famous example is the "butterfly ballot" that allegedly confused voters in Palm Beach County, Florida in the 2000 Presidential election. Traditionally, states have used paper ballots, but in response to federal incentives, many jurisdictions now computerize ballots in polling places. This innovation has prompted complaints that the vote could be miscounted without detection – accidentally or deliberately – prompting demands that any electronic voting also include a paper trail.

27 National Voter Registration Act of 1993 (Motor Voter).

Precincts: States also determine the location of polling places and assign voters by precinct to those polls. Each precinct takes resources, so administrators may be tempted to provide fewer of them. However, when a polling place is required to serve too many voters, long lines and delays can discourage turnout. Precinct workers are usually volunteers who serve long hours in return for a modest stipend, and it can be difficult to recruit and train sufficient staff. Quality staff is also important in jurisdictions where voters produce identification before voting, to ensure that ID requirements are implemented thoroughly and fairly.

Absentee and Early Voting: Voting early or absentee is popular with busy voters as well as with resource-strapped election administrators. However, the rate of rejection of mail-in absentee ballots, either because the voter mismarked and voided the ballot, or failed to sign and attest it before mailing, is considerably higher than for votes cast in polling places. Moreover, mail ballots can be cast fraudulently and/or under undue influence more easily than supervised precinct voting, and voter fraud using absentee ballots is a real concern. The risks of absentee ballot fraud are especially worrisome in assisted care facilities, hospitals, and other institutions where staff may have undue control over voters' access to ballots and ability to cast votes.[28]

Voter Identification: States can require voters to show government-issued photo identification before voting. Some object that this identification requirement is expensive, inconvenient to acquire, burdensome for the poor and elderly, and unnecessary to detect rare cases of in-person voter fraud. However, states that require identification believe it is a modest inconvenience and are unwilling to risk whatever voter fraud might take place without such requirements. In *Crawford v. Marion County Election Board*,[29] the Supreme Court upheld Indiana's photo identification requirement against a constitutional challenge. If voters' credentials are in doubt, they can vote by casting a provisional ballot, and eligibility issues can be solved later if the margin of victory is sufficiently close that provisional ballots need to be counted.

Voter Education Materials: Some problems with ballot design, voting technology, and crowds at precincts can be alleviated somewhat by providing voters with materials in advance, such as sample ballots and directions. Such efforts are to be encouraged, but not if funded at the expense of other needed election administration programs.

Points in Summary

- States need to balance concerns about voter fraud with the responsibility to make voting accessible.
- Seemingly neutral and benign improvements to election administration can have partisan impacts and prove controversial.

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28 See Daniel P. Tokaji and Ruth Colker, Absentee Voting by People with Disabilities: Promoting Access and Integrity, 38 McGeorge L. Rev. 1015 (2007).

29 *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Further Reading on Election Administration

Books

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Richardson v. Ramirez, 418 U.S. 24 (1974) (felon voting).

The Electoral College vs. the National Popular Vote

Background

The Electoral College has been the subject of some controversy. Many voters passionately defend the system, while others feel dissatisfied with it. Yet the discontent of this latter group has not translated into elimination of the Electoral College. Constitutional amendments require the approval of thirty-eight states and are thus hard to achieve. Electoral College opponents simply do not have the broad-based support necessary to clear this hurdle. In 2006, however, a group of direct election advocates launched an effort that could allow a national direct election system to be implemented, without the necessity of a formal constitutional amendment.

This group, National Popular Vote (NPV), is asking state legislatures to change the way that they allocate their presidential electors. Most states today allocate their entire slates of electors to the winner of the popular vote within their own states. NPV instead asks state legislatures to allocate electors to the winner of the *national* popular vote. States are bound to this method of elector allocation through an interstate compact. The compact goes into effect once states holding a majority of electors (270) – enough to win the election – have signed the agreement. In this way, a handful of states could fundamentally change the presidential election system.

NPV opponents fall into two categories: Some are general supporters of the Electoral College, but others are direct election advocates who believe that NPV is not the best way to change the presidential election system. Both believe that NPV is an inappropriate end-run around the constitutional amendment process that will result in many logistical and legal problems.

Issues

Should the Electoral College be Retained?

Benefits Touted by Electoral College Supporters: Electoral College proponents maintain that the system encourages presidential candidates to appeal to a wide variety of voters – a situation that is healthy in a large, diverse nation such as America. Candidates obtain the White House by winning simultaneous victories in many places across the nation. These victories can be achieved only by candidates who work to appeal to a wide range of voters. By contrast, a direct election system (whether implemented by NPV or a constitutional amendment) has a different set of incentives. Candidates can easily win the White House even if all their votes come from one type of voter, one region, or a handful of urban areas.

The Issue of Swing States: NPV advocates dispute that the Electoral College encourages national coalition-building, instead emphasizing that candidates spend most of their time and money on so-called "swing states." They note that a different election system would ensure that a vote cast in Wyoming has the same weight as a vote cast in California. Thus, the incentive to campaign only in swing states would be removed, and presidential candidates would pay attention to voters in every part of the country.

Supporters of the Electoral College have a different view. First, they note that, with a direct election system in place, it would not make sense for presidential candidates to campaign equally hard in every precinct nationwide. The country is too big and too diverse. As a strategic matter, candidates would focus their time and resources on densely populated areas or areas that are already friendly to them. Second, Electoral College supporters note that the identity of swing and safe states changes all the time. NPV proponents may correctly note that states receive varying amounts of attention during a single election year, but over the course of many election years, these discrepancies fade. In the long term, no political party can ignore the voters of any state without feeling the ramifications at the polls.

A "More Democratic" Election Process: NPV proponents dislike the fact that a popular vote winner can lose the presidency. They argue that presidential elections should be more democratic, as other elections are. The candidate supported by most Americans should be President. But Electoral College supporters note that Americans *do* hold democratic presidential elections – fifty-one of them – each and every presidential election year (all 50 states plus D.C.). The principle of democracy is then blended with another principle: federalism (the ability of states to act as states). An election process that combines democracy and federalism has proven fairer in the long run. Historically speaking, it has ensured that Presidents are good representatives for a diverse nation composed of many states, regions, and subcultures.

Election Fraud: NPV proponents claim that elections are easier to steal with the Electoral College than without it. They note that a handful of stolen votes in Florida in 2000 could have changed the outcome of the entire election, despite the fact that the national totals were not nearly as close. They feel that such a situation is just an accident waiting to happen.

Electoral College supporters believe the opposite: The system typically *hinders* fraud. In order to be successful, a person has to predict in advance where stolen votes will make a difference. Presumably, if one person can do that, then so can everyone else, and it becomes that much harder to steal votes in such a closely watched "hot spot." Contrast that situation with a direct election system in which any vote stolen in any part of the country (the "bluest" precinct in California or the "reddest" precinct in Texas) can impact the national outcome.

If the Electoral College is to be Eliminated, is NPV the Best Route?

NPV's Logistical Issues: NPV takes fifty-one different local processes and tries to smash them together into one national outcome. It will not work. States have different provisions for many issues: How does a candidate qualify for the ballot? What is the early voting timeline? Can felons vote? NPV does not address this patchwork of state election laws, nor can it force non-participating states to take any particular action. The result will be litigation and chaos as NPV states try to obtain one coherent national total from fifty-one sets of election codes. Any of these scenarios are possible with NPV in place:

- A state has to give its electors to a candidate who did not appear on its ballot.
- A President is elected by a small plurality of voters. NPV cannot force non-participating

states to hold run-offs, nor does it require a minimum plurality.

- The national tally is very close, but a recount is not conducted because no individual state's recount statute was triggered.
- A hanging chad is counted one way in a red state and another way in a blue state.

Interstate Compact v. Constitutional Amendment: NPV asks states to sign an interstate compact, binding them to award their electors to the winner of the national popular vote. The compact goes into effect when states holding a majority of electors (270) have signed it. NPV claims that its compact is fair – even if it ultimately allows a minority of states to change the presidential election process – because every state has complete discretion in deciding how to award its electors. If a state decides the compact is appropriate, then it can sign it.

NPV opponents believe that this radical change to the presidential election process should be attempted only via constitutional amendment. The Founders established an amendment procedure that contains supermajority requirements because they wanted to protect minority groups and the small states. Their process guarantees that changes are made only with broad support. Such a procedure is healthier than NPV's effort to make sweeping change with limited public discussion and the support of only a handful of state legislators.

NPV's Constitutionality and Other Lawsuits: NPV claims its compact is constitutional, but the matter is not clear. The compact will doubtless be the subject of lawsuits if enacted: Can states make a pact that changes the presidential election system so drastically, or is it an impermissible end-run around the constitutional amendment process? State legislatures have the authority to determine a method of electoral allocation for their states. Is this authority without limit? If the compact is otherwise permissible, is congressional approval of the compact required, in accordance with Article I, Section 10 of the Constitution?

Points in Summary

- The Electoral College encourages coalition-building. Because of the need to win simultaneous victories nationally, candidates need broad appeal to win. A direct election system would not carry similar incentives.
- NPV advocates say presidential elections focus on swing states. This is true in the short term, but in the long run, political parties must reach out to all in order to succeed.
- Both direct elections and the Electoral College are democratic. The former is purely democratic. The latter combines democracy and federalism into one process.
- The Electoral College hinders fraud. Dishonest voters must predict in advance where stolen votes will matter. If hot spots are predictable, they are closely watched.
- The constitutional amendment process ensures broad support before change is made. It would also avoid NPV's many logistical and legal problems.

- The constitutionality of NPV is not clear, despite claims to the contrary. There will be many lawsuits if the compact becomes effective.

Further Reading on the Electoral College vs. the National Popular Vote

Books

George C. Edwards III, *Why the Electoral College is Bad for America* (2004).

John C. Fortier, ed., *After the People Vote: A Guide to the Electoral College* (3d ed. 2004).

George Grant, *The Importance of the Electoral College* (2004).

John R. Koza, et al., *Every Vote Equal: A State-Based Plan For Electing The President* (2d ed. 2008).

Tara Ross, *Enlightened Democracy: The Case for the Electoral College* (2004).

Articles

"A Critical Look at the National Popular Vote Proposal," Center for Competitive Politics Policy Memo (2012).

Trent England, "Bypass the Electoral College? Careful What You Wish For," The Christian Science Monitor (August 12, 2010).

Tara Ross, "Legal and Logistical Ramifications of the National Popular Vote Plan," The Federalist Society for Law and Public Policy Studies (2010).

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