Originally published in

New York Law Journal

Letter to the Editor

December 12, 2018

A Call to The Bar: Fight for The National Popular Vote Initiative

By Jerry Goldfeder

DAnial J. Kornstein's excellent article reviews how voter disenfranchisement subverts our constitutional democracy (What to the Disenfranchised Voter is Democracy?, Dec. 11).

As he points out, lawyers have a critical role in rectifying state laws that restrict access to the voting booth. That said, I want to add two points, one depressing and the other encouraging.

With respect to his reference to the United States Senate, we are stuck with it. At our founding constitutional convention, each state was given an equal vote regardless of population. This feature was an important part of the bargain struck to obtain sufficient votes to pass the new constitution. Although embraced by the smaller states, the proposal was sufficiently fraught as to have passed by the narrowest of margins, 5-4. Indeed, the numerical equality among the states in the Senate was so essential to the final deal in Philadelphia as to prompt a unique provision in the constitution that forbids amending this arrangement without 100% agreement by the states (Article V: "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."). Thus we now have a majority of senators who represent a minority of our nation's voters, and, as a practical matter, there is nothing we can do about it.

The good news, however, is that the corollary provisions in the constitution relating to the power of the states can be addressed. The constitution provides that states regulate their own elections (Art. I, Sec. 4, cl. 1). That gives states the authority to impose restrictive ID or registration laws – even in national elections. But this provision goes on to say that Congress may alter such laws. Thus, Congress has from time to time enacted voting rights laws that supersede a state's ability to thwart voting. To be sure, it is not easy to persuade Congress to pass standardized rules that enfranchise voters; and the courts are routinely invoked to strike down some of these reforms. Yet, under the right political circumstances, it can be done. That is why Mr. Kornstein is so right to encourage the bar to involve itself in elections.

One final point. His article also refers to the Electoral College – another states rights provision created in part by the founders to obtain ratification. Every high schooler knows how difficult it is to amend the constitution (Art. V), and efforts to abolish or reform the Electoral College have made very little headway. However, in a creative measure to have the winner of the popular vote actually be elected president (cf. 1824, 1876, 1888, 2000 and 2016), the National Popular Vote initiative requires only that a sufficient number of states – constituting at least 270 electoral college votes – enter into a compact to award their electors to the candidate who receives the highest vote nationwide. New York, ten other states and Washington DC have passed this measure – totaling, so far, 172 electoral votes. Those interested in securing passage by additional states – and, thus, effectively abolishing the Electoral College – should review the proposal at www.nationalpopularvote.com. It is another way the bar can make an important difference in democratizing our nation's elections.

Jerry H. Goldfeder is an election lawyer at Stroock, and the author of Goldfeder's Modern Election Law (NY Legal Publishing Corp., 5th Ed. 2018). He also teaches Election Law at Fordham Law School and the University of Pennsylvania Law School.