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THE ELECTORAL COLLEGE — NOW, MORE THAN EVER

*Victoria Sutton**

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I. INTRODUCTION

The recent presidential election¹ raised great concerns, disbelief, and even outrage, that a popular vote would not determine the new president-elect. The Electoral College provision of the U.S. Constitution² — which had uneventfully operated in every presidential election suddenly raised opponents to its operation. Most noticeably, the then First Lady, Senator-Elect Hillary Rodham Clinton included in her acceptance speech her promise to eliminate the Electoral College provision from the Constitution: “We are a very different country than we were 200 years ago, and I believe strongly that in a Democracy, we should respect the will of the people and to me, that means it’s time to do away with the Electoral College. . . .”³ But have the differences she cites significantly changed the utility or intent of the electoral process in a way that would demand us to “do away” with it?

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1. Presidential Election 2000.

2. U.S. CONST. art. II, § 1, cl. 2, 3.

3. Hillary Clinton Wants to End Electoral College, United Press Int’l, Nov. 10, 2000, LEXIS-NEXIS Library, United Press Int’l File.

II. WHY IS THE ELECTORAL COLLEGE STILL BEING DEBATED?

First, an examination of the operation and effect of the Electoral College provision is in order. The Electoral College was established in 1787 in Article II, Section 1, of the U.S. Constitution:

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. . . .⁴

This provision was utilized beginning with the first Presidential election of 1789. Interestingly, eight electors from New York failed to be appointed in time, and two from Virginia and two from Maryland did not vote. Rhode Island and North Carolina did not send any electors because they had not yet ratified the Constitution. This resulted in a total of twenty-four of the eighty-one electoral votes, not being cast.

The Electoral College has determined the outcome of only two presidential elections preceding the 2000 election, where the popular vote gave a different result. Rutherford B. Hayes was elected in 1876 and Benjamin Harrison was elected in 1888, and neither won the popular vote. President John Quincy Adams did not win the popular vote against Andrew Jackson in 1824, but because neither received a majority of the Electoral College votes, the decision fell to the House of Representatives, which elected Adams.

The Electoral College provision was amended by the 12th Amendment to the Constitution in 1804,⁵ but no material changes have been made to the system. The idea of the Electoral College has been challenged by the American Bar Association as "archaic" and "ambiguous."⁶ Polling by ABA and *The Washington Post* showed that seventy-seven percent of Americans favored abolishing it in 1987.⁷

Two constitutional amendments, proposed in 1997, included runoff provisions if a candidate did not receive 40-50% of the vote, requiring a runoff between the top 2 candidates.⁸ If these amendments had been in effect in 1992, when Bill Clinton received less than 50% of the vote, a runoff election would have been triggered between Bill Clinton and George Bush. Voter turnout for a runoff election, too, would pose additional

4. U.S. CONST. art. II, § 1, cl. 2, 3.

5. U.S. CONST. amend. XII.

6. See Bruce Bartlett, *How to Compound the Chaos*, THE WASH. TIMES, Nov. 20, 2000, at A18.

7. *Id.*

8. H.R.J. Res. 28, 105th Cong. (1997); H.R.J. Res. 43, 105th Cong. (1997).

problems with an electorate that already scarcely registers and votes at the fifty percentile level.⁹

III. THE MADISONIAN NIGHTMARE — FACTIONALISM

In *The Federalist No. 10*, James Madison expressed his ideas about active citizen participation in the new government through the use of representatives:

[T]o refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.¹⁰

Madison believed that representatives are not deemed more competent, but rather the system of representation permits representatives with duties to represent the people to decide the synergies and coordination of governmental policies. Madison refers to the “public voice”¹¹ through the representatives of the people to be “more consonant to the public good”¹² than if individuals so convened.

Madison’s confidence in the people is further supported by his trust in the republican system, not in the individual virtue of each representative, when he wrote, “It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”¹³

The anti-federalists were hostile to the proposed Constitution because of the fear of rule by remote national leaders who were expected to fail to represent the interests of the people. When Madison spoke of factionalism, he saw it as the product of liberty. With a broader grant of liberty than ever

9. *Proposals for Electoral College Reform: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 4 (1997)* [hereinafter *Hearing*] (statement of Rep. Robert Scott, Member, House Comm. on the Judiciary); see also Terri Susan Fine, *Constitutionality, Legitimacy and Political Participation: A Look at First Time Voters in 2000*, 13 U. FLA. J.L. & PUB. POL’Y 153 (2001).

10. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

11. *Id.*

12. *Id.*

13. *Id.* at 80.

before in any other government, Madison knew that the threat of factionalism had to be controlled in order for the new government to succeed.

Madison wrote that a faction is “a number of citizens. . . united and actuated by some common impulse of passion. . . adversed to the rights of other citizens.”¹⁴ For these factions, Madison was concerned that these groups expected to have their own interests satisfied at the expense of other interests; thereby posing a threat of overwhelming minority interests.¹⁵ In *The Federalist No. 10*, Madison proposed two different approaches to cure the problem of factionalism.¹⁶ First, remove its causes.¹⁷ But Madison explained that doing so would be “worse than the disease.”¹⁸ That is, the very basis for our government would be threatened if groups were prohibited. Alternatively, Madison proposed to control the effects of factionalism through a republican form of government.¹⁹

IV. WHAT IS THE FACTIONALISM OF 2001?

While republicanism was intended to cure the threat of factionalism with representative government, factionalism has fashioned itself into public interest groups, associations, and lobbying groups for industries, societies, professional associations, as well as local and state governments. The fight against the factionalism of 2001 has been restyled as campaign finance reform, given that campaigns are financed largely by the support of lobbying and special interest groups. Corporations and individuals, too, contribute a portion of this support. The theory of “one man-one vote”²⁰ has been replaced more by massive contributions to campaigns than by any threat from the electoral college.

Madison wrote, “The immediate election of the President is to be made by the States in their political characters.”²¹ Factionalism was thus to be controlled by the representation of the States, with a body of electors representing each state, in addition to the republican system of selecting electors based upon Congressional representation.²²

How then, does a republican form of government protect the nation against the effects of factionalism? Madison compared the two systems of government, a pure democracy or a republican form of government, to

14. Madison, *supra* note 10, at 78.

15. *Id.*

16. *Id.* at 82.

17. *Id.*

18. *Id.*

19. *Id.*

20. See generally *Baker v. Carr*, 369 U.S. 186 (1962).

21. Madison, *supra* note 10, No. 39, at 44.

22. *Id.*

demonstrate the potential danger of factionalism and to promote republicanism. He wrote:

[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.²³

Madison contrasts the virtues of a republican form of government:

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.²⁴

In summary, Madison wrote that:

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.²⁵

While James Madison and Thomas Jefferson held strong beliefs in federalism,²⁶ which also supported the establishment of the Electoral College, Alexander Hamilton, strongly believed that representatives possessed greater knowledge to select a President and Vice-President than the masses. "A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation."²⁷

A pure democracy would require direct citizen elections for the Presidency. Such elections for the Presidency would raise other problems,

23. *Id.*

24. *Id.*

25. *Id.* at 82.

26. *Id.* at 81-82; see also ADRIENNE KOCH, JEFFERSON AND MADISON; THE GREAT COLLABORATION (1st ed. Knopf 1950).

27. THE FEDERALIST No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

including logistical difficulties and the voter fraud investigations in a national system.²⁸ Managing a recount where every vote could change the national election could recreate the Florida scenario of the presidential election of 2000, fifty times. A fraud allegation or a recount could trigger a change in the national outcome for every state. However, the Electoral College system brings a finality to the election, utilizing a state system of representation.

V. THE ELECTORAL COLLEGE VERSUS THE POPULAR VOTE IN 2000

The framers' intent in the Federalist Papers discussed in the previous section, exhibits that Madison and Jefferson relied upon the infallibility of federalism,²⁹ while Hamilton believed that an intellectual elite would be more suited to select a President.³⁰ The contextual interpretation of the Constitution must consider the clear choice of a representative form of government to be consistent with the use of the electoral college concept. One constitutional interpretation approach, often referred to as the "living document" approach, finds that the Constitution is a "living document", intended to be interpreted in the light of changing circumstances.³¹ But given that the electoral college is firmly supported by traditional methods of constitutional interpretation, what kind of changes in circumstances would be required for the States to ratify changes to the Constitution involving the Electoral College?

One approach to examining this question is to evaluate the changes made since the constitutional convention and the first election of 1789. The number of states has changed from thirteen to fifty (only twelve voted in the first presidential election, however), and the population of each state has changed dramatically. If the electoral college was intended to provide representation for states with lower populations so that the more populated states would not dominate the election of the President, then one would expect some losers and some winners in the electoral college distribution of 1790.

Figure 1 compares each state's population as a percentage of the total country's population to the number of electoral college votes as a percentage of the total votes. The total population of the thirteen states in 1789 (when the First United States Census was taken) was 3,893,874.³²

28. *Hearing, supra* note 9, at 7.

29. Madison, *supra* note 10, at 81-82; KOCH, *supra* note 26.

30. Hamilton, *supra* note 27.

31. See generally Thurgood Marshall, *The Constitution: A Living Document*, 30 *How. L.J.* 623 (1987).

32. See <http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl> (last visited Feb. 1, 2001), quoting, Inter-Univ. Consortium for Political and Soc. Research. Study 00003: Historical Demographic, Economic, and Social Data: U.S., 1790-1970. Anne Arbor: ICPSR.

The total number of electoral votes for the thirteen states was eighty-one; although North Carolina and Rhode Island did not contribute to this total, as noted above, because they had not yet ratified the Constitution.³³ For purposes of this evaluation, the total population of thirteen states and the total electoral votes are used to determine which states would have had more influence based upon the popular vote (population number) and which states would have had more influence based upon the electoral college (number of electoral votes). Figure 1 shows that among all thirteen states, Virginia is the only state which would have had more influence based upon the popular vote, while the other twelve states would have had more influence using the Electoral College system. Is it surprising that a majority of the States in 1787 supported the Electoral College system, likely to limit the influence of powerful Virginia?

Using that same analysis to compare the thirteen original states in 2000 should provide an empirical approach to determining if influence has really shifted in a significant way since 1789. It is possible to determine whether the popular vote or the electoral vote would give a state more influence in a presidential election by using: the population of each of the original thirteen states from the U.S. Census of 2000,³⁴ the Electoral College votes for each of the States,³⁵ determining each state's total population percentage, and each state's percent of total Electoral College votes. Figure 2 shows this comparison in the year 2000 for each of the thirteen original states. From this figure, Delaware, New Hampshire, Rhode Island and South Carolina have more influence on the outcome of the presidential election through electoral college voting than through the popular vote. Conversely Georgia, New Jersey, New York, North Carolina, Pennsylvania and Virginia have more influence on the outcome of the presidential election through the popular vote. Because two states neither benefit nor are harmed by the Electoral College or popular vote system, six states have more influence from the popular vote, while five states have more influence from the Electoral College vote of the original thirteen states.

33. *1789 Presidential Electoral Vote Count*, available at <http://h0040055bf148.ne.mediaone.net/~dave/POL/pe1789ev.html> (last visited Feb. 1, 2001).

34. U.S. Census 2000, "Table 2. Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000," available at <http://blue.census.gov/population/www/cen2000/respop.html>. Connecticut, 3,405,565; Delaware, 783,600; Georgia, 8,186,453; Massachusetts, 6,349,097; Maryland, 5,296,486; New Hampshire, 1,235,786; New Jersey, 8,414,350; North Carolina, 8,049,313; Pennsylvania, 12,281,054; Rhode Island, 1,048,319; South Carolina, 4,012,012; and Virginia, 7,078,515. *Id.*

35. *Distribution of Electoral Votes*, available at <http://www.state.nd.us/sec/distributionofelectoralvotes.htm> (last visited Jan. 28, 2001). Electoral votes were distributed among the 13 original states in 2000 as follows: Connecticut, 8; Delaware, 3; Georgia, 13; Massachusetts, 12; Maryland, 10; New Hampshire, 4; New Jersey, 15; North Carolina, 14; Pennsylvania, 23; Rhode Island, 4; South Carolina, 8; and Virginia, 13. *Id.*

These facts suggest that the benefits of the Electoral College system are more evident now than they were in 1789, and that it brought more even representation of the States than it would have in 1789. There is, however, a significant shift in that five states have joined Virginia (since 1789) in having more influence on the presidential election based upon popular vote, rather than upon electoral votes.

The next question to examine is whether the Electoral College has failed to carry out the original intent of a republican form of government, and a republican form of representation in electing a President. To examine the impact on the election of 2000, the following methodology has been developed to compare the popular vote and the electoral vote in terms of their benefit to each state. Using a state's percent population of the total population in the U.S.; and the state's percent of Electoral College votes of the total electoral votes in the U.S., and dividing the percent of the electoral votes by the percent of the total population produces an index for that state. Any index over 1.0 means that the state has more influence from the Electoral College than from the popular vote; while any index under 1.0 indicates that the state has more influence from the popular vote than from the Electoral College. As an example, Alabama has 0.0158% of the U.S. population; and 0.0167% of the total Electoral College votes. Therefore, its index value is:

$$\frac{0.01670}{0.01580} = 1.057 \text{ Index}$$

Such an index indicates that Alabama has slightly more influence based upon the Electoral College system than it would under a popular voting system. Table 1 shows the data used to compute the indices, as well as the resulting index, for each state. They range from 0.803 for Texas to 3.314 for Wyoming.

To examine whether a significant shift requiring a constitutional amendment is evident since 1789, a distribution of the States' indices indicate the degree to which the States as groups are benefitted and to what degree by the Electoral College system. The resulting distribution is shown in Figures 3 and 4, and show a one-tailed distribution of indices or, in other words, half of a bell-curve distribution. The x-axis indicates the range of indices and it is shown here, that the greatest number of states fall within the index range which indicates that they have comparatively more influence from the Electoral College votes than from the popular voting system.

VI. CONCLUSION

The republican system of electing a President was clearly favorable to twelve of the original thirteen states. It is Virginia, alone, which was given less influence through the Electoral College system. In the 2000 election, the effect of the republican system of the Electoral College made less difference by far, than in 1789. That is, the Electoral College system benefitted 12 states in 1789, but only 6 states in 2000 of the original 13 states.

The factionalism so feared by Madison and the federalists has been controlled through representative government, but was allowed to flourish through the lack of campaign finance controls. Factionalism was the fear, and a republican form of government was designed to prevent its signature for failure for the new government. Opponents of the republican system in pursuit of the one man-one vote principle, fail to note that the effects of large campaign contributions has more than replaced the power of the one man-one vote rule.

This analysis thus argues strongly against any constitutional amendment that would move to a purely popular voting system from the existing Electoral College system.

Fig. 1 Percent Popular Vote v. Percent Electoral Vote in the Thirteen Colonies, 1789

**% Popular Vote v. % Electoral Vote
Thirteen Colonies in 1789**

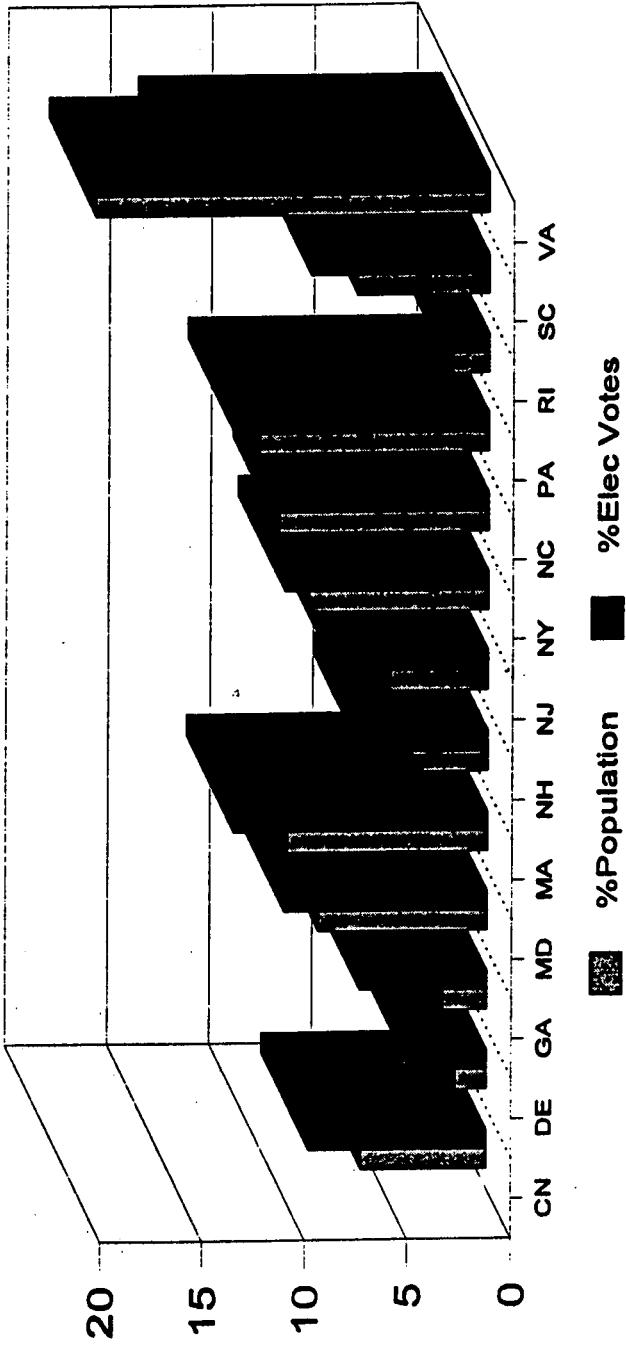


Fig. 2. Percent Popular Vote v. Percent Electoral Vote in the First Thirteen States, 2000

**% Popular Vote v. % Electoral Vote
Thirteen Colonies in 2000**

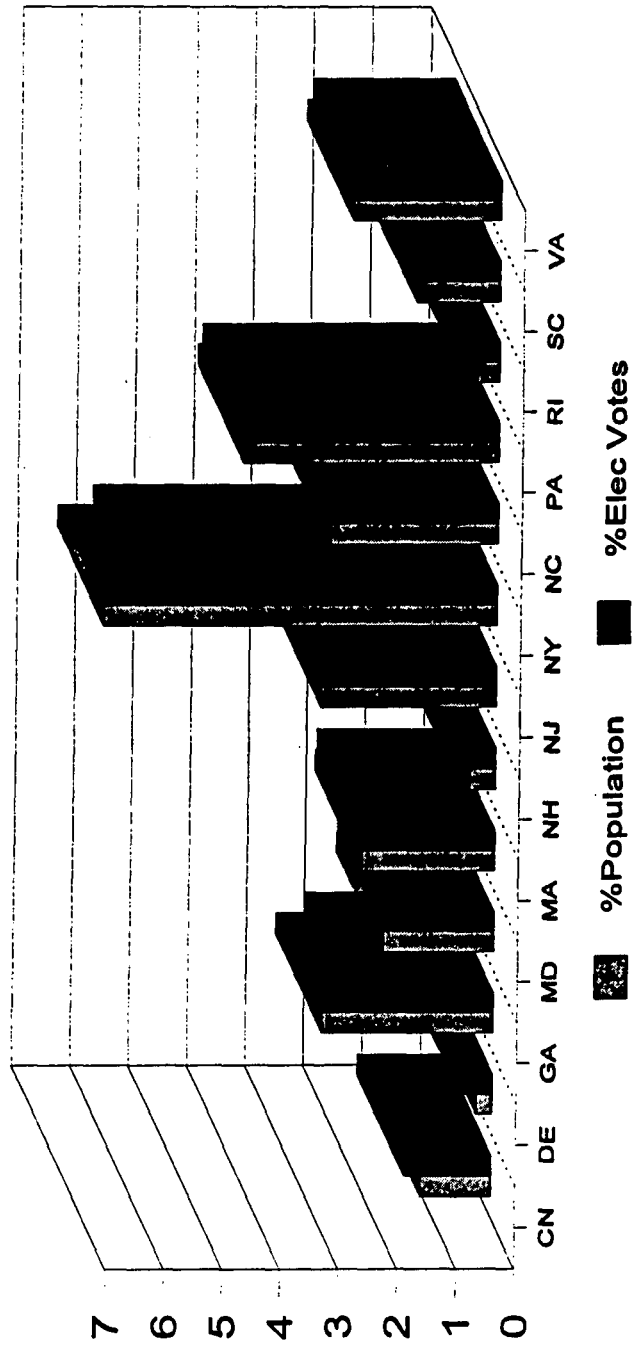


Table 1. Computation of Each State's Index

States	Population	% of Population	Electoral Votes	% of Electoral Vote+	Index
Alabama	4,447,100	0.0158	9	0.0167	1.057
Alaska	626,932	0.00223	3	0.0058	2.601
Arizona	5,130,632	0.01823	8	0.0149	0.817
Arkansas	2,673,400	0.0095	6	0.0112	1.179
California	33,871,648	0.12036	54	0.1004	0.834
Colorado	4,301,261	0.01528	8	0.0149	0.975
Connecticut	3,405,565	0.0121	8	0.0149	1.231
Delaware	783,600	0.00278	3	0.0056	2.014
Dist of Columbia	572,059	0.00203	3	0.0056	2.759
Florida	15,982,378	0.05679	25	0.0465	0.819
Georgia	8,186,453	0.02909	13	0.0242	0.832
Hawaii	1,211,537	0.00431	4	0.0074	1.717
Idaho	1,293,953	0.0046	4	0.0074	1.609
Illinois	12,419,293	0.04413	22	0.0409	0.927
Indiana	6,080,485	0.02161	12	0.0223	1.032
Iowa	2,926,324	0.0104	7	0.013	1.25
Kansas	2,688,418	0.00955	6	0.0112	1.173
Kentucky	4,041,769	0.01436	8	0.01487	1.031
Louisiana	4,468,976	0.01588	9	0.0167	1.052
Maine	1,274,923	0.00453	4	0.0074	1.634
Maryland	5,296,486	0.01882	10	0.01859	0.988
Massachusetts	6,349,097	0.02256	12	0.0223	0.988
Michigan	9,938,444	0.03532	18	0.0335	0.948
Minnesota	4,919,479	0.01748	10	0.0186	1.064
Mississippi	2,844,658	0.0101	7	0.013	1.287
Missouri	5,595,211	0.0199	11	0.0204	1.025
Montana	902,195	0.0032	3	0.0058	1.813
Nebraska	1,711,263	0.0061	5	0.0093	1.525
Nevada	1,998,257	0.0071	4	0.0074	1.042
New Hampshire	1,235,786	0.00439	4	0.0074	1.686
New Jersey	8,414,350	0.02989	15	0.0279	0.933
New Mexico	1,819,046	0.0065	5	0.0093	1.431
New York	18,976,457	0.06743	33	0.0613	0.909
North Carolina	8,049,313	0.0286	14	0.0260	0.909
North Dakota	642,200	0.00228	3	0.0058	2.544
Ohio	11,353,140	0.04034	21	0.039	0.967
Oklahoma	3,450,654	0.01226	8	0.0149	1.215
Oregon	3,421,399	0.01216	7	0.013	1.06
Pennsylvania	12,281,054	0.04364	23	0.0428	0.981
Rhode Island	1,048,319	0.00373	4	0.0074	1.984
South Carolina	4,012,012	0.01426	8	0.0149	1.045
South Dakota	754,844	0.00268	3	0.0058	2.164
Tennessee	5,689,283	0.02022	11	0.0204	1.009
Texas	20,851,820	0.07409	32	0.0595	0.803
Utah	2,233,169	0.00794	5	0.0093	1.171
Vermont	608,827	0.0022	3	0.0058	2.636
Virginia	7,078,515	0.02515	13	0.0242	0.962
Washington	5,894,121	0.0209	11	0.0204	0.976
West Virginia	1,808,344	0.00643	5	0.0093	1.446
Wisconsin	5,363,675	0.01901	11	0.0204	1.073
Wyoming	493,782	0.00175	3	0.0058	3.314

Fig. 3 Distribution of States' Electoral College Votes Indices

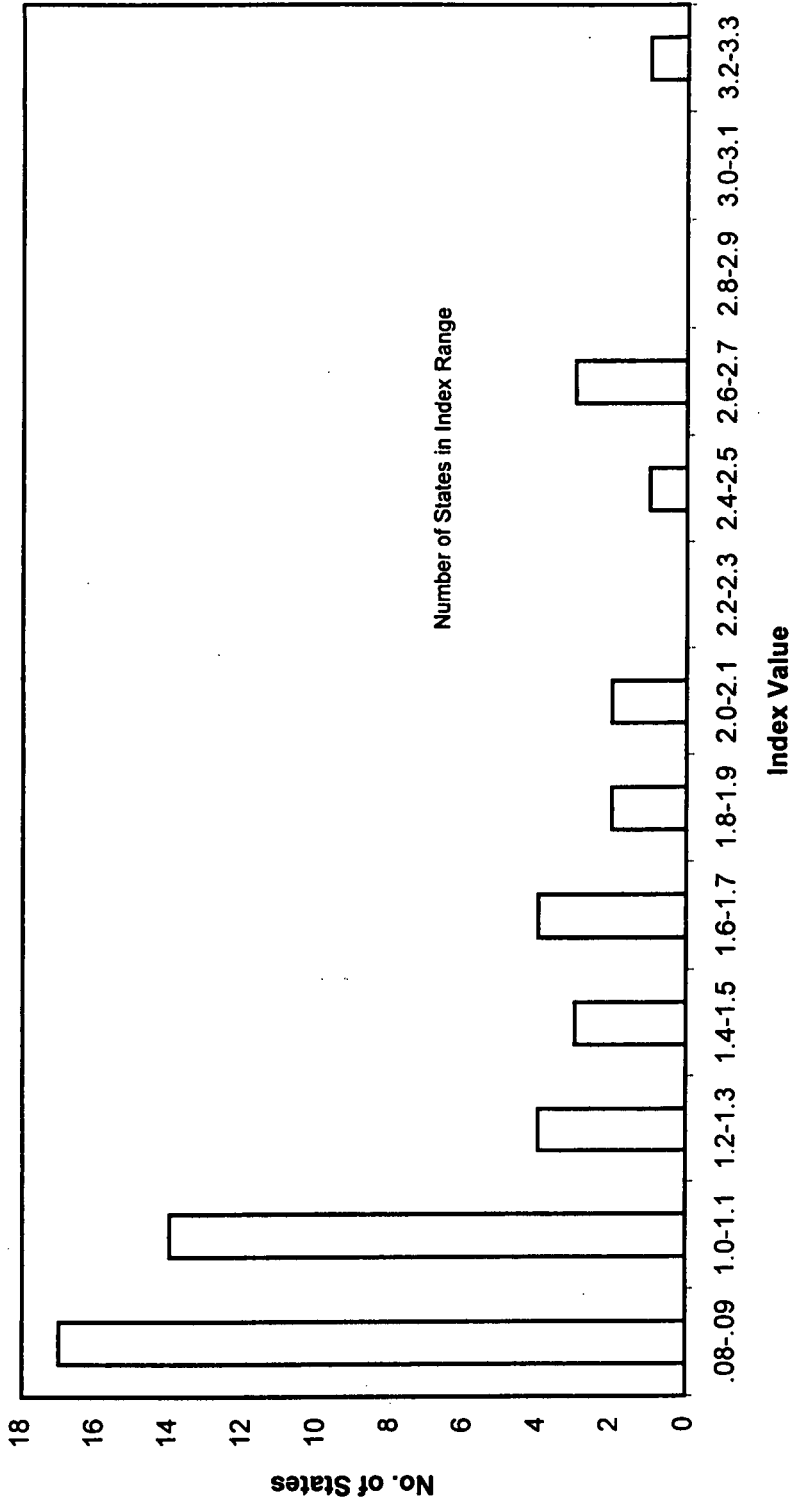


Fig. 4 Distribution of States' Electoral College Votes Indices

