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The Winner Takes All and Will Never Give it Up: The U.S. Supreme Court Must Protect Voters from the Electoral College

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〈국문초록〉

현대의 민주국가 중에서 미국의 행정수반을 선출하는 방법은 이례적이고 역사적으로 볼 때 불공평과 4년마다 수백만의 유권자의 선택을 무시하는 효과를 가져왔다. 이러한 결과는 적어도 어느 당이 집권하든 간에 무시할 수 없을 정도로 상당하며 제도 설계의 단순한 변칙은 아니다. 아마도 이러한 불공평은 선거 절차가 세계 어느 민주국가나 미국의 어떤 주에서 행정수반을 뽑는 제도 중에서 복제된 것이 아니기 때문일 것이다. 4년마다 대통령을 선출하는데 있어서 승자독식제도를 사용하는 거의 대부분의 주에서의 선거인단 제도는 실제로 비민주적이고, 소수자 법하에서의 평등보호를 박탈하는 것이기 때문에 헌법에 위반된다.

수십년에 걸쳐 정치적 견해의 양쪽에 있는 정치가나 학자들이 선거인단 제도를 폐지하거나 고치려는 헌법개정을 주장해왔다. 이러한 절차는 소수자 투표자들이 감내할 수 있는, 불공평에 대한 해결방법이긴 하지만 그것은 유일한 방법이 아니고 평등보호를 달성하기 위하여 헌법을 바꿀 필요는 없다. 승자독식제도가 소수자 투표권자로부터 정치적 자산을 박탈하는 것이기 때문에, 이것은 정치적 문제가 아니고 헌법적 문제이다.

승자독식 제도는 헌법에서 위임한 것이라기보다는 많은 주가 만들어 낸 것이다. 승자독식 방식은 근소한 승리에도 불구하고 그 주에서의 일반투표 승자에게 선거인단 투표의 전부를 할당한다. 그 결과 그 주의 투표권자를 대표하지 않고 소수자 투표권자의 어떠한 목소리를 부정하는 정치적 권력의 집중을 가져오게 된다. 이러한 제도는 일인일표의 원칙과 대조되고 헌법상의 기본권인 투표권을 침해한다.

근래 항소심에서 기각되었지만 상황의 심각성이나 희귀성으로 인해 대법원의 심사를 필요로 하는, 선거인단을 결정하는 방법의 헌법성을 다투는 사법적 제소가 많이 있었다. 권리구제를 구하는 캘리포니아, 매사추세츠, 사우스 캐롤라이너, 텍사스에서의 유권자의 이러한 제소와 권리박탈을 심사하면서 대법원은 권력을 가진 집권당이 자신들에게 권력을 준 제도를 쉽사리 결정하지 않는 것을 기다리지 않고 수백만의 투표권을 보호할 수 있다.

이 논문에서는 선거인단과 승자독식 제도를 다른 나라에서의 간접선거와 비교

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하고, 그리고 점증하는 지리적 불공평으로 인하여 입법작용이 일어나지 않을 가능성이 높아지는 것을 설명하고 최근의 항소심 판결을 분석한다. 또한 사법적 개입이 적당한 방법이라는 입장을 유지하면서 이러한 제도에서 발생하는 부정의를 시정할 사법적 그리고 비사법적 방안이 제시된다.

주제어 : 선거인단, 간접투표, 헌법, 평등보호, 선거법, 승자독식

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Ⅰ. Introduction

Every four years, millions of voters in the United States, Democrats, Republicans and third-party voters alike, cast their ballots for the national presidential election. The impact of these votes varies depending on their status as a minority or majority voter in their electoral state. This impact, in states where one political party dominates, is practically always none. This is a result of the chosen method of allocation of Electoral College votes in nearly all of the United States, the "winner take-all" procedure (WTA or the "unit rule").[1] With this method, all minority votes within a state are deemed irrelevant, as the majority, or a plurality of the popular vote are awarded all of the Electoral votes that are then cast for President and Vice President. This is not only a poor policy choice, resulting in disproportionate power continually being held in certain "battleground" states and election inversions to occur, it is a violation of equal protection under the law by disenfranchising the minority voters within each state.

Among contemporary democracies, this method for electing the chief executive of the United States is an anomaly, with a history convincingly rooted by the goal of inequity and an effect that disregards the choice of millions of voters every four years. Perhaps this is the reason that this

1) 48 out of the 50 States award Electoral votes on a winner-takes-all basis (as does the District of Columbia). *See* National Archives and Records Administration, *Frequently Asked* Questions https://www.archives.gov/electoral-college/faq#wtapv (last visited September 28, 2020).

selection process for the head of state is one of the only US governmental methodologies that has never been replicated by emerging democracies or even by any of the states within the US to select their own governors. The Electoral College combined with the vast majority of states that use the WTA system to elect a president every four years not only produces undemocratic results, it is unconstitutional, as it deprives equal protection under the law to residents in the minority. At this point, this result is inarguably a feature and not a bug of this design, with the majority party enjoying the rewards, thus having little political motivation for reform.

It is not that there has not been political interest. Thousands of proposals have been made to either change or abolish the Electoral College, more than any other part of the Constitution.[2] These recommendations have been made by academics, politicians and journalists from all different political backgrounds. Part of the reason these proposals have failed is due to the difficult procedure of ratifying a Constitutional Amendment or successfully holding an Article V constitutional convention. Another reason is that as long as one party feels disadvantaged, it will be more supportive of change, but, when a party is in power, the support for change is halted. This shifting inequity between groups obscures the disenfranchisement of individual voters.

In this article, I will explore the history of the Electoral College and the WTA, comparing it to other countries indirect election methods. I will explain the growing geographic inequity that dilutes the power of voter's presidential ballots, summarize the recent Circuit Court cases brought by these voters, and argue that the shifting inequity between groups makes legislative action to remedy this constitutional violation highly unlikely, leaving the Supreme Court to be the only viable remedy to give each voters' ballot a voice.

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2) Joy McAffee, Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000, 32 CUMB. L. REV. 643, 645 n.8 (2002).

Ⅱ. The Constitutional Right to Vote

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[3] In *Williams*, the Court held that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall ***deny to any person*** the equal protection of the laws."[4]

The Court has explained that every person's vote must be "worth" the same and have applied this concept in the context of political gerrymandering analysis, upholding the principle of one person, one vote.[5] Political equality has been recognized as "one person, onevote" and is required by the Equal Protection Clause.[6] The importance of suffrage in a free and democratic society was the core of the rulings regarding equal apportionment of seats in state legislature.[7] States must "ensure that each person's vote counts as much, insofar as it is practicable, as any other person's."[8]

The *Bush v. Gore*, per curiam opinion, cited *Reynolds*, referred to the right to vote as fundamental and applied the Equal Protection Clause to overturn the court below.[9] Despite this opinion and result, the Court did not apply strict scrutiny, which is the standard typically applied when it is alleged that a fundamental right has been infringed upon.[10]Despite this opinion and result, the Court did not apply strict scrutiny, which is the standard typically applied when it is alleged that a This decisioncast doubt

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3) Williams v. Rhodes, 393 U.S. 23 (1968), (citing Westberry v. Sanders, 376 U.S. 1, 17 (1964)).
4) Williams, 393 U.S. at 30 (citing U.S. Const. amend. XIV § 1).
5) *See, e.g.*, Guy-Uriel E. Charles, Election Law and the Roberts Court: Redistricting: Race, Redistricting, and Representation, 68 OHIO ST. L.J.1185, 1202 (2007).
6) See Gray v. Sanders, 372 U.S. 368 (1963).
7) Reynolds v. Sims, 377 U.S. 533, 561 (1964); Wesberry, 376 U.S. at 17-18.
8) Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
9) Bush v. Gore, 531 U.S. 98 (2000).
10) *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944)

on the fundamental nature of suffrage that had been previously established by the Court.right has been infringed upon.

Recently, in *Chiafalo et al v. Washington,* a unanimous court reiterated that although States have far-reaching authority over presidential electors, that authority does not include violation of the Equal Protection Clause or any other Constitutional checks.[11]

Ⅲ. Brief Introduction to the Electoral College

The Electoral College is enumerated in the U.S. Constitution, establishing that the President and Vice President shall be elected by a Number of "Electors" appointed by the States "in such Manner as the Legislature thereof may direct."[12] This body of Electors appointed by each state is to be in proportion to its representation in the Senate and the House of Representatives. Once appointed, Congress designates a day which the Electors "meet in their respective states" and vote "in distinct ballots" for President and Vice President.[13] The votes are sent to Washington D. C. where they are tallied by the President of the Senate and the candidate that receives the majority of the those electors' votes wins the presidency, "if such number be a majority of the whole number of Electors appointed," with the same procedure being followed for the vice presidency.[14]

The rationale for creating the Electoral College is in dispute, with some evidence that it was an effort to balance between big and small states, or perhaps to provide educated Electors who would help bridge the issue of information not reaching all geographic areas or even because the framers had doubts about democracy. Another theory is that the purpose was to maintain and capitalize on the extra population that states that enslaved people would benefit from. With this Electoral College system, the

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11) Chiafalo et al. v. Washington, 591 U.S. ___ n. 4 (2020).
12) U.S. Const. art. II § 1, cl. 2.
13) *Id.* Amend. XII.
14) *Id.*

population who were enslaved were utilized and counted as three-fifths of a free person, allowing Virginia, the state with the most people enslaved to gain a great benefit. Had the presidency been by direct vote, as the House of Representatives was, the politicians of Virginia would have lost that benefit and most likely not have held eight of the first nine presidential elections.[15]

A. How WTA Took Over

The WTA method of allocating electoral votes is not required, is mentioned nowhere in the Constitution, nor in *The Federalist Papers*, it was not discussed at the Constitutional Convention.[16] Though there is no federal mandate nor guidance, all but two states utilize this method of voting for the presidency and vice presidency.[17]

The first Electors had been expected to "exercise a reasonable independence and fair judgment" in the selection of the president, but partisan political pressure was apparent from the first elections.[18] This tactical advantage was utilized and although the practice was philosophically troubling to at least one of the founding fathers, it was adopted widely.[19] In 1824, Missouri Senator Thomas Hart issued a critique

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15) Akhil Reed Amar, Some Thoughts on the Electoral College: Past, Present, and Future, 33 OHIO N.U. L. REV. 467 (2007).

16) *See* John R. Koza et. al, Every Vote Equal, 82, 366 (4thed.2013)

17) Maine and Nebraska are the only states in the country that do not use this method. They both use the 'Modified District Plan' (MDP). In the MDP, one elector is elected from each congressional district and two are elected at-large. Washington, DC also uses WTA.

18) McPerson v. Blacker, 146 U.S. 1, 36 (1892).

19) Thomas Jefferson wrote to Virginia Governor James Madison in 1800 criticizing the WTA, stating that it would ensure that "the minority [was] entirely unrepresented," but then urged the state of Virginia to adopt the method for political gain. He had just lost the 1796 presidential election after Virginia and North Carolina split their electors and he wanted to ensure that would not happen again (also ensuring no minority voters receive representation). *See* Letter from Thomas Jefferson to James Monroe (Jan 12, 1800) *in* 31 The Papers of Thomas Jefferson, Vol. 31, 300-01 (Barbara B. Oberg ed., 2004). Rodriguez v. Newsom, ___ F.3d ___, 2020 WL 531884 (9thCir.2020)(Pet.App.9).

of the WTA method, stating that "losing their votes is the fate of all minorities," and that the operation of the unit rule was "not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."[20] Despite the opposition regarding abandoning democratic ideals for competitive edge, by 1868, all states had adopted a popular election, winner-take-all system, which has been maintained until today, with only three exceptions of deviation to district-based voting (two of which remain today, Maine and Nebraska).[21]

B. A System Apart from World Democracies

This system is distinct, with no other democratic (or non-democratic) countries worldwide utilizing this type of indirect, decentralized, plurality voting method to elect their head of state.[22] The only other democracies that indirectly elect a leader that is comparable to the U.S. President (a head of state and head of government) do so by indirect legislative appointment.[23] This difference shapes the way we must analyze this election, as it is connected directly to the act of voting by citizens of each state.

This lack of direct democracy is notable, as the United States was the first country to have a chief executive selected through a distinct electoral process, separate from the election of legislatures.[24] The United States was

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20) Katherine Florey, Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature, 68 CASE W. RES. L. REV. (2017), *See* Lawrence D. Longley & Alan G. Braun, The Politics of Electoral College Reform, 406 YALE UNIVERSITY PRESS 228, 139 - 78 (1972).

21) Florey at 338.

22) Matthew Soberg Shugart, "Elections": The American Process of Selecting a President: A Comparative Perspective, Presidential Studies Quarterly, Sep. 2004, Vol 34, No. 3, The Public Presidency, p 632-655, 638 https://www.jstor.org/stable/27552617 (last visited September 29, 2020).

23) Drew DeSilver, Among Democracies, U.S. Stands Out in How it Chooses its Head of State, Pew Research Center, November 22, 2016 https://www.pewresearch.org/fact-tank/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/ (last visited September 29, 2020).

24) Sugart at 639.

a trailblazer in the concept of popular presidential elections, but now it remains one of the few that do not select their chief executive via direct election. While the world moves toward direct elections, it also has trended away from the plurality method, with many countries concerned regarding "spoilers."[25] The WTA method, which uses a plurality, is vulnerable to spoilers.

Three other countries (Argentina, Finland, and Taiwan) have used the Electoral College to select a powerful head of state in the past, though they have since abandoned the system. Despite their use of the Electoral College, the United States still stands alone as the only country to have utilized the plurality of each district or state to allocate their electoral votes. This "dual disproportionality" gives weight to states that does not correspond to their share of population is combined with the plurality result that gives the winning candidate 100% of the state's electoral vote regardless of the margin of victory.[26] This disproportionality magnifies the risk of spoilers affecting the outcome of the presidential election.

Ⅳ. Negative Effects of the Electoral System

The history and comparisons to other countries highlight some of the democratic concerns connected to the election of the President and Vice President of the United States. Alone, these concerns, mainly that it is a system developed to suppress minority voters and allow for partisan jockeying, are troubling, but they do not raise to the level of a constitutional infringement. In order to claim a violation of the Equal Protection Clause, a burden on voters must be present. In addition to those constitutional burdens, the Electoral College combined with the pervasive WTA rule creates an inescapably undemocratic and weakened electoral system.

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25) A spoiler is an unrealistic candidate who siphons votes from another candidate.
26) Sugart at 643.

This presidential electoral system is one rife with problems. It produces anomalous results, such as inverted elections; it creates a system in which presidential candidates are campaigning only to certain states, arbitrarily distributing power to certain voter groups and weakening the union by increasing factionalism; it creates incentive for fraud and voter suppression through that factionalism; it creates more opportunity for spoiler candidates have an unearned effect on the vote; it is contrary to democratic principles of electoral power and it creates a pendulum of partisan power that affects voters of all political beliefs.

A. The WTA Unconstitutionally Burdens Voters

Equal protection under the Constitution requires "as nearly as is practicable," that one person's vote "be worth as much as another's."[27] The WTA system devalues the votes of minority voters in all states and in particular consistently devalues the votes of minority voters in historically "blue" or "red" states. This affects Democrats, Republicans, Libertarians, and other non-mainstream party voters every four years.

When a Republican votes for the presidential and vice presidential election in California, he or she is denied equal representation within the Electoral College when his or her ballot is not valued as much as a Republican voter in Texas. The same is true for a Democrat in heavily Republican states where votes for the Democratic candidates for President and Vice President are systemically discarded before the final direct election for President (the Electoral College). This is the procedure in states that utilize the WTA method to allocate electoral votes, resulting in millions of voters' votes for president being disregarded (even if it is a 49% to 51% vote). This denial of an equal say in the presidential election is unconstitutional.

As argued by the plaintiffs in the recent cases in California, Massachusetts, South Carolina and Texas, the presidential elections process

27) Wesberry at 7-8.

in WTA states is analogous to the voter in *Gray v. Sanders*, because the WTA procedure effectively discards that voter's ballot for President at an intermediate step in the presidential election. This is a failure to allow the voter to participate in the electoral process, as the intermediate step reduces participation to zero.[28)]

In *Gray,* the Georgia Democratic Party used the county unit system to conduct statewide primaries for senator and governor. In that system, each county would receive a number of voting units that reflected the number of representatives in the Georgia lower House of Representatives. Each County then had an independent election, awarding all units to the plurality vote-getter through WTA, then the units were counted by the state.[29)]

The plaintiffs in the recent cases, country-wide, argued that the WTA method creates a similar multi-step process for election of the president and it is THAT process, not the actual Electoral College, that is unconstitutional. Specifically, the WTA unconstitutionally cancels the minority voters' votes for Electors by using an at-large, slate election to translate millions of minority votes into zero representatives.[30)]

Those plaintiffs have recently lost their challenges in the Circuit Courts, with the Courts choosing to not apply the *Grey* holding, but rather relying on *Williams.* In *Rodriguez v. Newsom*, the California case, the Court did not apply the *Gray* standard, holding that the voters "oversimplify the standard" by not showing an invidious attempt to cancel out or minimize voting strength.[31)]. In response to that, plaintiffs can show with historical context that the WTA invidious standard is met as each political party attempts invidiously to use the WTA system to suppress the minority vote and deny a democratic outcome (one person, one vote), when in power.

The spread of the WTA, years after the creation of the Electoral College, adopted by those who argued against it to purposefully dispose of the democratic ballots of minority voters. This is invidious intent, it is a

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28) Gray, at 371.
29) *Id.* at 370-371.
30) White v. Regester, 412 US 755, 769 (1973).
31) Rodriguez v. Newsom, No. 18-56281 (9thCir.2020).

government system that was put in place to dilute the power of votes.

This idea was at odds with the ideals of the Founding Fathers, with Jefferson, Hamilton and Madison (along with many others) arguing that a different system[32] would be more consistent with the electoral college's original intent.[33] Despite these arguments and reservations about whether to divide by state or district, these democratic grievances were only advanced until those making them needed the undemocratic "boost" from a plurality windfall of Electoral votes, which is strikingly similar to politicians today. This abandonment of democratic scrutiny in the name of political leverage is clear invidious intent, not inspired by racial animosity but rather greed and desire for political capital.

B. Election Inversions and Campaign Inequity

When a candidate or party wins the most votes nationwide yet fails to win the most electoral votes or parliamentary seats and therefore loses the election, an election inversion has occurred. As of today, there have been four times when the winner of the United States presidency did not receive the most votes: 1876, 1888, 2000, and 2016. These results are far more likely to happen with a WTA approach, as the popular vote is never considered towards the electoral result.

These election inversions, in and of themselves, are constitutional, as the Electoral College is a constitutional institution. It is the act of disposing of the minority votes prior to Electoral voting that is unconstitutional. This act creates a diluted Electorate and does not take into account the will of the people, this is the vehicle of unconstitutionality. One vote is not worth

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32) It is also important to note, that the objections to this plurality-based allocation system by the founding fathers, was an objection to a more democratic system, as the current WAT was not even a procedure that was considered. The concept of just "shrinking" the concept of a direct election and allowing that to determine the chief executor would have been completely illogical. It makes no sense that a smaller scale version of the national popular vote would somehow rid the process of the problems that steered founders away from direct plurality elections in the first place.

33) Florey at 339.

as much as another in a different state, thus violating the one person, one vote constitutional guarantee. In 2016, for example, Wyoming cast one electoral vote for every 190,000 residents; in California, an electoral vote represented 680,000 people. According to an analysis of state by state polling data, Andrew Gelman calculated that a New Hampshire resident has 30,000 times more power over the result of the election than a citizen of Wyoming.[34)]

Based on these numbers, any candidate with half a brain would treat voters in different states much differently. This type of victory is won by gaining narrow tactical advantages which dictate where and how to campaign. It encourages focusing on only those states that "matter" rather than the entire electorate. That is not a healthy democracy. This "geographical gerrymandering" leads presidents to focus all of the resources on a few potentially competitive states and ignore the rest of American voters. This is not a new occurrence, but the inequity is more apparent after looking at the data regarding campaigning in the 2012 election cycle. During that campaign, the Presidential and Vice Presidential candidates attended 253 events in 168 different cities these public campaign events. This number does not seem shocking, until you learn that ALL of these public campaign events were held in only 12 states after the party conventions.[35)]

Because the U.S. population is so very partisan[36)]and ha sreliably voted that way, spectator states[37)] tend to remain the same, with nine of the 2012

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34) See Andrew Gelman, What Are the Chances Your Vote Matters?, Slate (Nov. 7, 2016, 5:40 PM), http://www.slate.com/articles/news_and_politics/politics/2016/11/here_are_the_chances_your_vote_matters.html(last visited September 29, 2020).

35) Robert Richie, Andrea Levien, The Contemprary Presidency: How the 2012 Presidential Election has Strengthened the Movement for the National Popular Vote Plan. PRESIDENTIAL STUDIES QUARTERLY 43, NO. 2 (June 2013) https://onlinelibrary.wiley.com/doi/pdf/10.1111/psq.12027

36) Pew Research Center, Partisan Antipathy: More Intense, More Personal, October 10, 2019 https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more- intense-more-personal/ (last visited September 29, 2020).

37) Those that have not been competitive for ten presidential elections in a row. Bonnie J. Johnson, Identities of Competitive States in U.S. Presidential Elections: Electoral

states being among the 13 battleground states that were most visited by candidates in 2008. The remaining 37 states (including DC) were not battleground states in either.[38] This "ranking" of states in terms of their political clout is not the sign of a healthy democracy and leads to interstate and international voter suppression attempts in the hope of swaying political power.[39]

Electoral College critics have long used this argument to bolster the argument that the division of battleground and spectator states reduces voter turnout in "safe" or spectator states. An article published in 2008, assessing participation gap disproves that theory, showing that there are surges in battleground states rather than citizen withdrawal in safe state s.[40] This does not weaken the argument that the WTA procedure is unconstitutional, but helps show the desire for minority voters to have their votes counted.

Ⅴ. Attempts to Change the Presidential Electoral System

The majority of the Americans favor replacing the Electoral College with a nationwide popular vote.[41] The report, issued by the Pew Research Center, showed that the number of Republicans and independents who lean towards the Republican Party supporting an amendment the Constitution

College Bias or Candidate-Centered Politics?, PUBLIUS, Spring, 2005, Vol. 35, No. 2 (Spring, 2005), pp. 337-335.

38) Id.

39) U.S Department of Justice, Report On The Investigation Into Russian Interference In the 2016 Presidential Election, Volume I of II. March 2019 https://www.justice.gov/storage/report.pdf (last visited September 29, 2020).

40) Keena Lipsitz, The Consequences of Battleground and "Spectator" State Residency for Political Participation, POLIT BEHAV31, 187 (2009). https://doi.org/10.1007/s11109-008-9068-7

41) Andrew Daniller, "A Majority of Americans Continue to Favor Replacing Electoral College with a Nationwide Popular Vote," Pew Research Center, March 13, 2020. https://www.pewresearch.org/fact-tank/2020/03/13/a-majority-of-americans-continue-to-favor-replacing-electoral-college-with-a-nationwide-popular-vote/ (last visited September 29, 2020).

has dropped from 51% in 2011 to nearly two thirds supporting the current system. Among Democrats and Democratic leaners the number is 81% from 69% in 2012. [42] Public opposition to the Electoral College has been above 50% off and on since the 1960's, with a high of 75% in favor of abolishing it in 1981.[43]

As partisanship continues to mount, the hope of a Constitutional Amendment, which would need at least two-thirds ratification from both the House and Senate and approval from at least 38 of the 50 states seems to dwindle.

In addition to the Constitutional Amendment process, the National Popular Vote Interstate Compact is another solution proposed by Electoral College critics. The NPVIC is an interstate compact, which as of September 2020, 14 states and Washington, DC have joined, that would award member states' presidential electors to the candidate that receives the most votes nationwide. This compact would remedy the WTA constitutional burden, although at first glance it seems to magnify it. By allowing a full popular vote to count, minority voters in different states all have the same opportunity to cast a vote towards the presidential election. Although this is a novel idea it is not one that is likely to pass as some argue that this Compact negates the Electoral College process, which is enumerated in the Constitution. As such, it seems that the Court is the only way to affect this change.

A. Judicial Challenges to WTA

The four recent equal protection challenges to the WTA approach have all recently been denied by their respective Circuit Courts. Each of the holdings relied primarily on the Federal District Court case of *Williams v. Virginia State Bd. Of Elections*, which was summarily affirmed by the Supreme Court in 1969.[44] The Plaintiffs in these cases differentiated their

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42) Id.

43) National Archives, Frequently Asked Questions https://www.archives.gov/electoral-college/faq (last visited September 29, 2020).

cases citing the changes to electoral procedure, demographics, and the increase in election inversions, which lead to enhanced power of certain states. The precedent in *Williams,* (which was not litigated in the Supreme Court) simply does not address these issues. As the Court recently noted "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[45] In addition to new insights and understandings regarding voter suppression and dilution, the Plaintiffs rely on *Gray v, Sanders,* which upheld the equal protection claim when a state's WTA process discards votes in the first step of a two-step election within the state.

More urgently, the Circuit Courts have also failed to realize that the directive in *Williams*: that the minority voters should persuade the State legislature change the system fails to grasp the basic problem faced by these minority voters. That their votes are not as powerful. The mere fact that the voters in question are the minority places them with reduced political clout within their state. There is no legislative check to encourage or demand that a State legislature (whose power is gained through the votes of the majority) deconstruct that system to allow the minority to have more political gains. The Court, a ruling body that is aware of the need for checks and balances to prevent tyranny of the majority, has shut down the minority voters and left them nowhere to go. In addition, as evidenced from the historical emergence of WTA politics, those in power will not cede that power to become more democratic.

Despite the lack of a direct circuit split, these cases must be appealed to the Supreme Court. In the interest of democracy, logic, fairness and policy, there is simply no other avenue for minority voters to take that will actualize the power of their vote for President and Vice President, the party in power will not cede to level the playing field. There is not an incentive for a majority of voters to make it easier for the minority. A

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44) Baten v. McMaster, 967 F.3d 345 (4th Cir. 2020); , 954 F.3d 351 (1st Cir. 2020); , 951 F.3d 311 (5th Cir. 2020), Rodriguez

45) Obergefell v. Hodges, 576 US 644, 673 (2015).

non-partisan solution must be reached.

VI. Conclusion

There have been recent judicial challenges to the constitutionality of the method of determining Electors which have not survived the Circuit Courts, but the gravity and uniqueness of the situation necessitates that the Supreme Court review this issue. By reviewing these challenges and the disenfranchisement of voters in California, Massachusetts, South Carolina and Texas that have sought relief, the Supreme Court can protect the voting rights of millions without waiting for a political party that is in power to make the unlikely decision to change the system that gave them power.

The other options to remedy this undemocratic system are also unrealistic. This system, which renders some states more powerful than others and some voters without any meaningful say in the election of the President or Vice President, can be remedied in a nonpartisan way, despite its entrenchment in partisan politics. But, procedures that must be completed in order to create a more perfect democracy rely too heavily on the altruism of elected officials to act in a nonpartisan manner. The Court, which has not ruled on this issue, has the ability to step in and make a decision that could alleviate the constitutional burden on minority voters across the political spectrum.

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[Abstract]

The Winner Takes All and Will Never Give it Up: The U.S. Supreme Court Must Protect Voters from the Electoral College

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Among contemporary democracies, the method for electing the chief executive of the United States is an anomaly, with a history that is arguably rooted by inequity and an effect that disregards the choice of millions of voters every four years.

This result after this long is a feature and not a bug of this design, at least to whichever party is in control.

Perhaps this inequity is the reason that this election method is one of the only US governmental plans that has not been replicated by any other democracies worldwide or by any of the states within the US. The electoral college combined with the vast majority of states that use the "winner takes all" (WTA) system to elect a president every four years is not only undemocratic in practice, it is unconstitutional, as it deprives equal protection under the law to residents in the minority.

For decades, politicians and academics on both sides of the political spectrum have made arguments for a constitutional amendment to abolish or alter the Electoral College. This procedure could certainly be a solution to the inequity that minority voters endure, it is not the only path to take and it is not necessary to change the constitution to achieve equal protection. This is not a political issue, it is a constitutional one because the WTA deprives minority voters of their political capital.

The WTA system is not a constitutional mandate, but rather a creation of the majority of the states. The WTA method assigns all the Electoral votes to the winner of the popular vote in that state, regardless of the margin of

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victory. This results in the concentration of political power that does not represent the State's voters and denies any voice whatsoever to minority voters within the State. This system is in contrast to the "one person, one vote" principle, which is well established in Fourteenth Amendment Supreme Court jurisprudence and therefore violates the fundamental constitutional right to vote.

There have been recent judicial challenges to the constitutionality of the method of determining Electors which have not survived the Circuit Courts, but the gravity and uniqueness of the situation necessitates that the Supreme Court review this issue. By reviewing these challenges and the disenfranchisement of voters in California, Massachusetts, South Carolina and Texas that have sought relief, the Supreme Court can protect the voting rights of millions without waiting for a political party that is in power to make the unlikelydecisiontochangethesystemthatgavethempower.

In this article, I will explore the history of the Electoral College and the WTA comparing it to other countries indirect election methods, explain the growing geographic inequity that continues to increase the unlikelihood of legislative action and summarize the recent Circuit Court cases. I will also put forth both a judicial and non-judicial plan to remedy the injustice created by these systems, while maintaining that judicial intervention is the appropriate remedy.

Keywords : Electoral College, Indirect Voting, Constitutional Law, Equal Protection, Electoral Law, Winner Takes All