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Testimony before the General Administration and Elections Committee in support of *Senate Raised Bill 432, for Connecticut to join the Agreement among the States to Elect the President by Nationwide Popular Vote*, by Hugh C. Macgill, Oliver Ellsworth Research Professor and Dean Emeritus, University of Connecticut School of Law, 25 February 2013.

Mr. Chairman, members of the Committee, thank you for this opportunity to speak to the merits of SB 432, popularly the National Popular Vote bill. Let me address two specific points that have clouded past discussions of this proposal. First, is a shift from the Electoral College, as it now, possible without a constitutional amendment? The answer, without ambiguity, is Yes. The Electoral College is constitutionally created, but Article II directs that its members shall be appointed "in such manner as the [state] Legislature may direct." That "manner" has varied over the years, so that Connecticut's electors now are required to vote for the candidate to whom they are pledged, and the names of the electors – the only persons for which individuals cast votes – no longer even appear on the ballot. The Electoral College now is a shadow of the Framers' 1787 design. On the original plan, votes would elect electors, presumably men of high minds and high status, who would meet in their state capitols on a given day and decide, on their own judgment, who should be President. This was a college whose design made it impossible ever to meet. All 13, or 48, or 50 groups, isolated in their several capitols, might spontaneously and unanimously settle upon George Washington, but what about Ralph Nader or Herman Cain? This was far from the best of the Framers' work, and it is not surprising that all states, Connecticut included, have exercised the authority directly granted by Article II to modify it.. The Constitution does not require that a state's electors vote for the winner in any state. Connecticut, and most other states, do so, by statute. Maine and Nebraska, by statute, apportion their electoral vote by congressional district.

The second formal legal question is whether an agreement among several states can be effective without approval by Congress. It appears from the text of Article I, section 10, clause 3, that Congressional approval is required. The Supreme Court, however, in a consistent line of decisions over the past 120 years, has held otherwise. If an interstate compact has no impact on federal supremacy, imposes nothing on states not party to the compact, and exercises no power by a state which could not be exercised in the absence of the compact, the Court will not require Congress' approval. The National Popular Vote bill does not run afoul of any of these conditions, and therefore requires no approval beyond that of the states themselves.

This bill is within Connecticut's power to enact. But would it be a wise exercise of that power to enact it? The debacle of the 2000 election remains fresh in memory. The candidate who won had a half-million fewer votes than his competitor, and the Supreme Court, to its disgrace, jumped into politics with both feet to declare the election. The last two elections have not repeated the problem, but we, coasting on our good luck, have done nothing to prevent its future repetition. This bill, if adopted by states with half the electoral votes, will prevent election by minorities. It will compel political parties, and their contributors, radically to restructure their campaigns and their spending. A Connecticut vote will have precisely the same weight as a California vote. Candidates will never again be able to hover in "swing" states, ignoring all the rest - Connecticut included. But there is a graver problem, a potential game-changer, to which this bill is major defense. Recently a great deal of attention has focused on the gerrymandering of state congressional districts and its contribution to gridlock in Congress. When extremists in either party are concentrated in a district, the representative from that district has no political room for anything his constituents would read as compromise. The consequences are familiar to us. The Supreme Court has not figured out a principled limit on that process. The same gerrymandering could be used for presidential electoral purposes. Maine and Nebraska already apportion their electoral votes by congressional districts. Proposals for a similar division were placed before the legislatures of Pennsylvania and Michigan last week. What happens? A red state develops blue spots, a blue state breaks out in red spots, electoral college chaos ensues and the risk of rule by minorities is greatly magnified. Campaign contributors feel that hundreds of millions of dollars were ill spent on the national tickets last year. What might be the impact of those millions on a strategically selected group of vulnerable congressional districts?

Our original constitutional design left the election of senators to state legislatures, the election of presidents to small groups of the "great and wise." Mere representatives were elected directly, but only by propertied white men. For two centuries, this design has responded gradually to deep shifts in our national political consciousness. We now have universal suffrage. Senators are elected directly, and the rise of political parties has made the identity, and to a great degree the function, of presidential electors irrelevant. The "master narrative" of America is the growth and maturity of the democratic process. The bill now before you is hardly Connecticut's first step in that grand direction. If we are truly to "democratize" our democracy, I urge you to adopt it.