



The House-Passed National Popular Vote Bill (HB 2927) Should be Passed by Senate
May 20, 2017

The Alternative Bill (SB 825) Calls for a Referral in a Low-Turnout Primary Election

Oregon's existing winner-take-all statute was enacted by the Oregon legislature using the power granted to the Oregon legislature by Article II.

The Oregon Constitution allows a petition signed by a substantial number of voters to call a statewide referendum on a law passed by the Oregon legislature. Such referendums are held at a November general election (e.g., in November 2018).

SB 825 turns the requirements of the Oregon Constitution *upside-down*. First, SB 825 eliminates the requirement for collecting the constitutionally-specified number of signatures on a petition. Second, SB 825 also specifically states that the statewide vote would be held in a low-turnout primary (in May 2018).

Out-of-State Interests Could Spend Millions to Affect the Outcome in a Referral Campaign

There is no reason why repeal of Oregon's winner-take-all law should become the subject an expensive statewide referral campaign.

The State Legislature Has Passed All Previous Laws in Every State Involving the Choice of Method of Choosing Presidential Electors

The referral contained in SB 825 would have no historical precedent.

Article II of the U.S. Constitution assigns responsibility for selecting the method of choosing a state's presidential electors to the state "Legislature."

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [presidential] Electors."

In the entire history of the United States, *every* state winner-take-all statute (and every other law, in *every* state, specifying the state's method for choosing its presidential electors) has been enacted, amended, and repealed by action of the state legislature – not by initiative, referendum, or referral process.

Unresolved Legal Question as to Whether a State Legislature Can Refer the Choice of Method of Choosing Presidential Electors

The U.S. Supreme Court has interpreted the word "legislature" in the U.S. Constitution differently in connection with *Article V* (concerning federal constitutional amendments) and *Article I* (concerning congressional districting).

Article II: Neither the U.S. Supreme Court nor any lower federal court has ever issued a written opinion deciding whether the word "legislature" in Article II allows the initiative, referendum, or referral processes to be used to enact a state's law for choosing its presidential electors.

Article V: In *Hawke v. Smith* (253 U.S. 221), the U.S. Supreme Court interpreted the word "legislature" in Article V to exclude the use of the initiative, referendum, or referral processes in

connection with ratification of federal constitutional amendments. The Court ruled unconstitutional the provision of the Ohio Constitution allowing the use of the referendum process to review the action of the state legislature in ratifying a federal constitutional amendment.

Article I: In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (135 S. Ct. 2652), the U.S. Supreme Court interpreted the word “legislature” in Article I to allow the use of the initiative process in connection with congressional redistricting. However, the Court’s decision was based on the existence of a federal law (Title 2, U. S. Code, §2a(c)) that was specifically passed to recognize the right of the state to enact a redistricting law through the initiative and referendum process.

U.S. Supreme Court has characterized state legislature’s power concerning the choice of manner of choosing presidential electors as “plenary.”

In the leading case on the manner of choosing presidential electors, the Court ruled in *McPherson v. Blacker* (146 U.S. 1):

“From the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.”

In the 2000 case of *Bush v. Gore* (531 U.S. 98), the U.S. Supreme Court said:

“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”