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FOCUS & FORUM

The Legislature Has to Change the Delegate Selection Process

FORUM COLUMN

By Daniel Lee Jacobson
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An effort is afoot to place an initiative on California's ballot that would have the state choose its delegates to the Electoral College by congressional district instead of on a statewide basis. Backers of the initiative did not obtain enough signatures to meet the deadline for the June 2008 ballot, but some hope to place it on the November 2008 ballot.

The Constitution mandates in Article II, Section 1, "Each State shall appoint, in such Manner as the Legislature thereof may direct ... Electors ... [who in turn elect the president and the vice president in the Electoral College]." The word "Legislature" figures prominently.

In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court passed on the issue of whether a state's legislature could choose to have its electors selected by congressional district rather than on a statewide basis. The Michigan Legislature voted to have the state's electors chosen by congressional district, which the *McPherson* court found to be constitutional.

McPherson traced the history of the constitutional convention to conclude that the Electoral College clause was a compromise. "The Journal of the Convention discloses that propositions that the President should be elected by 'the citizens of the United States,' or by the 'people,' or 'by electors to be chosen by the people of the several States,' instead of by the Congress, were voted down, as was the proposition that the President should be 'chosen by electors appointed for that purpose by the legislatures of the States,' though at one time adopted ... Gerry proposed that the choice should be made by the State executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views by leaving it to the state *legislatures* to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket [statewide basis], or as otherwise might be directed" (emphasis added).

The *McPherson* court was plain in its conclusion that only a state's legislature has the power to direct in what manner that state's electors are chosen. "[The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object [of choosing electors]."

McPherson frames the 2008 California issue; it is one of power granted by the Constitution. Does the Constitution authorize a state to change its system through a direct vote of the people, or is that power reserved exclusively to that state's legislature?

McPherson's directive is clear, and it is specific to Article II, Section 1, Clause 2. The manner for selection of electors is left "to the legislature exclusively." So, in order for the people to change the manner of selection of electors, the people would have to be considered the "legislature." The Supreme Court has faced and answered the question of what the Constitution means by "legislature."

In *Hawke v. Smith*, 253 U.S. 221, the court was faced with whether the people of the state of Ohio could amend their constitution to "reserve to themselves the legislative power of the referendum on the action of the ... [Legislature] ratifying any proposed amendment to the constitution of the United States." Article V of the federal Constitution requires amendments to either be ratified "by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof."

The Supreme Court decided that the Constitution's use of the word "legislature" refers to the

traditional sense, and only the traditional sense. "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning."

So, *McPherson* says that the manner for selection of electors is left "to the legislature exclusively;" and Hawke says that "legislature" means "the representative body which made the laws of the people." In other words, legislature means legislature.

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000), was one of the Rehnquist court's celebrated cases that came out of the 2000 presidential election. It dealt directly with the Electoral College clause.

The Rehnquist court is legendary for maximizing state jurisdiction, and proportionally minimizing federal jurisdiction. So, when it says that the federal courts are to make a determination, not the state courts, the world should listen.

In establishing federal predominance over Florida state law if such law relates to the Electoral College, the *Palm Beach County* court said, "[I]n the case of a law enacted by a state legislature applicable ... to ... the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Article II, Section 1, Clause 2 of the United States Constitution." That "direct grant of authority" gives the federal courts, not the state courts, the right to decide state law related to the Electoral College.

In fact, *Palm Beach County* was remanded to the Florida Supreme Court because the U.S. Supreme Court was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the [state] legislature's authority under Article II, Section 1, Clause 2." That lack of clarity had to be resolved because, "it is ... important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." So, interpretation of state law related to the Electoral College clause is the province of the federal courts, which are allowed to reach past state courts, past state laws, even past state constitutions to decide the validity of state law related the Electoral College.

Whether California's general citizenry is the state "Legislature" pursuant to Section II, Article 1, Clause 3 is a question for the federal courts to answer. The Supreme Court has firmly answered in the negative; the choice of the manner of the selection of electors belongs exclusively to the state legislature. The term legislature "was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning."

The Federal Constitution will bar a law passed by way of initiative that would change California's manner for selecting delegates to the Electoral College from a statewide election to a Congressional district-by-district election.

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