

9 | Responses to Myths about the National Popular Vote Compact

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9.1. MYTHS ABOUT THE U.S. CONSTITUTION

9.1.1. MYTH: A federal constitutional amendment is necessary for changing the current method of electing the President.

QUICK ANSWER:

- The U.S. Constitution gives the states the “exclusive” and “plenary” power to choose the method of awarding their electoral votes.
- The shortcomings of the current system of electing the President stem from state winner-take-all statutes that award all of a state’s electoral votes to the candidate who receives the most popular votes within each separate state.
- The state-by-state winner-take-all method of awarding electoral votes is not in the U.S. Constitution. It was not debated at the Constitutional Convention. It was not discussed in the *Federalist Papers*.

- The winner-take-all rule was used by only three states in the nation’s first presidential election in 1789 (all of which abandoned it by 1800). The Founders were dead for decades before the winner-take-all rule became the predominant method of awarding electoral votes.
- Maine and Nebraska currently award electoral votes by congressional district—a reminder that the method of awarding electoral votes is a state decision.
- The winner-take-all rule is used today in 48 of the 50 states because it was enacted as a state statute in those states, under the same provision of the U.S. Constitution (empowering the states to choose the method of awarding their electoral votes) being used to enact the National Popular Vote plan.
- Winner-take-all statutes may be repealed in the same way they were enacted—namely, through each state’s process for enacting and repealing state laws. Therefore, a federal constitutional amendment is not necessary to change the state-by-state winner-take-all method of awarding electoral votes.
- The Constitution’s grant of exclusive power to the states to decide how presidential elections are conducted was not a historical accident or mistake, but was intended as a “check and balance” on a sitting President who, in conjunction with a compliant Congress, might manipulate election rules to perpetuate himself in office.

MORE DETAILED ANSWER:

It is important to recognize what the U.S. Constitution says—and does not say—about electing the President.

Article II, section 1, clause 2 of the U.S. Constitution provides:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”¹ [Emphasis added]

These 17 words are the Constitution’s delegation of power to the states concerning how they may award their electoral votes.

In 1787, the delegates to the Constitutional Convention debated the method of electing the President on 22 separate days and held 30 separate votes on the topic.

One of the major points of contention at the Convention was whether the people should be allowed to vote for President.

On four separate occasions, the Convention voted (and then reversed its decision) that Congress should choose the President—that is, the people would not be allowed to vote for President. On another occasion, the delegates voted that the state legisla-

¹ The complete wording of clause 2 is “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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

tures would choose the President. At one point, the delegates considered empowering state Governors to choose the President.²

Even when the delegates eventually decided—toward the end of the Constitutional Convention—that the President would be elected by presidential electors (collectively called the “Electoral College”), the Founders were still unable to agree on how the presidential electors would be chosen. They left several politically significant questions undecided, including:

- Should the presidential electors be chosen directly by the people—analogueous to the method of electing members of the U.S. House of Representatives?
- Should the presidential electors be chosen by the state legislatures—analogueous to the method of appointment of U.S. Senators by state legislatures that was specified in the original Constitution?³
- Should the presidential electors be chosen by some other method (perhaps by Governors)?

In the end—unable to agree upon any particular method for selecting presidential electors—the Founding Fathers adopted the language contained in section 1 of Article II, leaving the decision to the states.

The eventual wording in section 1 of Article II (“as the Legislature . . . may direct”) is unqualified. It does not encourage, discourage, require, or prohibit the use of any particular method for awarding a state’s electoral votes.

If the legislature decides to give the people a vote for President, the Constitution does not specify whether the presidential electors should be elected statewide, in single-member presidential elector districts, in single-member congressional districts, or in multi-member districts.

If the legislature decides against giving the people a vote for President, the Constitution does not specify whether the presidential electors should be appointed by the Governor, the Governor and his cabinet, by the Governor and the lower house of the state legislature, by both houses of the legislature sitting together in a joint convention, or by both houses of the legislature using a concurrent resolution.⁴

Indeed, *all* of the above methods have been used in our country’s history.

The most salient feature of our nation’s current method of electing the President—the state-by-state winner-take-all method of awarding electoral votes—was never debated at the Constitutional Convention. It was never voted upon at the Constitutional Convention. It appears nowhere in the U.S. Constitution. It was never mentioned in

² Edwards, George C. III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press.

³ The 17th Amendment (ratified in 1913) provided for popular election of U.S. Senators.

⁴ When a concurrent resolution is used, the two houses of the legislature meet separately, and a majority of both houses must agree on a common slate of presidential electors. When both houses of the legislature meet in a joint convention, a majority of the joint convention controls the choice of presidential electors. Use of a concurrent resolution makes the individual members of the smaller body (i.e., the state Senate) relatively more important.

the *Federalist Papers*. It was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states. Indeed, the Founders were long dead before the winner-take-all rule became the predominant method of awarding electoral votes.

Under the winner-take-all rule (also known as the “unit rule” or “general ticket”), a plurality⁵ of a state’s voters are empowered to choose all of a state’s presidential electors.

When the Founding Fathers returned from the Constitutional Convention in Philadelphia to organize the nation’s first presidential election in 1789, only three states chose to employ the winner-take-all method for awarding their electoral votes.⁶

Today, the winner-take-all method of awarding electoral votes is used in 48 of the 50 states and the District of Columbia.⁷

Maine and Nebraska currently elect presidential electors by congressional district (with two electors-at-large).

The U.S. Supreme Court has repeatedly characterized the authority of the states over the manner of awarding their electoral votes as “exclusive” and “plenary.”

The leading case on the awarding of electoral votes is the 1892 case of *McPherson v. Blacker*. The U.S. Supreme Court ruled:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It 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. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text. . . .

⁵ In some early versions of the winner-take-all rule, an absolute majority of the state’s voters was required to choose presidential electors.

⁶ The three states that used the winner-take-all rule in 1789 were New Hampshire, Pennsylvania, and Maryland. All three states abandoned it by 1800, but later returned to it. In the version of the winner-take-all rule that was used in 1789 (and, indeed, until the middle of the 20th century in most states), each voter was allowed to cast as many votes as the state’s number of presidential electors. Voting for individual presidential electors remained in use as late as 1980 in Vermont. During the early 20th century, states started to shift to the so-called “short presidential ballot.” The short presidential ballot enables a voter to conveniently vote for an entire slate of presidential electors merely by casting one vote for a named candidate for President and Vice President. Under the short presidential ballot, a vote for the presidential and vice-presidential candidate whose names appear on the ballot is deemed to be a vote for all of the individual presidential electors nominated in association with the named candidates. For example, when a voter cast a vote for McCain–Palin in California in 2008, the voter was deemed to be casting a vote for each of 55 individual candidates for the position of presidential elector nominated by the California Republican Party. See section 2.2.6.

⁷ Maine and Nebraska currently choose presidential electors by congressional district (and also choose two presidential electors statewide).

“In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.”⁸ [Emphasis added]

In *Bush v. Gore* in 2000, the Court approvingly referred to the characterization in *McPherson v. Blacker* of the state’s power under section 1 of Article II of the Constitution.

“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. U.S. Const., Art. II, §1. **This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature’s power to select the manner for appointing electors is plenary;** it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28-33. . . .

“**There is no difference between the two sides of the present controversy on these basic propositions.**”⁹ [Emphasis added]

In short, states may exercise their power to choose the manner of appointing their presidential electors in any way they see fit (provided, of course, that they do not violate any restriction contained elsewhere in the U.S. Constitution).^{10,11}

There is good reason to give the states the power to control the conduct of presidential elections. State control over presidential elections thwarts the possibility of an over-reaching President, in conjunction with a compliant Congress, manipulating the rules governing his own re-election. This delegation of control over presidential elections was intended to guard against the establishment of a self-perpetuating President and, in particular, the establishment of a monarchy in the United States. For these good reasons, control over presidential elections is an exclusive state power.

⁸ *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

⁹ *Bush v. Gore*. 531 U.S. 98. 2000.

¹⁰ All powers delegated to Congress and the states are subject to general restrictions found elsewhere in the Constitution. For example, in *Bush v. Gore* (531 U.S. 98), the Court observed that “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ([O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment’). It must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). There is no difference between the two sides of the present controversy on these basic propositions.”

¹¹ As the U.S. Supreme Court noted in *McPherson v. Blacker*, the state legislature’s discretion over the manner of appointing presidential electors may be limited by the state constitution. For example, the Colorado constitution prohibited the state legislature from appointing presidential electors after 1876.

All of the existing winner-take-all statutes are state law. The winner-take-all method of awarding electoral votes was adopted piecemeal on a state-by-state basis. The winner-take-all rule was never the prevailing method of awarding electoral votes during the lifetimes of the Founding Fathers. Instead, winner-take-all statutes became prevalent decades later, in the period prior to the Civil War, with the emergence of strong political parties aiming to maximize their own political power by stifling the state's minority party.

More importantly, existing winner-take-all statutes did not come into use by means of an amendment to the U.S. Constitution. The winner-take-all rule does not have constitutional status. Accordingly, repealing state winner-take-all statutes does not require an amendment to the U.S. Constitution. Winner-take-all statutes may be repealed in the same way they were enacted, namely through each state's process for enacting and repealing state laws.

Indeed, the winner-take-all method of awarding electoral votes has been adopted, and repealed, by various states on numerous occasions over the years.

All three of the states that used the winner-take-all rule in the first presidential election in 1789 abandoned it by 1800.

Massachusetts has used 11 different methods of awarding its electoral votes.

- In 1789, Massachusetts had a two-step system in which the voters cast ballots indicating their preference for presidential elector by district, and the legislature chose from the top two vote-getters in each district (with the legislature choosing the state's remaining two electors).
- In 1792, the voters were allowed to choose presidential electors in four multi-member regional districts (with the legislature choosing the state's remaining two electors).
- In 1796, the voters elected presidential electors by congressional districts (with the legislature choosing only the state's remaining two electors).
- In 1800, the legislature took back the power to pick all of the state's presidential electors (excluding the voters entirely).
- In 1804, the voters were allowed to elect 17 presidential electors by district and two on a statewide basis.
- In 1808, the legislature decided to pick the electors itself.
- In 1812, the voters elected six presidential electors from one district, five electors from another district, four electors from another, three electors from each of two districts, and one elector from a sixth district.
- In 1816, Massachusetts again returned to state legislative choice.
- In 1820, the voters were allowed to elect 13 presidential electors by district and two on a statewide basis.
- Then, in 1824, Massachusetts adopted its 10th method of awarding electoral votes, namely the statewide winner-take-all rule that is in effect today.

- Finally, in 2010, Massachusetts changed its method of appointing its presidential electors by enacting the National Popular Vote interstate compact. This change will go into effect when states possessing a majority of the electoral votes (270 out of 538) enact the same compact.

None of these 11 changes involved an amendment to the U.S. Constitution. These changes were accomplished using the Constitution's built-in method for changing the method of electing the President, namely section 1 of Article II. That constitutional provision gives Massachusetts (and all the other states) exclusive and plenary power to choose the manner of awarding their electoral votes.

In the nation's first presidential election in 1789, the New Jersey legislature passed a law empowering the Governor and his Council to appoint the state's presidential electors.¹² In 1804, the legislature permitted the people to vote for presidential electors under the winner-take-all rule.

Delaware has used three different methods. In 1789, one presidential elector was elected from each of the state's three counties. Then, between 1792 and 1828, the Delaware legislature decided to exclude the voters and appointed all of the state's presidential electors itself. Starting in 1832, Delaware allowed the people to vote for presidential electors under the winner-take-all rule.

The North Carolina legislature has exercised its power to change the method of awarding the state's electoral votes on four occasions. In 1792, the legislature chose the presidential electors. Between 1796 and 1808, the people then voted for electors from presidential-electoral districts. Then, the legislature chose the electors in 1812. In 1816, the legislature changed to the statewide winner-take-all rule.¹³

As recently as 1992, Nebraska replaced its winner-take-all statute with a congressional-district system of awarding electoral votes. Maine did so in 1969. After the 2008 presidential election (when Barack Obama won one district-level electoral vote in Nebraska), the Nebraska legislature conducted hearings on the possibility of repealing the congressional-district system and returning to the statewide winner-take-all approach. Within the past decade, a Republican-controlled New York Senate and a Democratic-controlled North Carolina House and Senate passed bills, at various times, switching to the congressional-district system (although none of these bills became law).

In summary, there is nothing in the U.S. Constitution that needs to be amended in order to repeal existing state winner-take-all statutes for awarding a state's electoral votes. The states *already have the power* to make this change.

For additional information, see section 1.1 and chapter 2.

¹² DenBoer, Gordon (editor). 1986. *The Documentary History of the First Federal Elections*. Madison, WI: The University of Wisconsin Press. Volume III. Page 29.

¹³ Since 2000, both the North Carolina Senate and House have voted, in different years, to change from the statewide winner-take-all rule to a congressional-district system for awarding electoral votes.

9.1.2. MYTH: The traditional and appropriate way of changing the method of electing the President is by means of a federal constitutional amendment.

QUICK ANSWER:

- Nearly all the major reforms in the method of conducting U.S. presidential elections have been initiated at the state level—not by means of an amendment to the U.S. Constitution.
- State-level action is the traditional, appropriate, and most commonly used way of changing the method of electing the President.
- The politically most important characteristics of our nation’s current system of electing the President (e.g., permitting the people to vote for President and the winner-take-all rule) were established by state statute—not by federal constitutional amendments.
- The winner-take-all method of awarding electoral votes was not established by a constitutional amendment. It may be repealed by any state in the same manner as it was originally adopted, namely by state statute.
- State action is the right way to change the method of awarding electoral votes because this is the mechanism that is built into the U.S. Constitution (section 1 of Article II).

MORE DETAILED ANSWER:

John Samples has written the following about the National Popular Vote compact:

“NPV brings about this change without amending the Constitution, thereby undermining the legitimacy of presidential elections.”¹⁴

In fact, nearly all the major reforms in the method of conducting U.S. presidential elections have been initiated at the state level—not by means of an amendment to the U.S. Constitution. State-level action is the traditional, appropriate, and most commonly used way of changing the method of electing the President.

Major changes in the method of electing the President that were implemented entirely at the state level—without a federal constitutional amendment—include:

- permitting the people to vote for President,
- abolition of property qualifications for voting, and
- the winner-take-all rule—the target of the National Popular Vote compact.

Examples of changes that were initiated at the state level and then later adopted at the national level, include:

¹⁴ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1.

- women’s suffrage,
- direct election of U.S. Senators,
- the 18-year-old vote, and
- black suffrage.

Permitting the People to Vote for President

The most significant change that has ever been made in the way the President of the United States is elected was to allow the people to vote for President. This change was implemented by means of state statutes—not a federal constitutional amendment.

There is nothing in the original U.S. Constitution that gave the people the right to vote for President or presidential electors.

As the U.S. Supreme Court stated in the 1892 case of *McPherson v. Blacker*:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It 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.”¹⁵ [Emphasis added]

As the U.S. Supreme Court wrote in 2000:

“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.”¹⁶ [Emphasis added]

The Founding Fathers were divided as to whether the people should be allowed to vote for President.

The people were permitted to vote for presidential electors in the nation’s first presidential election in 1789 in only six states. In some states, the state legislature appointed the presidential electors. In New Jersey, the Governor and his 13-member Legislative Council (Privy Council) appointed the state’s presidential electors.¹⁷

The *Federalist Papers* made it clear that the choice of method for appointing presidential electors is a state power, but skirted the question of exactly what method the states would likely choose.

Federalist No. 45 (presumably written by James Madison) says:

¹⁵ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

¹⁶ *Bush v. Gore*. 531 U.S. 98. 2000.

¹⁷ DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III.

“Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, **in most cases, of themselves determine it.**” [Emphasis added]

Federalist No. 44 (said to be written by James Madison) says:

“The members and officers of the State governments . . . will have an essential agency in giving effect to the federal Constitution. **The election of the President and Senate will depend, in all cases, on the legislatures of the several States.**” [Emphasis added]

Section 1 of Article II of the U.S. Constitution gives the states flexibility in the manner of appointing their presidential electors. In the nation’s first presidential election, only six states—New Hampshire, Pennsylvania, Maryland, Delaware, Virginia, and Massachusetts¹⁸—permitted the people to vote for presidential electors.¹⁹

In permitting the people to vote for President, the states exercised their role, under the U.S. Constitution, as the “laboratories of democracy.”²⁰

With the passage of time, more and more states observed that the practice of permitting the people to vote for President did not produce disastrous consequences. Indeed, popular elections became popular.

By 1824, three-quarters of the states had embraced the idea of permitting the people to vote for the state’s presidential electors. However, the state-by-state process of empowering the people to vote for President was not completed until the 1880 election—almost a century after the Constitutional Convention.²¹

This fundamental change in the manner of electing the President was not accomplished by means of a federal constitutional amendment. It was instituted through state-by-state changes in state laws.

Today, this feature of presidential elections is so widely regarded as a fixed feature of American politics that virtually no one suggests that the people should not be permitted to vote for President.

Permitting the people to vote for President was not an “end run” around the U.S.

¹⁸ In this book, we are somewhat generous in counting Massachusetts among the six states that permitted the people to vote for President in 1789. The legislature appointed the state’s presidential electors from the top two candidates from each district. In modern-day terminology, the people “nominated” the candidates for the position of presidential elector, and the legislature “elected” them.

¹⁹ New Hampshire, Pennsylvania, and Maryland used the winner-take-all method, whereas Virginia, Delaware, and Massachusetts used districts to elect presidential electors.

²⁰ Justice Louis Brandeis wrote in the 1932 case of *New State Ice Co. v. Liebmann* (285 U.S. 262), “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

²¹ The appointment of presidential electors by the legislature of the newly admitted state of Colorado in 1876 was the last occasion when presidential electors were not chosen by a direct vote of the people.

Constitution but instead, an exercise of a power that the Founding Fathers explicitly assigned to state legislatures in the Constitution.

We have not encountered a single person who argues that state legislatures did anything improper, inappropriate, or unconstitutional when they made this fundamental change in the way the President is elected.

Does John Samples think that permitting the people to vote for President without a federal constitutional amendment “undermine[d] the legitimacy of presidential elections?”

Abolition of Property Qualifications for Voting

When the U.S. Constitution came into effect in 1789, 10 of the 13 states had property qualifications for voting. The requirements varied from state to state. The requirements typically included factors such as ownership of a specific number of acres of land, ownership of assets with a specific value, or specific amounts of income.²²

In 1789, there were only about 100,000 eligible voters in a nation of over 3,000,000 people.

By 1855, only three of the then-31 states had property qualifications for voting.²³

Today, there are no property qualifications for voting in any state.

The elimination of property qualifications was not accomplished by means of a federal constitutional amendment. The elimination of property qualifications for voting by the states was not improper, inappropriate, or unconstitutional. It was not an “end run” around the U.S. Constitution. This substantial expansion of the electorate occurred because state legislatures used a power that rightfully belonged to them to change the method of conducting elections.

Women's Suffrage

In several instances, a major reform initiated at the state level led to a subsequent federal constitutional amendment after the reform had become established in a substantial number of states.

For example, women did not have the right to vote when the U.S. Constitution came into effect in 1789 (except in New Jersey, where that right was withdrawn in 1807).

Wyoming gave women the right to vote in 1869.

By the time the 19th Amendment was passed by Congress (50 years later), women already had the vote in 30 of the then-48 states. The main effect of the 19th Amend-

²² In many states, there were different requirements for voting for the lower house of the state legislature than for the upper house.

²³ Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York, NY: Basic Books. Table A.3. Page 314.

ment was to impose women’s suffrage on the minority of states (18) that had not already adopted it at the state level.²⁴

The decision by 30 separate states to permit women to vote in the 50-year period between 1869 and 1919 was not an “end run” around the U.S. Constitution. We have not encountered a single person who argues that state legislatures did anything improper, inappropriate, or unconstitutional when they made this very substantial expansion of their electorates. Women’s suffrage is another example of state legislatures using the authority granted to them by the U.S. Constitution to institute a major change concerning the conduct of elections.

Women’s suffrage was achieved because 30 states exercised their power as the “laboratories of democracy” to change the manner of conducting their own elections.²⁵ The federal constitutional amendment followed.

Direct Election of U.S. Senators

The direct election of U.S. Senators is another example of a major change initiated at the state level (and later enshrined in the Constitution by means of a constitutional amendment).

The original U.S. Constitution was explicit in specifying that U.S. Senators were to be elected by state legislatures.

Support for the direct election of Senators grew throughout the 19th century—particularly after popular voting for presidential electors became the norm during the Jacksonian “era of the common man.” The 1858 Lincoln-Douglas debates were public events aimed at influencing the choice for U.S. Senator that was ultimately made by the Illinois state legislature.

Starting with the “Oregon Plan” in 1907, states passed laws establishing “advisory” elections for U.S. Senator. Under the Oregon plan, the people cast their votes for U.S. Senator in a statewide “advisory” election, and the state legislature then dutifully rubberstamped the people’s choice by formally electing the winner of the “advisory” election. By the time the 17th Amendment passed the U.S. Senate in 1912, the voters in 29 states were, for all practical purposes, electing U.S. Senators.

18-Year-Old Vote

States took the lead in granting suffrage to 18-year-olds. Citizens under the age of 21 first acquired the right to vote in various states (e.g., Georgia, Kentucky, Alaska,

²⁴ The amendment also served to extend women’s suffrage to all offices in those states where women only had the right to vote for certain specified offices (e.g., just President, just local offices). In addition, the constitutional amendment made it more difficult to ever reverse the granting of the vote to women.

²⁵ The reasons that the 19th Amendment passed Congress in 1919 was that (1) women already constituted half the electorate in 30 states and (2) members of Congress from the remaining states knew that it was only a matter of time before women would obtain the right to vote in the remaining states—with or without a federal constitutional amendment.

Hawaii, and New Hampshire). In 1971, the 26th Amendment extended the 18-year-old vote to all states.

Black Suffrage

States also took the lead in granting suffrage to African Americans. African Americans were given the right to vote in New York in the 1820s and in five states by the 1850s. Black suffrage was later extended to all states by the 15th Amendment (ratified in 1870).

The Winner-Take-All Rule

Finally, it should be noted that one of the politically most important characteristics of our nation's current system of electing the President—the winner-take-all rule—was established by state statute—not a federal constitutional amendment.

Why does John Samples say that repealing the winner-take-all rule without a federal constitutional amendment would “undermin[e] the legitimacy of presidential elections,” while not criticizing the original adoption of the winner-take-all rule by the states as illegitimate?

The fact is that state-level action is the traditional, appropriate, and most commonly used way of changing the method of electing the President.

In terms of electing the President, state control is precisely what the Founding Fathers intended, and it is precisely what the U.S. Constitution specifies. The Founding Fathers created an open-ended system with built-in flexibility concerning the manner of electing the President.

Indeed, the 12th Amendment (ratified in 1804) was the only time when a federal constitutional amendment was used to initiate a change in the manner of voting for the President.

In this instance, a constitutional amendment was necessary. The original Constitution specifically provided that each presidential elector would vote for two persons (with the candidate receiving the most votes becoming President and the second-place candidate becoming Vice President). The 12th Amendment changed that procedure and specified that each presidential elector would cast a separate vote for President and a separate vote for Vice President.²⁶

²⁶ The 12th Amendment acknowledged the reality of the emergence of political parties. When political parties emerged in the 1796 election, each party centrally nominated its candidate for President and Vice President (through the party's congressional caucus). Once there were national nominees, presidential electors were expected to vote for their party's nominee for President in the Electoral College. The emergence of political parties extinguished the vision of the Founding Fathers that the Electoral College would act as a deliberative body. In the 1800 presidential election, the winning party's electors each dutifully cast one vote for their party's presidential and vice-presidential nominees—thus creating a tie in the Electoral College and throwing the election of the President and Vice President into Congress. The 1800 election made it clear that ties in the Electoral College would be a continuing occurrence if political parties continued to exist. Thus, a constitutional amendment was necessary. See Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford: Oxford University Press. See also Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press.

In referring to the National Popular Vote plan, Professor Joseph Pika (author of *The Politics of the Presidency*) pointed out:

“This effort would represent amendment-free constitutional reform, the way that most other changes have been made in the selection process since 1804.”²⁷ [Emphasis added]

It is worth noting that while the states have exclusive control over the awarding of their electoral votes, the Constitution treats state power over congressional elections differently. Article I, section 4, clause 1 of the U.S. Constitution states:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” [Emphasis added]

Thus, the U.S. Constitution gives *primary*—but not *exclusive*—control over the manner of electing Congress to the states. In the case of congressional elections, the U.S. Constitution gave Congress the power to review and override state decisions. This override power has been used sparingly over the years.

In contrast, state power to choose the manner of electing the President is “exclusive” and “plenary” (i.e., complete). In particular, Congress does not have the power to override a state’s decision concerning the manner of awarding its electoral votes.

9.1.3. MYTH: The Electoral College would be abolished by the National Popular Vote compact.

QUICK ANSWER:

- The National Popular Vote compact would preserve the Electoral College. It would not abolish it. It would not affect the structure of the Electoral College contained in the U.S. Constitution.
- The National Popular Vote plan is based on the power of the states to choose the method of awarding their electoral votes. The compact would replace existing state winner-take-all statutes with a different state statute, namely one that guarantees the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.
- Under the National Popular Vote plan, the states would retain their exclusive and plenary power to choose the method of awarding their electoral votes, including the option to make other changes in the future.

²⁷ Pika, Joseph. Improving on a doubly indirect selection system. *Delaware On-Line*. September 16, 2008. <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20080916/OPINION09/809160318/1004/OPINION>.

MORE DETAILED ANSWER:

The National Popular Vote bill is state legislation—not a federal constitutional amendment. As such, it would not (and indeed could not) change the structure of the Electoral College as specified in the U.S. Constitution.

Instead, the National Popular Vote bill would change the method by which the states award their electoral votes in the Electoral College.

The National Popular Vote bill uses the Constitution’s built-in state-based power for changing the method of awarding electoral votes namely, section 1 of Article II of the U.S. Constitution:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”²⁸ [Emphasis added]

The “manner” of appointment of presidential electors is specified by clause 3 of Article III of the National Popular Vote compact.

“The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.”

Because the compact only takes effect when enacted by states possessing a majority of the electoral votes (i.e., 270 of 538), the compact guarantees that presidential electors supporting the “national popular vote winner” will have enough votes to choose the President.

The National Popular Vote compact would not abolish the Electoral College. Instead, it would reform the Electoral College so that it reflects the choice of the voters in all 50 states and the District of Columbia.

Under the National Popular Vote plan, the states would retain their exclusive and plenary power to choose the method of awarding their electoral votes, including the option to make other changes in the future.

9.1.4. MYTH: The Founding Fathers designed and favored our nation’s current system of electing the President.

QUICK ANSWER:

- The Founding Fathers never decided how presidential electors should be chosen. Instead, they left the matter to the states.
- The Founding Fathers expected that the Electoral College would be a deliberative body. However, presidential electors became a rubberstamp for the candidates nominated by their parties by the time of the nation’s first competitive presidential election in 1796.

²⁸ U.S. Constitution. Article II, section 1, clause 2.

- The Electoral College further deviated from the Founders' vision when state winner-take-all statutes became prevalent (long after the Founders were dead).
- The winner-take-all method of awarding electoral votes was not debated (much less voted upon or adopted) at the 1787 Constitutional Convention.
- The winner-take-all rule is not mentioned in the *Federalist Papers*.
- The winner-take-all method was not the choice of the Founders and was, in fact, used by only three states in the nation's first presidential election in 1789 (all of which abandoned it by 1800).
- The electoral system that we have today was not designed, anticipated, or favored by the Founding Fathers. Instead, it is the result of decades of evolutionary change driven primarily by the emergence of political parties and the desire of each state's ruling party not to give any of the state's electoral votes to the minority party.
- The winner-take-all rule came into widespread use because of the pressure created by its use in other states.

MORE DETAILED ANSWER:

The Founding Fathers did not design nor anticipate—much less favor—the most salient feature of our nation's present-day system of electing the President, namely state winner-take-all statutes (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most popular votes within each separate state).

The Founding Fathers never intended that all of a state's presidential electors would mindlessly vote, in lockstep, for the candidate nominated by an extra-constitutional body (a political party's nominating caucus or convention).

In the debates of the Constitutional Convention and in the *Federalist Papers*, there is no mention of the winner-take-all method of awarding electoral votes. When the Founding Fathers went back to their states in 1789 to organize the nation's first presidential election, only three state legislatures chose to employ the winner-take-all method. Each of these three states repealed it by 1800.

Instead, the Founding Fathers envisioned an Electoral College composed of “wise men” who would act as a deliberative body and exercise independent and detached judgment as to the best person to serve as President.

As John Jay (the presumed author of *Federalist* No. 64) wrote in 1788:

“As the **select assemblies** for choosing the President . . . will in general be composed of **the most enlightened and respectable citizens**, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues.” [Emphasis added]

As Alexander Hamilton (the presumed author of *Federalist* No. 68) wrote in 1788:

“[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **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 such complicated investigations.**” [Emphasis added]

In this regard, the Electoral College was patterned after ecclesiastical and royal elections. For example, the College of Cardinals in the Roman Catholic Church constitutes the world’s oldest and longest-running electoral college. Cardinals (with lifetime appointments) deliberate to choose the Pope. The Holy Roman Emperor was elected by a similar small and distinguished group of “electors.” In many kingdoms in Europe, a small group of “electors” would, upon the death of the king, choose the person best suited to be king from a pool consisting of certain members of the royal family or nobility.

The Founding Fathers’ expectations that the Electoral College would be a deliberative and contemplative body were dashed by the political realities of the nation’s first competitive presidential election in 1796 and the emergence of political parties.

After George Washington declined to run for a third term in 1796, the Federalist and Republican parties nominated candidates for President and Vice President. These nominations were made by each party’s congressional caucus. In other words, the nominations were made by extra-constitutional political organizations.

The necessary consequence of national nominees was that each party nominated candidates for the position of presidential elector who made it known that they would serve as willing “rubberstamps” for their party’s nominee in the Electoral College.

As the Supreme Court observed in its opinion in the 1892 case of *McPherson v. Blacker*:

“Doubtless **it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive**, but experience soon demonstrated that, **whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power** in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated.”²⁹ [Emphasis added]

The centralized nomination by the political parties for President and Vice President in 1796 extinguished the notion that the Electoral College would operate as a deliberative body.

²⁹ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

All but one of the 138 electoral votes cast in the 1796 election were synchronized with “the will of the appointing power.”

In the eight states where the state legislature appointed presidential electors in 1796, there was no hint of independent judgment by any of the presidential electors. The votes in the Electoral College coincided with “the will of the appointing power” (whether a Federalist or Jeffersonian state legislature):

- Connecticut—100% for Adams
- Delaware—100% for Adams
- New Jersey—100% for Adams
- New York—100% for Adams
- Rhode Island—100% for Adams
- South Carolina—100% for Jefferson
- Tennessee—100% for Jefferson³⁰
- Vermont—100% for Adams

In the eight states where the voters chose the presidential electors in 1796, the votes cast by the presidential electors mirrored (with one exception discussed below) the sentiment of the voters that elected them—whether at the statewide level or the district level.³¹

The one exception was the unexpected vote cast in 1796 by Samuel Miles (a Federalist presidential elector) for Thomas Jefferson.

Public reaction to Miles’s unexpected vote cemented the presumption that presidential electors should vote for their party’s nominees. As a Federalist supporter notably complained in the December 15, 1796, issue of the *United States Gazette*:

“What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, **I chufe him to act, not to think.**” [Emphasis added] [Spelling per original]

Of the 22,991 electoral votes cast for President in the nation’s 57 presidential elections between 1789 and 2012, the vote of Samuel Miles for Thomas Jefferson in 1796 remains the only instance when the elector may have believed, at the time he cast his vote, that his vote might possibly affect the national outcome.³²

³⁰ As explained in section 2.2.2, the Tennessee legislature effectively appointed the state’s presidential electors.

³¹ The winner-take-all rule was used in New Hampshire and Georgia, and the votes cast in the Electoral College were cast unanimously for the statewide preference (Adams and Jefferson, respectively). Multi-member regional districts were used in Massachusetts, and the votes cast in the Electoral College mirrored voter sentiment (for Adams) in the four districts. Districts were used in Kentucky, and the votes cast in the Electoral College matched voter sentiment (for Jefferson). Districts were used in Virginia, North Carolina, and Maryland, and the votes cast in the Electoral College (although not unanimous) matched voter sentiment in each district.

³² Fifteen of the 17 deviating electoral votes for President were “grand-standing” votes (that is, votes cast after the presidential elector knew that his vote would not affect the national outcome). One electoral vote (in Minnesota in 2004) was cast by accident. In addition, 63 electoral votes were cast in an unexpected way in

The expectation that presidential electors should faithfully support the candidates nominated by their party has persisted to this day.³³

In the 1952 case of *Ray v. Blair*, U.S. Supreme Court Justice Robert H. Jackson summarized the history of presidential electors as follows:

“No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices. . . .

“This arrangement miscarried. Electors, although often personally eminent, independent, and respectable, officially become voluntary party lackeys and intellectual nonentities to whose memory we might justly paraphrase a tuneful satire:

‘They always voted at their party’s call
‘And never thought of thinking for themselves at all’ ”³⁴

In short, the Electoral College that we have today was not designed, anticipated, or favored by the Founding Fathers. It is, instead, the product of decades of evolutionary change precipitated by the emergence of political parties and the enactment of winner-take-all statutes by most states. The actions taken by the Founding Fathers in organizing the nation’s first presidential election in 1789 (in particular, the fact that only three states used the winner-take-all method in 1789) make it clear that the Founding Fathers never gave their imprimatur to the winner-take-all method.

9.1.5. MYTH: Alexander Hamilton considered our nation’s current system of electing the President to be “excellent.”

QUICK ANSWER:

- Alexander Hamilton’s statement in *Federalist No. 68* saying that the Electoral College is “excellent” is frequently quoted out-of-context in order to suggest that Hamilton (and perhaps the whole Founding Generation) would have favored our current system of electing the President. In fact, Hamilton’s statement does not refer to the current state-by-state winner-take-all system but instead, to the Founders’ never-achieved vision of a “judicious” and “deliberative” Electoral College.
- Hamilton’s statement that the Electoral College is “excellent” was made in the *Federalist Papers* during the debate on ratification of the U.S. Constitution—

the 1872 presidential election when the losing Democratic candidate died after Election Day, but before the Electoral College met. For details, see section 2.12.

³³ In 2010, the National Conference of Commissioners on Uniform State Laws drafted a “Uniform Faithful Presidential Electors Act” and recommended it for enactment by all the states.

³⁴ *Ray v. Blair* 343 U.S. 214 at 232. 1952.

that is, *before* Hamilton or anyone else could see how the Electoral College would operate in practice.

- Hamilton’s only known statement on the method by which a state should award its electoral votes is contained in an 1800 letter in which he advocated that New York switch from legislative appointment of presidential electors to popular election using districts. There is no record of Hamilton ever endorsing the currently prevailing system in which states conduct popular elections to award 100% of their electoral votes to the candidate who receives the most popular votes in the state.
- Hamilton was dead for a quarter century before the winner-take-all rule become prevalent in most states (including his own state of New York).

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, has asserted:

“[The National Popular Vote compact] . . . tears apart a well-established institution that was **admired by the Founding generation** and that has **served America successfully for centuries**. Alexander Hamilton described its reception by the Founding generation, noting that

‘the mode of appointment of the Chief Magistrate of the United States is almost the only part of the system . . . which has escaped without severe censure. . . . I venture somewhat further, and hesitate not to affirm that **if the manner of it be not perfect, it is at least excellent.**’ [Emphasis added]

Trent England (a lobbyist opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington) has written:

“**An ‘excellent’ system** Alexander Hamilton wrote in *The Federalist* (No. 68) that, if the Electoral College is not perfect, ‘it is at least excellent.’ **The system probably works even better than the American Founders expected, considering the addition of 37 states . . . since Hamilton’s original judgment.**”³⁵ [Emphasis added]

These out-of-context quotations about the excellence of the Electoral College do not refer to the way that the Electoral College has actually operated “for centuries” or how it operates today.

Instead, as Hamilton made clear a few sentences later in *Federalist* No. 68, he was referring to the Founders’ never-achieved vision of a “deliberative” Electoral College:

“[The] election should be made by **men most capable of analyzing the qualities** adapted to the station, and **acting under circumstances favor-**

³⁵ England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

able to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. **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 such complicated investigations.**” [Emphasis added]

The practice of presidential electors acting as rubberstamps started at the time of the nation’s first competitive election in 1796 (as discussed in greater detail in section 9.1.4). In 1796, political parties started making national nominations for President and Vice President. The obvious and necessary way to ensure the election of a party’s national nominees was to nominate presidential electors who could be relied upon to vote in lockstep in the Electoral College for the party’s nominees.

Both parties were immediately successful in converting presidential electors into rubberstamps in 1796. All but one presidential elector in 1796 voted for his own party’s nominee for President (that is, either John Adams or Thomas Jefferson). The one exception was Samuel Miles (the deviant Federalist elector from Pennsylvania), who unexpectedly cast his vote in the Electoral College for Jefferson—instead of Adams. A Federalist supporter famously complained in the December 15, 1796, issue of the *United States Gazette* that Samuel Miles had voted for Thomas Jefferson, instead of John Adams, by saying,

“What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, **I chufe him to act, not to think.**” [Emphasis added] [Spelling per original]

Of the 22,991 electoral votes cast for President in the nation’s 57 presidential elections (between 1789 and 2012), only 17 were cast in a deviant way.³⁶ Moreover, the unexpected vote of Samuel Miles in 1796 remains the only instance (among these 17 cases) when the elector might have thought, at the time he voted, that his vote could possibly affect the national outcome.³⁷

It should be noted that Hamilton’s statement in *Federalist* No. 68 that the Electoral College is “excellent” was made during the debate on ratification of the U.S. Constitution—that is, *before* Hamilton or anyone else could see how the Electoral College would operate in practice.

The fact that “the mode of appointment of the [President] is almost the only part of the system . . . which has escaped without severe censure” during the debate on ratification of the U.S. Constitution reflected the fact that George Washington was universally expected to become President and the fact that designating a deliberative body to choose the President seemed, at the time, to be a reasonable way to fill the office.

³⁶ See section 2.12.

³⁷ As discussed in greater detail in section 2.12, all but one of the other instances of faithless electors are considered grand-standing votes. One electoral vote (in 2004) was cast by accident.

Hamilton's only known statement on the method by which a state should award its electoral votes is contained in an 1800 letter in which he advocated that New York switch from legislative appointment of presidential electors to popular election using districts.

The Federalists unexpectedly lost control of the New York legislature in the April 1800 legislative elections. Under an existing New York statute, the legislature appointed all of the state's presidential electors. The loss of the legislature meant that the Federalists would lose all of New York's electoral votes when the legislature would meet later in the year to choose the state's presidential electors.³⁸

“Jarred by the specter of defeat in the autumn [Federalist Alexander] Hamilton importuned Governor John Jay to call a special session of the Federalist-dominated New York legislature so that it might act before the newly elected assemblymen took their seats [on July 1]. Hamilton's plan was for the outgoing assembly to enact legislation providing for the popular election—in districts—of the state's presidential electors, a ploy virtually guaranteed to ensure that the Federalists would capture nine or ten of the twelve electoral college slots.”³⁹

As Alexander Hamilton put it in his letter to Governor John Jay on May 7, 1800:

“The moral certainty therefore is, that there will be an anti-federal majority in the ensuing legislature; and the very high probability is, that this will bring Jefferson into the chief magistracy, unless it be prevented by the measure which I now submit to your consideration, namely, the immediate calling together of the existing legislature.

“I am aware that there are weighty objections to the measure; but the reasons for it appear to me to outweigh the objections. And in times like these in which we live, **it will not do to be over-scrupulous.** It is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules.

“In observing this, I shall not be supposed to mean that anything ought to be done which integrity will forbid; but merely that the **scruples of delicacy and propriety**, as relative to a common course of things, **ought to yield to the extraordinary nature of the crisis.** They ought not to hinder the taking of a legal and constitutional step to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of State.”⁴⁰ [Emphasis added]

³⁸ Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow. Page 238.

³⁹ Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 131.

⁴⁰ The complete letter can be found in *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892. Pages 30–31. See also Cunningham, Noble E., Jr. 1957. *Jeffersonian Republicans: The Formation of Party*

Governor Jay (a former Chief Justice of the United States) rejected Hamilton’s proposal and wrote on the letter:

“Proposing a measure for party purposes which it would not become me to adopt.”⁴¹

There is no record of Hamilton ever endorsing the currently prevailing system in which states conduct popular elections to award 100% of their electoral votes to the candidate who receives the most popular votes in the state.

Alexander Hamilton died in 1804. Hamilton’s home state of New York did not adopt the winner-take-all rule until 1832. It was not until 1832 that the winner-take-all rule became predominant throughout the country.

In short, Alexander Hamilton, the other Founding Fathers, and the rest of the Founding Generation were dead for decades before the state-by-state winner-take-all rule became the predominant method for awarding electoral votes.⁴²

9.1.6. MYTH: The National Popular Vote compact should be rejected because a proposal for direct election of the President was rejected by the 1787 Constitutional Convention.

QUICK ANSWER:

- The 1787 Constitutional Convention voted against several methods for selecting the President, including having state legislatures choose the President, having Governors make the choice, election of the President by presidential electors chosen by districts, and nationwide popular election.
- The wording that actually ended up in the Constitution does not prohibit the use of any of the methods that were debated and rejected, as evidenced by the fact that three of the methods rejected by the Constitutional Convention were used in the nation’s first presidential election in 1789, namely election of presidential electors by district, appointment by legislatures, and gubernatorial appointment.

MORE DETAILED ANSWER:

In referring to supporters of the National Popular Vote plan, John Samples of the Cato Institute wrote:

“They suggest that the power to appoint electors is unconstrained by the Constitution. It is accurate that the Constitution does not explicitly con-

Organizations. Chapel Hill, NC: University of North Carolina Press. Page 185. See also Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow. Page 239.

⁴¹ Brief of F.A. Baker for Plaintiffs in Error in *McPherson v. Blacker*. 1892. Page 31.

⁴² After 1832 (and until 1992), there was never more than one state, in any one presidential election, that did not employ the winner-take-all rule to award all of its electoral votes to the candidate who received the most popular votes in the state.

strain the power of state legislatures in allocating electors. But **a brief consideration of the history of the drafting of this part of the Constitution suggests some implicit constraints on state choices.**

“The Framers considered several ways of electing a president. . . . On July 17, 1787, the delegates from nine states voted against direct election of the president; the representatives of one state, Pennsylvania, voted for it.”⁴³

. . .

“NPV offers a way to institute a means of electing the president that was rejected by the Framers of the Constitution.”⁴⁴ [Emphasis added]

Professor Norman Williams of Willamette University has stated:

“The Framers expressly and overwhelmingly rejected vesting the selection of the President directly in the people. Despite their republican instincts, the delegates believed that the people would be unable to identify worthy candidates, most of whom (in the framers’ expectations) would be unknown to the people at large. In a predominantly rural nation lacking a developed system of public education and a nationwide system of transportation or communication, theirs was not a trifling concern.”⁴⁵

Prior to arriving at the eventual wording of section 1 of Article II, the 1787 Constitutional Convention debated the method of choosing the President on 22 separate days and took 30 (mostly contradictory) votes on the matter.⁴⁶

The methods that were rejected included:

- electing presidential electors by districts,
- having state legislatures choose the President,
- having Governors choose the President,
- nationwide direct election, and
- having Congress choose the President.

If John Samples and Norman Williams were correct in asserting that it is unconstitutional for a state to use a method of choosing presidential electors that was rejected by the Constitutional Convention, then George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe were all elected unconstitutionally. Indeed,

⁴³ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 8.

⁴⁴ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 13.

⁴⁵ Williams, Norman. Why the National Popular Vote compact is unconstitutional. *Brigham Young University Law Review*. November 19, 2012. Page 138. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188020.

⁴⁶ Edwards, George C. III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press.

a *majority* of the presidential electors in the nation's *first nine presidential elections* (1789–1820) were chosen using methods rejected by the Constitutional Convention.

On June 2, 1787, the Convention voted against a motion by James Wilson of Pennsylvania specifying that the voters would elect presidential electors by district.⁴⁷ Madison reported:

“Mr. Wilson made the following motion, to be substituted for the mode proposed by Mr. Randolph’s resolution,

‘that the Executive Magistracy shall be elected in the following manner: **That the States be divided into ___ districts: & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect ___ members for their respective districts to be electors of the Executive magistracy,** that the said Electors of the Executive magistracy meet at ___ and they or any ___ of them so met shall proceed to elect by ballot, but not out of their own body [the] person in whom the Executive authority of the national Government shall be vested.’” [Emphasis added]

Despite the Constitutional Convention’s rejection of the district system, Virginia and Delaware implemented Wilson’s rejected plan and authorized their voters to elect their state’s presidential electors by district in the nation’s first presidential election in 1789. Moreover, in the nine presidential elections between 1789 and 1820 (when James Monroe was elected), the voters in a total of eight states (including Massachusetts, Maryland, North Carolina, Kentucky, Illinois, and Maine) elected presidential electors by district on one or more occasions.

Moreover, if John Samples and Norman Williams were correct in asserting that section 1 of Article II precludes states from using a method of choosing presidential electors that was rejected by the Constitutional Convention, Maine and Nebraska’s *current* district method would be unconstitutional.

Of course, the U.S. Supreme Court upheld Michigan’s 1892 law specifying that the voters elect the state’s presidential electors by congressional district in *McPherson v. Blacker*.⁴⁸

On July 24, 1787, the Constitutional Convention rejected selection of the President by state legislatures. Nonetheless, in 1789, Connecticut, South Carolina, and Georgia chose to appoint their presidential electors in the state legislature. In the nine presidential elections between 1789 and 1820, the legislatures of a total of 15 states (including New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Pennsylva-

⁴⁷ Madison Debates. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. On June 2, 1787, http://avalon.law.yale.edu/18th_century/debates_602.asp.

⁴⁸ *McPherson v. Blacker*, 146 U.S. 1. 1892.

nia, Delaware, South Carolina, Kentucky, Louisiana, Indiana, Alabama, and Missouri) appointed their state’s presidential electors on one or more occasions.⁴⁹

On June 15, 1787, the Constitutional Convention voted against selection of the President by state Governors. Nonetheless, New Jersey’s presidential electors were appointed by the Governor and his Council in the nation’s first presidential election in 1789.⁵⁰ In 1792, Vermont combined two methods that were rejected by the Constitutional Convention. Its presidential electors were appointed by a “Grand Committee” consisting of the Governor and his Council along with the state House of Representatives (the only house Vermont had at the time).⁵¹

In summary, the course of conduct of the Founding Generation immediately after ratification of the Constitution indicates that no one interpreted section 1 of Article II as precluding the states from using methods of choosing presidential electors that were rejected at some point during the Constitutional Convention.

9.1.7. MYTH: The National Popular Vote compact should be rejected because of implied restrictions on a state’s choices for appointing presidential electors and because only the Founders’ “failure of imagination” prevented them from explicitly prohibiting the National Popular Vote compact.

QUICK ANSWER:

- Section 1 of Article II of the U.S. Constitution does not prohibit, require, encourage, or discourage the use of any particular method for awarding a state’s electoral votes. The wording “as the Legislature . . . may direct” permits the states to exercise their power to choose the manner of appointing their presidential electors in any way they see fit—subject only to the implicit limitation on all grants of power in the Constitution, namely that the states not violate any specific restriction on state action contained elsewhere in the Constitution.
- The U.S. Supreme Court rejected the urging of (the losing) attorney in *McPherson v. Blacker* that it ignore the wording of the section 1 of Article II

⁴⁹ In *Bush v. Gore* in 2000, the U.S. Supreme Court agreed that state legislators could appoint presidential electors. 531 U.S. 98.

⁵⁰ An Act for carrying into effect, on the part of the state of New Jersey, the Constitution of the United States. November 21, 1788. *Acts of the General Assembly of the State of New Jersey*. Page 481. See also DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 29. Interestingly, the U.S. Supreme Court’s opinion in the 1892 case of *McPherson v. Blacker* contains an error concerning New Jersey. In its historical review of methods used to appoint presidential electors in 1789, the Court (incorrectly) stated, “At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina.” 146 U.S. 1 at 29. The source of this misinformation about New Jersey appears to be page 19 of the plaintiff’s brief in the 1892 case. *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892.

⁵¹ An Act Directing the Mode of Appointing Electors to Elect a President and Vice President of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43.

and judicially manufacture restrictions on the power of the states to choose the manner of appointing their presidential electors.

- In deciding *McPherson v. Blacker*, the U.S. Supreme Court rejected the argument that the widespread use of the winner-take-all rule, over an extended period of time, extinguished the power of the states to adopt different methods of appointing their presidential electors (that is, the non-use argument).
- The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it and, therefore, the question of whether there are unstated implicit restrictions on the allowable methods for appointing presidential electors.

MORE DETAILED ANSWER:

In referring to supporters of the National Popular Vote plan, John Samples of the Cato Institute wrote:

“They suggest that the power to appoint electors is unconstrained by the Constitution. It is accurate that the Constitution does not explicitly constrain the power of state legislatures in allocating electors. But a brief consideration of the history of the drafting of this part of the Constitution suggests **some implicit constraints on state choices.**”⁵² [Emphasis added]

Throughout her book *Enlightened Democracy: The Case for the Electoral College*, Tara Ross, an opponent of the National Popular Vote compact, generally describes the Founding Fathers in glowing terms.

“The Electoral College is . . . **a carefully considered and thought-out solution.**”⁵³ [Emphasis added]

Ross repeatedly refers to the

“**finely wrought procedures** found in the Constitution.” [Emphasis added]

Ross reminds us that:

“The Founders spent months debating the appropriate presidential election process for the new American nation.”⁵⁴

⁵² Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 8.

⁵³ Ross, Tara. 2004. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Page 51.

⁵⁴ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Pages 37–44.

Then, after extolling the Founders' work product and wisdom, Ross writes:

"The [U.S. Supreme] Court has held that 'the State legislature's power to select the manner for appointing electors is plenary.' . . .

"Is this power of state legislators completely unrestricted? If it is, then Rhode Island could decide to allocate its electors to the winner of the Vermont election. In a more extreme move, New York could allocate its electors to the United Nations. **Florida could decide that Fidel Castro always appoints its electors.** . . .

"NPV is the opposite of what the Founders wanted, but failure of imagination prevented the Founders from explicitly prohibiting this particular manner of allocating electors."⁵⁵ [Emphasis added]

A glance at the U.S. Constitution shows that the Founders displayed no shortage of legal talent and certainly did not suffer from any "failure of imagination" in crafting restrictions on the exercise of power when they thought that restrictions were advisable.

Section 8 of Article I provides:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . **but all Duties, Imposts and Excises shall be uniform throughout the United States.**" [Emphasis added]

Section 10 of Article I provides:

"No State shall . . . make any Thing **but gold and silver Coin** a Tender in Payment of Debts." [Emphasis added]

The Founders even limited the scope of future constitutional amendments in Article V with two specific restrictions:

"No Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first⁵⁶ and fourth⁵⁷ Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." [Emphasis added]

⁵⁵ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Pages 37–44.

⁵⁶ Clause 1 of section 9 of Article I states, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

⁵⁷ Clause 4 of section 9 of Article I of the Constitution states "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

There are numerous additional examples of carefully crafted restrictions placed on grants of power throughout the Constitution.

Even section 1 of Article II itself contains a restriction on the power of the states to appoint their presidential electors.

“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: **but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.**”
[Emphasis added]

Tellingly, section 1 of Article II contains *no other restriction* on the manner by which the states exercise their power.

Ross’ “failure of imagination” argument echoes the argument made in 1892 before the U.S. Supreme Court by the losing attorney in *McPherson v. Blacker*.

Referring to Great Britain (the villainous 1890’s analog of Fidel Castro in present-day American politics), attorney F. A. Baker argued:

“The crown in England is hereditary, the succession being regulated by act of parliament.

“Would it be competent for a State legislature to pass a similar act, and provide that A. B. and his heirs at law forever, or some one or more of them, should appoint the presidential electors of that State?”⁵⁸

In its unanimous ruling in *McPherson v. Blacker*, the U.S. Supreme Court answered Baker’s argument about unstated constitutional restrictions on the power of the states to award their electoral votes:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, **nor that the majority of those who exercise the elective franchise can alone choose the electors.** It 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. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, **resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text.**”⁵⁹ [Emphasis added]

⁵⁸ Brief of F.A. Baker for Plaintiffs in Error in *McPherson v. Blacker*. 1892. Page 73.

⁵⁹ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

The U.S. Supreme Court recognized in *McPherson v. Blacker* that there are limitations on a state's power under section 1 of Article II. For example, a state's constitution may constrain a state's power to choose the method of appointing presidential electors.

“The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, **except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. **What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.** The clause under consideration does not read that the people or the citizens shall appoint, but that “each state shall;” and if the words, ‘in such manner as the legislature thereof may direct,’ had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned **in the absence of any provision in the state constitution in that regard.** Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.”⁶⁰ [Emphasis added]

The Court continued:

“In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States”⁶¹ [Emphasis added]

The losing attorney in *McPherson v. Blacker* (F.A. Baker) urged the Court to judicially manufacture restrictions that do not actually appear in the Constitution and to adopt a “more elastic system of government.”

“There is no rule of constitutional interpretation, or of judicial duty, which requires the court . . . to adhere to the obsolete design of the constitution.”⁶²

In his plea to the U.S. Supreme Court to engage in judicial activism, Baker bemoaned his client's earlier loss at the Michigan Supreme Court:

⁶⁰ *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

⁶¹ *Id.* at 29.

⁶² Brief of F.A. Baker for Plaintiffs in Error in *McPherson v. Blacker*. 1892. Page 80.

“There can be no such thing as an absolutely rigid constitution. It is an impossibility, although the supreme court in Michigan in its wisdom most solemnly declares, that it will recognize no other.”⁶³

Baker also argued that the widespread use of state winner-take-all statutes, over an extended period of time, extinguished the power of the states to adopt different methods of appointing their presidential electors (that is, the non-use argument).

“There is no rule of constitutional interpretation, or of judicial duty, which requires the court . . . to **disregard the plan of the electoral college as it actually exists, after a century of practical experience and development.**”⁶⁴ [Emphasis added]

In 2012, Professor Norman Williams of Willamette University echoed the non-use argument made by (losing) attorney Baker in the 1892 case of *McPherson v. Blacker* by saying that the states are limited today to choices of methods for appointing presidential electors that have been used in the past. Tellingly, while remaking Baker’s non-use argument, Williams concedes that the Constitution does not actually “express” the limitation for which he is arguing.

“The framers had created a presidential election system . . . [in which] the choice of President would be made not by an undifferentiated mass of people nationwide, but by **electors accountable to the people of their individual states. To be sure, the framers did not make these expectations express.** The notion that any state would appoint its electors in accordance with the wishes, even in part, of voters in other states was **beyond the imagination of any at the time.** Nevertheless, **if any doubt about this expectation exists, it is negated by actual experience.** As Part III will show, the actual practice of the states in the wake of the Constitutional Convention—a practice that has continued to this day—demonstrates the universal understanding among the states, both then and now, that presidential electors from each state are to be selected in accordance with the will of the voters in each state, not the entire national populace.”⁶⁵ . . .

“History illuminates and informs the scope of state power under Article II. Throughout the nation’s history, states have used one of four processes for selecting their presidential electors: (1) legislative

⁶³ *Id.* at 80.

⁶⁴ Brief of F.A. Baker for Plaintiffs in Error in *McPherson v. Blacker*. 1892. Page 80.

⁶⁵ Williams, Norman. Why the National Popular Vote Compact is unconstitutional. *Brigham Young University Law Review*. November 19, 2012. Pages 139–140. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188020.

appointment, (2) popular election in which all electors are selected on the basis of the statewide vote (an at-large or winner-take-all system), (3) popular election by district, or (4) a combination of the latter two electoral systems—a hybrid process in which some electors are elected on the basis of the statewide vote and some on the basis of a district vote. **Critically, under all four systems, each state’s electors are selected in accordance with the wishes of the people of the state, not the nation generally.**

“Not once between 1880 and today, a period in which every state in the union has conducted a statewide popular election for its electors, has any state selected its electors based on the votes of individuals in other states. Rather, as the framers expected, states have selected their electors based on the will of state voters, not the nation at large.”⁶⁶ [Emphasis added]

The U.S. Supreme Court rejected the non-use argument in its ruling in *McPherson v. Blacker*:

“The question before us is not one of policy, but of power . . . The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way.”⁶⁷ [Emphasis added]

If it were the case that the states were precluded from using any method of awarding electoral votes that was not specifically “imagined” by the Founders, then the winner-take-all method would itself be unconstitutional. No historian, or anyone else of whom we are aware, has ever argued that the Founders expected, or wanted, 100% of a state’s presidential electors to vote slavishly, in lockstep, for a choice for President made by an extra-constitutional meeting (namely, a political party’s national nominating caucus or convention).

The winner-take-all rule was never debated or voted upon by the 1787 Constitutional Convention.

It is not mentioned in the *Federalist Papers*.

It was used by only three states in the nation’s first presidential election in 1789 (and was abandoned by all three by 1800).

The Founders were dead for decades by the time the winner-take-all rule came into widespread use.

It was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states.

⁶⁶ Williams, Norman. Why the National Popular Vote Compact is unconstitutional. *Brigham Young University Law Review*. November 19, 2012. Page 151. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188020.

⁶⁷ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

There is virtually unanimous agreement among historians that the Founding Fathers intended that the Electoral College would operate as a deliberative body and did not anticipate the emergence of political parties.

The Constitutional Convention never agreed on any particular method for choosing the President. On August 31, 1787, the Convention assigned the question of electing the President to a special Committee of Eleven. On September 4, the Committee of Eleven returned with a recommendation that the President be chosen by presidential electors (an element of Wilson’s rejected motion of June 2, 1787); however, the Committee *could not agree on any particular method for choosing the presidential electors*. The result was that section 1 of Article II empowered the states to decide how to choose their presidential electors.

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors . . .”⁶⁸ [Emphasis added]

Section 1 of Article II of the U.S. Constitution does not prohibit, require, encourage, or discourage the use of any particular method for awarding a state’s electoral votes. The wording “as the Legislature . . . may direct” permits the states to exercise their power to choose the manner of appointing their presidential electors in any way they see fit—subject only to the implicit limitation on all grants of power in the Constitution, namely that the states not violate any specific restriction on state action contained elsewhere in the Constitution.⁶⁹

The report of the U.S. Senate Committee on Privileges and Elections in 1876 reviewed the history of the appointment of presidential electors by state legislatures and Governors:

“The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. **They may be chosen by the Legislature**, or the Legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States, and **it is no doubt competent for the Legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors.**”⁷⁰ [Emphasis added]

⁶⁸ U.S. Constitution. Article II, section 1, clause 2.

⁶⁹ Among the specific restrictions on the states concerning the manner of appointing their presidential electors are those contained in the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of servitude”), the 19th Amendment (woman’s suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote). The Constitution’s explicit prohibition against *ex post facto* laws and the Impairments Clause also operate as restraints on section 1 of Article II.

⁷⁰ Senate Report 395. Forty-Third Congress.

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it and, therefore, the question of whether there are implicit restrictions on the allowable methods for appointing presidential electors.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” [Emphasis added]

Section 1 of Article II contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.⁷¹

The 10th Amendment was ratified in 1791 (that is, *after* ratification of the original Constitution) and thus takes precedence over the original Constitution. Even if there were implicit restrictions in the original 1787 Constitution on state choices on the manner of appointing their presidential electors (perhaps in the form of penumbral emanations emitted by section 1 of Article II), such implicit restrictions were extinguished in 1791 by the 10th Amendment.

9.1.8. MYTH: Federalism would be undermined by a national popular vote.

QUICK ANSWER:

- Federalism concerns the distribution of power between state governments and the national government.
- The power of state governments relative to the federal government is not increased or decreased based on whether presidential electors are elected along state boundary lines (as is the case under the current state-by-state winner-take-all system), along congressional district boundary lines (as is currently the case in Nebraska and Maine), or national lines (as would be the case under the National Popular Vote plan).
- There is no connection between the way power is—or should be—distributed between the state and federal governments and the boundary lines used to tally votes for presidential electors.

⁷¹ The original Constitution contains few specific restrictions on state action that bear on the appointment of presidential electors. Thus, under Article II, section 1, clause 1, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, a state legislature certainly may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a presidential election. Similarly, a state legislature may not pass a law imposing criminal penalties on specifically named persons who may have committed fraudulent acts in connection with a presidential election (that is, a bill of attainder). Also, the Constitution’s explicit prohibition against a “law impairing the obligation of contract” operates as a restraint on the delegation of power contained in section 1 of Article II. Of course, various later amendments restrict state choices, including the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of servitude”), the 19th Amendment (woman’s suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

- The National Popular Vote approach preserves the power of the states to conduct elections—an important element of federalism.

MORE DETAILED ANSWER:

Federalism concerns the distribution of power between state governments and the national government.

Avid supporters of federalism are typically ardent about preserving and enhancing the power of state government in relation to the power of the national government.

John Samples of the Cato Institute argues that a national popular vote would “weaken federalism.”

“Anti-federalists feared the new Constitution would centralize power and threaten liberty. . . .

“The founders sought to fashion institutional compromises that responded to the concerns of the states and yet created a more workable government than had existed under the Articles of Confederation. . . .

“The national government would [be] part of a larger design of checks and balances that would temper and restrain political power.” . . .

“The realization of **the NPV plan would continue [the] trend toward nationalization and centralized power.**”⁷² [Emphasis added]

UCLA Professor Daniel H. Lowenstein has argued:

“Against all the pressures of nationalization, **it is important to maintain the states as strong and vital elements of our system.**”⁷³ [Emphasis added]

The power of state governments relative to the federal government is not increased or decreased based on whether presidential electors are elected along state boundary lines (as is the case under the current state-by-state winner-take-all system), along congressional district boundary lines (as is currently the case in Nebraska and Maine), or along national lines (as would be the case under the National Popular Vote plan).

The balance of power between the state and federal levels of government is controlled by the U.S. Constitution, state constitutions, and various federal and state laws.

The National Popular Vote plan does not affect the amount of power that state governments possess relative to the federal government.

When the Founding Fathers from Virginia, Delaware, and Massachusetts returned from the 1787 Constitutional Convention and organized the first presidential

⁷² Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008.

⁷³ Debate entitled “Should We Dispense with the Electoral College?” sponsored by PENnumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf.

election in their respective states in 1789, they certainly did not reduce the powers of their state governments relative to the federal government when they chose to elect their state's presidential electors by district (rather than the statewide winner-take-all method).

Similarly, the powers of the state governments of Virginia, Massachusetts, and North Carolina were not enhanced relative to the federal government when those states subsequently decided to change (in the early 1800s) to the winner-take-all rule.

Surely, no one would argue that Nebraska and Maine undermined federalism when they decided (in 1992 and 1969, respectively) to award their electoral votes by congressional district (instead of using the statewide winner-take-all method).

The National Popular Vote compact preserves the power of the states to conduct elections—an important element of federalism. It also preserves the power of the states to make future changes in the method of electing the President.

Adoption of the National Popular Vote compact is an exercise of federalism. It constitutes action by state governments to solve a recognized problem. It is an exercise of a power explicitly granted to the states by the U.S. Constitution.

As then-Congressman George H.W. Bush said on September 18, 1969, in support of direct popular election of the President:

“This legislation has a great deal to commend it. It will correct the wrongs of the present mechanism . . . by calling for direct election of the President and Vice President. . . . Yet, in spite of these drastic reforms, the bill is **not . . . detrimental to our federal system or one that will change the departmentalized and local nature of voting in this country.**

“In electing the President and Vice President, the Constitution establishes the principle that votes are cast by States. This legislation does not tamper with that principle. It only changes the manner in which the States vote. Instead of voting by intermediaries, the States will certify their popular vote count to the Congress. **The states will maintain primary responsibility for the ballot and for the qualifications of voters.** In other words, they will still designate the time, place, and manner in which elections will be held. Thus, there is a very good argument to be made that **the basic nature of our federal system has not been disturbed.**⁷⁴
[Emphasis added]

In short, there is no connection between the way power is—or should be—distributed between the state and federal governments and the boundary lines used to tally votes for presidential electors.

⁷⁴ *Congressional Record*. September 18, 1969. Pages 25,990–25,991.

9.1.9. MYTH: A national popular vote is contrary to the concept that the United States is a republic, not a democracy.

QUICK ANSWER:

- In a republic (as the term is defined in the *Federalist Papers* and used in the U.S. Constitution), citizens do not rule directly but instead, elect officeholders to represent them and conduct the business of government in the period between elections. Therefore, the United States is currently a republic—not a democracy—and it will remain a republic, with or without the National Popular Vote approach to appointing presidential electors.
- The division of power between the citizenry and elected officeholders to whom governmental power is delegated is not affected by the boundaries of the regions used to tally popular votes in choosing presidential electors.
- Popular election of the chief executive does not determine whether a government is a republic or democracy.

MORE DETAILED ANSWER:

Writing in the *Patriot Action Network*, Brad Zinn refers to former U.S. Senator Fred Thompson (R–Tennessee) and 2008 presidential candidate as follows:

“Sen. Fred Thompson supports the National Popular Vote Compact, which effectively guts the Electoral College, and ends the Republic as we know it.”

“With this National Popular Vote method, we will no longer be a Republic, but a democracy. A democracy is the one thing that the Founding Fathers feared more than anything else. Every democracy in the history of the world has devolved into tyranny. Democracy is two wolves and a sheep voting on what’s for dinner. The Founding Fathers knew this and made every effort to prevent the U.S. from slipping into the abyss. As Franklin said, ‘This is a Republic, if you can keep it.’ **The National Popular Vote Compact will end the Republic.**”⁷⁵ [Emphasis added]

In *Federalist No. 10*, James Madison—frequently called the “Father of the Constitution”—said that the

“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.”⁷⁶ [Emphasis added]

⁷⁵ Zinn, Brad. Does Fred Thompson really understand the Constitution? *Patriot Action Network*. July 19, 2012. <http://resistance.ning.com/forum/topics/does-fred-thompson-really-understand-the-constitution?page=1&commentId=2600775%3AComment%3A5855088&x=1#2600775Comment5855088>.

⁷⁶ Publius. The utility of the union as a safeguard against domestic faction and insurrection (continued). *Daily Advertiser*. November 22, 1787. *Federalist No. 10*.

In *Federalist No. 14*, Madison distinguished between a republic and a democracy by saying:

“The true distinction between these forms was also adverted to on a former occasion. It is, that **in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.** A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.”⁷⁷
[Emphasis added]

In a republic, the citizens do not rule directly, but instead elect officeholders to represent them and to conduct the business of government in the period between elections.

In the United States, legislation is approved by officeholders who serve for a term of two years (in the U.S. House of Representatives), six years (in the U.S. Senate), and four years (the President). Laws are executed and administered by an officeholder (the President) who serves for a term of four years.

The United States has a “republican form of government” because of this existing division of power between the citizenry and the elected officials who act on behalf of the citizenry between elections. Therefore, the United States *is*, at the present time, a republic—not a democracy.

Today, examples of direct democracy in the United States are—to use Madison’s wording in *Federalist No. 14*—limited to “small spots,” such as town meetings in New Hampshire.

Popular election of the chief executive does not determine whether a government is a republic or democracy. The division of power between the citizenry and elected officeholders to whom governmental power is delegated is not affected by the boundaries of the regions used to tally popular votes in choosing presidential electors. The United States is neither less nor more a “republic” if its chief executive is elected under the state-by-state winner-take-all method (i.e., awarding all of a state’s electoral votes to the candidate who receives the most popular votes in each separate state), under a district system (such as used by Maine and Nebraska), or under the proposed national popular vote system (in which the winner would be the candidate receiving the most popular votes in all 50 states and the District of Columbia).

The United States *is* currently a republic under current state winner-take-all statutes, and it would remain so under the National Popular Vote compact.

The meaning of the phrase “republican form of government” can be ascertained by examining the single place in the U.S. Constitution where these words appear, namely the Guarantee Clause:

⁷⁷ Publius. Objections to the proposed constitution from extent of territory answered. *New York Packet*. November 30, 1787. *Federalist No. 14*.

“The United States shall guarantee to every State in this Union a **Republican Form of Government.**”⁷⁸ [Emphasis added]

At the time of the Constitutional Convention in 1787, Connecticut, Massachusetts, New Hampshire, and Rhode Island conducted popular elections for Governor.⁷⁹

If popular election of a state’s chief executive were a violation of the Guarantee Clause, then these four states would have been in violation of the Guarantee Clause starting from the moment that the writing of the Constitution was finished in 1787.⁸⁰

It seems unlikely that the delegates from these four states would have voted for the Constitution at the 1787 Constitutional Convention if they believed that their own states lacked a “republican form of government” at the time.

It would seem even more unlikely that these four states would have ratified the Constitution if they believed that they were in violation of the Guarantee Clause.

Moreover, in the first few decades after ratification of the Constitution, the remaining original states (as well as additional states that were admitted to the Union) adopted the practice of directly electing their chief executive. No one has ever argued that these states denied their citizens a “republican form of government” because they directly elected their chief executives. No one has ever argued that the federal government should have invoked the Guarantee Clause and intervened (militarily or otherwise) to prevent these states from electing their chief executives by popular vote.

In short, popular election of the chief executive has nothing to do with the question of whether a particular government is a republic or democracy. Direct popular election of the chief executive is not incompatible with a “republican form of government.”

As Senator Fred Thompson said (quoted by Zinn):

“The National Popular Vote approach offers the states a way to deal with this issue in a way that is **totally consistent with our constitutional principles.**” [Emphasis added]

9.1.10. MYTH: The Guarantee Clause of the Constitution precludes the National Popular Vote compact.

QUICK ANSWER:

- The argument that the National Popular Vote compact violates the Guarantee Clause is based on an interpretation of the clause that is not supported by the clause’s language or any judicial precedent.
- Moreover, even if the Guarantee Clause were applied to the national government, direct popular election of the chief executive is not incompatible with “a republican form of government” or the concept of a “compound republic.”

⁷⁸ U.S. Constitution. Article IV, section 4, clause 1.

⁷⁹ Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Page xx.

⁸⁰ Vermont was not one of the 13 original states that ratified the Constitution.

MORE DETAILED ANSWER:

The Guarantee Clause of the U.S. Constitution states:

“The United States shall guarantee **to every State in this Union** a Republican Form of Government.”⁸¹ [Emphasis added]

Kristin Feeley has argued that the National Popular Vote compact would violate the Guarantee Clause.⁸²

Feeley’s claim requires

- (1) extending the interpretation of the words “every State in this Union” to include the national government, and
- (2) arguing that direct popular election of the President is incompatible with the concept of a “republican form of government” and incompatible with the concept of a “compound republic.”

In her review of Guarantee Clause jurisprudence, Feeley found no judicial precedent (or even a dissenting opinion) that has ever applied the guarantee of the Guarantee Clause to the national government. In other words, the Guarantee Clause has never been interpreted to say:

“**The United States** shall guarantee **the United States** a Republican Form of Government.” [Emphasis added]

Assume, for the sake of argument, that the Guarantee Clause were interpreted to apply to the national government. Based on that assumption, Feeley then argues:

“The Guarantee Clause provides for a compound republican government at the national level. . . . NPV legislation violates the Guarantee Clause by **blurring important state lines in our compound republic.**” [Emphasis added]

There is nothing about direct popular election of the President that is incompatible with the concept of a “republican form of government” or a “compound republic.”

As to the definition of a “republic,” James Madison—frequently called the “Father of the Constitution”—wrote in *Federalist No. 10* that the

“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 . . .**”⁸³ [Emphasis added]

In *Federalist No. 14*, Madison wrote:

⁸¹ U.S. Constitution. Article IV, section 4, clause 1.

⁸² Feeley, Kristin. 2009. Guaranteeing a federally elected president. 103 *Northwestern University Law Review* 1427–1460.

⁸³ Publius. The utility of the union as a safeguard against domestic faction and insurrection (continued). *Daily Advertiser*. November 22, 1787. *Federalist No. 10*.

“The true distinction between these forms was also adverted to on a former occasion. It is, that **in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.**”⁸⁴ [Emphasis added]

In short, the definition of a “republic” is based on whether elected officeholders *exercise governmental power* (as opposed to the people directly exercising governmental power). The National Popular Vote compact would do nothing to change the fact that the people delegate power to elected officeholders who, in turn, run the government.

The term “compound republic” appears twice in the *Federalist Papers*.⁸⁵

James Madison’s *Federalist No. 51* is entitled “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.” It distinguishes between a simple “republic” (where the separation of powers among different departments of government works to protect the rights of the people) and a “compound republic” (where there are two distinct levels of government).

“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. **In the compound republic of America, the power surrendered by the people is first divided between two distinct governments,** and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. **The different governments will control each other,** at the same time that each will be controlled by itself.”⁸⁶ [Emphasis added]

In *Federalist No. 62*, Madison refers to:

“a compound republic, partaking both of the national and federal character”⁸⁷

In short, the definition of a “compound republic” is based on there being *two* distinct layers of government (state and federal), each of which is a republic. The definition of a “compound republic” is not based on the boundaries of the regions used to count popular votes in electing the head of *one of the three* “departments” (branches)

⁸⁴ Publius. Objections to the proposed constitution from extent of territory answered. *New York Packet*. November 30, 1787. *Federalist No. 14*.

⁸⁵ Brown, Adam. Do we live in a “compound Constitutional Republic” or something else? *Utah Data Points*. July 11, 2011. <http://utahdatapoints.com/2011/07/do-we-live-in-a-compound-constitutional-republic-or-something-else/>.

⁸⁶ Publius. The structure of the government must furnish the proper checks and balances between the different departments. *Independent Journal*. February 6, 1788. *Federalist No. 51*.

⁸⁷ Publius. *Federalist No. 62*. The Senate. *Independent Journal*. February 27, 1788. *Federalist No. 62*.

of government (i.e., the executive branch) of *one of the two* distinct layers of government (i.e., the federal government).

The National Popular Vote compact would do nothing to affect the existence of the *two* distinct layers of government implied by the term “compound republic.”

In short, even if a court were to apply the Guarantee Clause to the national government, there is nothing in the National Popular Vote compact that would affect the fact that the United States has a “republican form of government” and that the United States is a “compound republic.”⁸⁸

9.1.11. MYTH: The Meeting Clause of the 12th Amendment precludes the National Popular Vote compact.

QUICK ANSWER:

- The Meeting Clause of the 12th Amendment requires that the physical location of the meeting of presidential electors be inside each separate state, but does not restrict the manner by which states choose their presidential electors.
- The National Popular Vote compact would not affect the meeting place for presidential electors.

MORE DETAILED ANSWER:

The Meeting Clause of the 12th Amendment (ratified in 1804) specifies that the meeting of the presidential electors must be physically conducted in each state.

The 12th Amendment states:

“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President”⁸⁹ [Emphasis added]

Congress has implemented the Meeting Clause of the 12th Amendment by enacting section 7 of chapter 1 of Title 3 of the United States Code:

“The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.” [Emphasis added]

⁸⁸ We also refer the reader to the discussion in section 9.1.9 of whether direct popular election of governors was viewed as incompatible with a “republican Form of Government” at the time of drafting of Constitution and immediately thereafter.

⁸⁹ The full text of the 12th Amendment is available in appendix A.

Individual states, in turn, have further implemented the Meeting Clause of the 12th Amendment and section 7 of the United States Code.

For example, current Alaska law provides that Alaska’s presidential electors shall meet at the offices of the Director of the Division of Elections located in Juneau:

“The electors shall meet at the office of the director or other place designated by the director at 11:00 o’clock in the morning on the first Monday after the second Wednesday in December following their election. If Congress fixes a different day for the meeting, the electors shall meet on the day designated by the Act of Congress.”⁹⁰

The 12th Amendment does not address the method of choosing presidential electors.

The National Popular Vote compact would not affect the meeting place for presidential electors.

The National Popular Vote compact does not violate the Meeting Clause of the 12th Amendment.

9.1.12. MYTH: The National Popular Vote compact would contradict the 12th Amendment.

QUICK ANSWER:

- The National Popular Vote compact does not contradict anything in the 12th Amendment of the U.S. Constitution.
- The 12th Amendment does not address the manner by which states choose their presidential electors.

MORE DETAILED ANSWER:

Hans von Spakovsky has stated:

“Without question, the NPV deprives non-participating states of their right under Article V to participate **in deciding whether the Twelfth Amendment, which governs the Electoral College, should be changed.**”⁹¹
[Emphasis added]

The full text of the 12th Amendment to the U.S. Constitution is as follows:

“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the

⁹⁰ Section 15.30.070.

⁹¹ Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”

What part of the 12th Amendment does Hans Von Spakovsky believe “without question” is changed by the National Popular Vote compact? As can be seen from the above quotation of the full text of the 12th Amendment, there is nothing in it that addresses the manner by which states choose their presidential electors.

9.1.13. MYTH: The National Popular Vote compact would encroach on federal sovereignty.

QUICK ANSWER:

- The U.S. Supreme Court has repeatedly stated that the power to choose the method of awarding a state’s electoral votes is an “exclusive” and “plenary” state power.

- The National Popular Vote compact would not encroach on federal sovereignty, because the power to choose the method of awarding a state’s electoral votes is an exclusive state power.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, asserts:

“If ever a compact encroached on federal . . . sovereignty, this is it.”⁹²

In fact, the U.S. Constitution gives the federal government *no role* in choosing the manner by which states award their electoral votes:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”⁹³ [Emphasis added]

As the U.S. Supreme Court ruled in the 1892 case of *McPherson v. Blacker*:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It 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.** . . .

“In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.”⁹⁴ [Emphasis added]

In *Bush v. Gore* in 2000, the Court approvingly referred to *McPherson v. Blacker* and called section 1 of Article II of the Constitution:

“The source for the statement in *McPherson v. Blacker* . . . that the State legislature’s power to select the manner for appointing electors is **plenary.**”⁹⁵ [Emphasis added]

As a point of comparison, the U.S. Constitution gives the states considerably more discretion in choosing the manner of appointing their presidential electors than it does in choosing the manner of electing members of Congress. The states’ power to choose

⁹² Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 41.

⁹³ U.S. Constitution. Article II, section 1, clause 2.

⁹⁴ *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

⁹⁵ *Bush v. Gore*. 531 U.S. 98. 2000.

the manner of conducting congressional elections is subject to congressional review and veto. Article I, section 4, clause 1 of the U.S. Constitution provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**, except as to the Places of choosing Senators.” [Emphasis added]

The National Popular Vote compact would not encroach on federal sovereignty because it involves an exercise of the “exclusive” power of the states to choose the method for appointing their presidential electors.

9.1.14. MYTH: The National Popular Vote compact would encroach on state sovereignty.

QUICK ANSWER:

- The National Popular Vote compact is an exercise by states of state sovereignty—not an encroachment.
- The U.S. Supreme Court has repeatedly ruled that the power to choose the method of awarding a state’s electoral votes is an “exclusive” and “plenary” state power.
- A state cannot encroach on state sovereignty when a state exercises one of its own “exclusive” and “plenary” powers.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, asserts:

“If ever a compact encroached on . . . state sovereignty, this is it.”⁹⁶

The U.S. Supreme Court ruled in the 1892 case of *McPherson v. Blacker* that the choice of method for appointing a state’s presidential electors is an “exclusive” and “plenary” state power (quoted in section 9.1.13). Moreover, the U.S. Supreme Court approvingly referred to *McPherson v. Blacker* as recently as the 2000 case of *Bush v. Gore*.

How is it possible for a state to “encroach” on state sovereignty when the state is exercising one of its own “exclusive” and “plenary” powers?

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it and, therefore, the question of whether there are unstated, implicit restrictions on the allowable methods for appointing presidential electors.

⁹⁶ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 41.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” [Emphasis added]

Section 1 of Article II contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.⁹⁷

The 10th Amendment was ratified in 1791 (that is, after ratification of the original Constitution) and thus takes precedence over the original 1787 Constitution. Even if there were implied restrictions on state choices on the manner of appointing their presidential electors (perhaps from penumbral emanations emitted by section 1 of Article II), such implicit restrictions were extinguished by the 10th Amendment in 1791.

Moreover, states that choose to enter the National Popular Vote compact retain the power to review their decision and withdraw from the compact at future times. Like virtually every other interstate compact (except for boundary-settlement contracts, which are intended to be permanent), the National Popular Vote compact permits a state to withdraw.⁹⁸

In short, the National Popular Vote compact would be an exercise of state sovereignty—not an encroachment on it.

9.1.15. MYTH: Section 2 of the 14th Amendment precludes the National Popular Vote compact.

QUICK ANSWER:

- The U.S. Supreme Court has considered, and rejected, the argument that section 2 of the 14th Amendment made the statewide winner-take-all method of awarding electoral votes the only constitutional method of appointment of presidential electors.

⁹⁷ The original Constitution contains few specific restrictions on state action that bear on the appointment of presidential electors. Thus, under Article II, section 1, clause 1, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, a state legislature certainly may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a presidential election. Similarly, a state legislature may not pass a law imposing criminal penalties on specifically named persons who may have committed fraudulent acts in connection with a presidential election (that is, a bill of attainder). Also, the Constitution’s explicit prohibition against a “law impairing the obligation of contract” operates as a restraint on the delegation of power contained in section 1 of Article II. Of course, various later amendments restrict state choices, including the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of servitude”), the 19th Amendment (woman’s suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

⁹⁸ In particular, clause 2 of Article IV of the National Popular Vote compact would permit a state to withdraw from the compact by simply repealing the statute under which it entered the compact. The effective date of the withdrawal is immediate during 3½ years of every four-year presidential election cycle. The withdrawal is subject to a delay until after Inauguration Day if the withdrawal occurs during a blackout period running between July 20 of a presidential election year and the following January 20 (Inauguration Day).

MORE DETAILED ANSWER:

Section 2 of the 14th Amendment reads:

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. **But when the right to vote at any election for the choice of electors for President and Vice President of the United States**, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, **is denied** to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, **or in any way abridged**, except for participation in rebellion, or other crime, **the basis of representation therein shall be reduced** in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. [Emphasis added]

Section 2 of the 14th Amendment *does not mandate* the states to use any particular method for choosing their presidential electors. Instead, *it provides a remedy* if a state denies or abridges any person’s right to vote. The remedy is in the form of reduced congressional representation.

The National Popular Vote compact would not deny or abridge any person’s right to vote for presidential electors. Under the National Popular Vote compact, the opportunity of voters to vote for their “choice of electors for President and Vice President of the United States” would neither be denied nor abridged. Therefore, the criterion of section 2 would not be satisfied, and the remedy (namely, reduced congressional representation) would not apply.

Section 2 of the 14th Amendment does not give the voters the right to vote for President, nor does it require that the state-by-state winner-take-all rule be used to appoint presidential electors.

The losing attorney (F.A. Baker) in the 1892 case of *McPherson v. Blacker* strenuously argued before the U.S. Supreme Court that section 2 of the 14th Amendment limited the states in their choice of manner of electing presidential electors.

“The electoral system as it actually exists is recognized by the 14th and 15th amendments, and by necessary implication, **the general ticket method [i.e., the winner-take-all rule] for choosing presidential electors is made permanent, and the only constitutional method of appointment.**⁹⁹” [Emphasis added]

As pointed out in the brief¹⁰⁰ of the winning attorney (Otto Kirchner) in *McPherson v. Blacker*, one (of the many) deficiencies in Baker’s interpretation of section 2 of the

⁹⁹ Brief of F.A. Baker for Plaintiffs in Error in *McPherson v. Blacker*. 1892. Page 64.

¹⁰⁰ Brief of Otto Kirchner for Defendants in Error in *McPherson v. Blacker*. 1892.

14th Amendment is that “judicial officers of a state” are also mentioned in section 2 of the 14th Amendment. Judges were not elected by the people in many states at the time of formulation, debate, and ratification of the 14th Amendment.

Even more pertinently, the history of the 14th Amendment shows that it was never intended to limit the states in their choice of method of appointing presidential electors. The 14th Amendment was ratified in 1867. *Immediately before, during, and after* the period of the Amendment’s formulation, debate, and ratification, some state legislatures appointed presidential electors without a vote by the people (e.g., South Carolina in 1860, Florida in 1868, and Colorado in 1876).

In addition, the congressional act providing for Colorado’s statehood in 1876 included a specific acknowledgement of the fact that the Colorado legislature would appoint the state’s presidential electors for the 1876 election.

If Baker’s interpretation of the 14th Amendment had any validity, the appointment of presidential electors by the Florida legislature in 1868 and by the Colorado legislature in 1876 would have been unconstitutional. However, no contemporary argued that these actions by the state legislatures were unconstitutional under the 14th Amendment.

If contemporaries thought the 14th Amendment mandated popular election of presidential electors, that legal argument would certainly have been vigorously advanced during the contentious dispute over the 1876 presidential election. If the Colorado legislature’s appointment of the state’s three presidential electors (favoring Republican Rutherford B. Hayes) in 1876 had been found to be unconstitutional, Tilden would have had the “majority of the whole number of Electors *appointed*”¹⁰¹ and, therefore, would have become President—even after losing the contested electoral votes of Louisiana, Florida, and South Carolina in the Electoral Commission. However, contemporaries favoring Tilden never raised this argument.

The history and practices used to choose presidential electors were exhaustively reviewed during the dispute over the 1876 election. The report of the Senate Committee on Privileges and Elections reviewed the history concerning the appointment of presidential electors and stated:

“The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. They may be chosen by the Legislature, or the Legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States, and it is no doubt competent for the Legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors.”¹⁰² [Emphasis added]

¹⁰¹ The Constitution does not require an absolute majority of the electoral votes to become President but only an absolute majority of the electoral votes “appointed.” There have been occasional cases when a state failed to appoint its presidential electors. For example, New York did not in 1789 because the legislature could not agree on how to appoint them. Notably, the Southern states did not appoint presidential electors in 1864.

¹⁰² Senate Report 395. Forty-Third Congress.

In any event, the U.S. Supreme Court was not moved by Baker’s argument that section 2 of the 14th Amendment requires the states to use the statewide winner-take-all rule. The Court unanimously ruled in *McPherson v. Blacker* that:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., the ‘winner-take-all’ rule], nor that the majority of those who exercise the elective franchise can alone choose the electors.”¹⁰³ [Emphasis added]

In 2000, the U.S. Supreme Court wrote:

“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. U.S. Const., Art. II, §1.

“This is the source for the statement in *McPherson v. Blacker* . . . that the State legislature’s power to select the manner for appointing electors is plenary.” . . .

“There is no difference between the two sides of the present controversy on these basic propositions.”¹⁰⁴ [Emphasis added]

Far from denying or abridging “the right to vote at any election for the choice of electors for President and Vice President of the United States,” the National Popular Vote compact would reinforce the people’s vote for President in compacting states. Article II of the compact states:

“Each member state shall conduct a statewide popular election for President and Vice President of the United States.”¹⁰⁵

9.1.16. MYTH: The Privileges and Immunities Clause of the 14th Amendment precludes the National Popular Vote compact.

QUICK ANSWER:

- The National Popular Vote compact would not abridge any protection that citizens currently enjoy relative to abridgments of their rights by the federal government.

¹⁰³ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

¹⁰⁴ *Bush v. Gore*. 531 U.S. 98. 2000.

¹⁰⁵ The term “statewide popular election” is defined in article V of the compact as “a general election at which votes are cast for presidential slates by individual voters and counted on a statewide basis.”

MORE DETAILED ANSWER:

The Privileges and Immunities Clause of the 14th Amendment (ratified in 1867) reads:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

The Privileges and Immunities Clause gives each citizen the same protection against abridgments by state governments as each citizen already possesses, by virtue of national citizenship, relative to abridgments by the federal government.

The National Popular Vote compact would not deny or abridge any constitutional privilege or immunity currently possessed by citizens of the United States.

In particular, as discussed in section 9.1.15, there is no federal right to vote for President conferred by section 2 of the 14th Amendment. Moreover, even if there were a federal right to vote for President, the National Popular Vote compact would do nothing to abridge it.

9.1.17. MYTH: The Due Process Clause of the 14th Amendment precludes the National Popular Vote compact.**QUICK ANSWER:**

- The National Popular Vote compact would not deprive any person of life, liberty, or property.

MORE DETAILED ANSWER:

The Due Process Clause of the 14th Amendment provides:

“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ”

The National Popular Vote compact would not deny any person of life, liberty, or property in any way.

9.1.18. MYTH: The Equal Protection Clause of the 14th Amendment precludes the National Popular Vote compact.**QUICK ANSWER:**

- The U.S. Constitution does not require that the election laws of all 50 states be identical. In fact, the Constitution virtually guarantees that election procedures will *not* be identical from state to state because it gives the states control over elections. Thus, differences in election laws are inherent under the federalist system established by the U.S. Constitution.
- The Equal Protection Clause of the 14th Amendment states, “No state shall . . . deny to *any person within its jurisdiction* the equal protection of the laws.”

- The Equal Protection Clause does not prevent a state from appointing presidential electors in the manner specified by the National Popular Vote compact because all voters within the jurisdiction of each state are treated equally.

MORE DETAILED ANSWER:

The U.S. Constitution does not require that the election laws of all 50 states be identical. In fact, the Constitution virtually guarantees that election procedures will *not* be identical from state to state because it gives the states control over elections. Thus, differences in election laws are inherent under the federalist system established by the U.S. Constitution.

There are numerous differences in the ways that the states conduct elections.

For example, some states (e.g., Kentucky and Indiana) close their polling places at 6:00 P.M., while others keep their polls open later into the evening. Some states provide numerous opportunities for early voting, while other states are more restrictive.

Some states permit previously incarcerated felons to vote after they serve their prison term, whereas others restore voting rights after passage of a certain amount of time, and other states never restore voting rights.

Some states (e.g., Oregon and Washington) conduct their elections entirely by mail, while other states conduct voting at traditional polling places.

Some states require photo identification at the polls, while others do not.

Professor Norman R. Williams of Willamette University has written the following concerning the National Popular Vote compact:

“Aggregating votes from each of the fifty states and District of Columbia raises severe problems under the Equal Protection Clause of the Fourteenth Amendment. . . .

“Once the relevant voting community is expanded to include the entire nation, however—as the NPVC seeks to do—it is **hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable.** . . .

“The Court in *Bush v. Gore* did require the deployment of a uniform state-wide standard for evaluating and tabulating votes for presidential electors, as well as a system of training election personnel to ensure such uniformity. **If the differences in voting standards between Palm Beach and Miami-Dade counties violated the Equal Protection Clause, so too must the differences between states** that count mismarked ballots as valid, such as Massachusetts, and those states, such as California, that typically do not.”¹⁰⁶ [Emphasis added]

¹⁰⁶ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011.

The actual wording of the Equal Protection Clause of the 14th Amendment does not, however, support Williams’ contention that “so too must the differences *between* states.” The U.S. Constitution provides:

“No state shall . . . deny **to any person within its jurisdiction** the equal protection of the laws”¹⁰⁷ [Emphasis added]

Voters in Palm Beach and Miami-Dade counties are *within* the jurisdiction of the state of Florida. Consequently, Florida must provide uniformity to them because they are “within its jurisdiction.”

The Equal Protection Clause does not, however, impose any obligation on any state concerning a “person” in another state who is not “within its [the first state’s] jurisdiction.”

Florida state universities do not charge students from Palm Beach County a higher tuition rate than those from Miami-Dade County, nor do they charge black Floridians a different tuition rate than white Floridians. However, Florida state universities do charge different tuition rates to out-of-state students.

Vikram David Amar responded to Williams’ contention concerning *interstate* non-uniformity by saying:

“*Bush v. Gore* (which itself crafted newfangled equal protection doctrine) was concerned with **intrastate—not interstate—non-uniformity**. Under the NPVC, it is hard to see how variations among states results in any one state denying equal protection of the laws ‘to any person within its jurisdiction,’ insofar as **all persons within each state’s jurisdiction (i.e., voters in the state) are being dealt with similarly. No single state is treating any people who reside in any state differently than the other folks who live in that state.**”¹⁰⁸ [Emphasis added]

Jennings Jay Wilson observed:

“There is **no legal precedent for inter-state equal protection claims**. Successful equal protection claims have always been brought by citizens being disadvantaged vis-à-vis other citizens of their own state.”¹⁰⁹ [Emphasis added]

¹⁰⁷ U.S. Constitution. 14th Amendment. Section 1.

¹⁰⁸ Amar, Vikram David. 2011. Response: The case for reforming presidential elections by sub-constitutional means: The Electoral College, the National Popular Vote compact, and congressional power. 100 *Georgetown Law Journal* 237 at 250.

¹⁰⁹ Wilson, Jennings Jay. 2006. Bloc voting in the Electoral College: How the ignored states can become relevant and implement popular election along the way. 5 *Election Law Journal* 384 at 387.

Indeed, the U.S. Supreme Court has previously considered, and rejected, claims that the 14th Amendment applies to interstate differences in connection with the appointment of presidential electors.

In 1968, the constitutionality of the statewide winner-take-all rule was challenged in *Williams v. Virginia State Board of Elections*. In that case, a federal court in Virginia considered and rejected an interstate equal protection claim as well as a claim based on the one-person-one-vote principle. The full opinion may be found in appendix FF.

The plaintiffs in *Williams v. Virginia State Board of Elections* argued that the state of Virginia violated the rights of Virginia voters to equal treatment under the Equal Protection Clause (and, therefore, that Virginia's winner-take-all statute was unconstitutional) because Virginia's statute limited Virginia voters to influencing the selection of only 12 presidential electors, whereas New York's voters influenced the selection of 43 presidential electors.

The federal court described the plaintiff's interstate equal protection argument as follows:

“Presidential electors provided for in Article II of the Constitution of the United States cannot be selected, plaintiffs charge, by a statewide general election as directed by the Virginia statute. Under it *all* of the State's electors are collectively chosen in the Presidential election by the greatest number of votes cast throughout the entire State. . . .

“Unfairness is imputed to the plan because it gives the choice of *all* of the electors to the statewide plurality of those voting in the election—“winner take all”—and accords no representation among the electors to the minority of the voters. **An additional prejudice is found in the result of the system as between voters in different States. We must reject these contentions.**” . . .

“Plaintiffs’ proposition is advanced on three counts:

- (1) the intendment of Article II, Section 1, providing for the appointment of electors is that they be chosen in the same manner as Senators and Representatives, that is two at large and the remainder by Congressional or other equal districts;
- (2) **the general ticket method violates the ‘one-person, one-vote’ principle of the Equal Protection Clause of the Fourteenth Amendment, i.e., the weight of each citizen’s vote must be substantially equal to that of every other citizen.** *Gray v. Sanders*, 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed. 2d 821 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); and

- (3) **the general ticket system gives a citizen in a State having a larger number of electors than Virginia the opportunity to effectuate by his vote the selection of more electors than can the Virginian.**¹¹⁰ [Emphasis added] [Italics in original]

The federal court made the following ruling concerning the argument that Virginia's statewide winner-take-all statute violates the Equal Protection clause and one-person-one-vote principle:

“It is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one-person, one-vote doctrine or banned by Constitutional mandates of protection. In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. **Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.**” [Emphasis added]

The federal court said the following in connection with “interstate inequality of voters”:

“Further instances of inequality in the ballot's worth between them as Virginia citizens, plaintiffs continue, and citizens of other States, exists as a result of the assignment of electors among the States. To illustrate, New York is apportioned 43 electors and the citizen there, in the general system plan, participates in the selection of 43 electors while his Virginia compatriot has a part in choosing only 12. His ballot, if creating a plurality for his preference, wins the whole number of 43 electors while the Virginian in the same circumstances could acquire only 12. . . .

“Disparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. **But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme** and to the permissible unit system.

“For these reasons the injustice cannot be corrected by suit, especially one

¹¹⁰ *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, E.D. Virginia (1968). This decision was affirmed by U.S. Supreme Court at 393 U.S. 320 (1969) (per curiam). The opinion of the federal court in Virginia is found in appendix FF.

in which but a single State is impleaded. Litigation of the common national problem by a joinder of all the States was evidently unacceptable to the Supreme Court. *State of Delaware v. State of New York*, supra, 385 U.S. 895, 87 S.Ct. 198. Readily recognizing these impediments, **plaintiffs point to the district selection of electors as a solution, or at least an amelioration, of this interstate inequality of voters.** However, to repeat, this method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and use of the unit method of tallying is not unlawful.” [Emphasis added]

The U.S. Supreme Court affirmed the decision of the Virginia federal court in a *per curiam* decision in 1969.

Tara Ross has made an argument similar to Professor Williams’ concerning interstate equal protection.

“NPV claims that its change to a direct election system is needed in order to guarantee ‘every vote equal.’ Oddly, its proposal guarantees the exact opposite. It would cram voters from across the country into one election pool, despite the fact that different election laws apply to different voters. *Voters would not be more equal.* They would be more unequal. **Lawsuits claiming Equal Protection would certain follow.**

“Consider the issue of early voters. Voters in Alaska have one set of laws regarding early voting. Other states might have provisions regarding when early voting starts, how long it lasts, or who may early vote and how they may early vote. These differences in laws do not matter when Alaskans are participating in their own election only with Alaskans—all voters are treated equitably with other members of the same election pool. However, if NPV throws Alaskans into another, national electorate, then the difference in laws begin to create many inequities. **Some voters in this election pool, for instance, may have more time to vote than Alaskan voters.** Or maybe others have an easier time registering to early vote. **Alaskans are not treated equitably with other members of the national election pool if they must abide by a more restrictive—or even a less restrictive!—set of election laws.**”¹¹¹ [Italics in original] [Emphasis added]

There is nothing incompatible between the concept of a national popular vote for President and the inevitable differences in election laws resulting from state control over elections. That was certainly the overwhelming mainstream view when the U.S. House of Representatives passed a constitutional amendment in 1969 for a na-

¹¹¹ Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition. Pages 177–178.

tional popular vote by a 338–70 margin. The 1969 amendment was endorsed by Richard Nixon, Gerald Ford, and Jimmy Carter. It was endorsed by various members of Congress who later ran for Vice President or President, including then-Congressman George H.W. Bush, then-Senator Bob Dole, and then-Senator Walter Mondale. The American Bar Association also endorsed it.

The amendment proposed in 1969 provided that, once a person’s vote has been cast under each state’s existing (admittedly differing) policies, the popular-vote tallies from each state would be comingled and added together to obtain the nationwide total for each candidate.

The National Popular Vote compact employs the same process, namely once a person’s vote has been cast under each state’s existing (admittedly differing) policies, the popular-vote tallies from each state would be comingled and added together to obtain the nationwide total for each candidate.

In fact, the *current* state-by-state system of electing the President employs the same process of comingling and adding. Under the current state-by-state system of electing the President, the *electoral vote counts* from all 50 states are comingled and added together—despite the fact that the electoral-vote counts reported by the states are each profoundly affected by differing state policies concerning the hours of voting, voter registration procedures, policies concerning ex-felon voting, the ease of advance voting, the interpretation of mismarked ballots, voter photo identification requirements, and so forth.

The 2000 Certificate of Ascertainment from the state of Florida reported 2,912,790 popular votes for George W. Bush and 2,912,253 popular votes for Al Gore and a 25–0 allocation of electoral votes between Bush and Gore. When Florida’s 25–0 allocation of electoral votes was added together with the allocations of electoral votes from other states, Florida’s 25–0 allocation decided the outcome of the national election.

The procedures governing presidential elections in closely divided battleground states (e.g., Florida and Ohio) can affect, and indeed have decisively affected, the ultimate outcome of national elections. Thus, everyone in the United States is affected by (and has an “interest” in) every state’s allocation of its electoral votes because the Presidency is determined by these state-by-state allocations of electoral votes.

In the same way, the numerical division of the *popular* vote reported on the Certificate of Ascertainment from Florida and every other state would decide the national outcome of some future election conducted under the National Popular Vote compact.

Let us analyze Ross’ argument in connection with the closely divided battleground state of Virginia (with no early voting in 2012) and the battleground state of Ohio (with early voting in 2012).¹¹²

¹¹²States vary considerably in their policies concerning early voting, absentee voting, and mail voting as shown in a summary chart prepared by the National Conference of State Legislatures at <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx>.

Ross would argue that votes cast by Virginia citizens are diminished in comparison to votes cast by Ohio citizens because when the (diminished) Virginia votes are comingled and added together with the Ohio votes, the votes of one state “are not treated equitably with other members of the national election pool.” Ross would argue that the comingling and adding together of *popular* votes under the National Popular Vote compact violates the Equal Protection Clause of the 14th Amendment. However, this same comingling and adding together happened in 2012 (and all previous presidential elections) under the *current* system in connection with *electoral votes*. The votes cast from the state having less convenient early voting are comingled and added together with electoral votes of other states with more convenient early voting.

If there were a possibility of successful litigation against the National Popular Vote compact on the basis of Ross’ doctrine of “interstate inequality” under the 14th Amendment, then the possibility of successful litigation would exist today with respect to the adding together and comingling of *electoral votes* under *the current system*.

Let’s assume that, as a result of a close statewide popular vote, Ohio reported an 18–0 division of its electoral votes in favor of Barack Obama on its 2012 Certificate of Ascertainment and that those 18 votes decided the Presidency. There would be no possibility today of successful 14th-Amendment litigation initiated by disgruntled Republicans from Virginia (where there is no early voting) arguing that Virginia voters were devalued and that their party lost the White House because Ohio’s early voting benefited the Democrats. The state of Ohio definitely has obligations to “any person in its jurisdiction” to ensure that all of Ohio’s voters were treated in the same way, but it has no obligation to disgruntled Virginia Republicans to treat its voters the same way that Virginia does.

If there were such a thing as a doctrine of “interstate inequality” under the 14th Amendment, the courts would quickly use it to declare existing winner-take-all statutes unconstitutional. The argument that was unsuccessfully made in 1968 in *William v. Virginia State Board of Elections* (discussed above) would immediately become a winning legal argument. Moreover, there would suddenly be a legal basis for challenging the numerous other “interstate inequalities” created by the winner-take-all rule. For example, Al Gore won five electoral votes by virtue of his margin of 365 popular votes in New Mexico in 2000, whereas George W. Bush won five electoral votes by virtue of his margin of 312,043 popular votes in Utah—an 855-to-1 disparity in the value of a vote.

The only way to achieve totally uniform national rules governing elections would be to amend the U.S. Constitution to eliminate state control of elections and establish uniform federal election rules. Elimination of state control of elections was not seen as a politically realistic possibility when Congress considered the proposed 1969 federal constitutional amendment.

As then-Congressman George H.W. Bush said on September 18, 1969, in support of a constitutional amendment for direct popular election of the President in which the states would have continued to conduct elections under differing state election laws:

“This legislation has a great deal to commend it. It will correct the wrongs of the present mechanism . . . by calling for direct election of the President and Vice President. . . . Yet, in spite of these drastic reforms, the bill is **not . . . detrimental to our federal system or one that will change the departmentalized and local nature of voting in this country.**

“In electing the President and Vice President, the Constitution establishes the principle that votes are cast by States. This legislation does not tamper with that principle. It only changes the manner in which the States vote. Instead of voting by intermediaries, the States will certify their popular vote count to the Congress. **The states will maintain primary responsibility for the ballot and for the qualifications of voters. In other words, they will still designate the time, place, and manner in which elections will be held.** Thus, there is a very good argument to be made that **the basic nature of our federal system has not been disturbed.**¹¹³ [Emphasis added]

9.1.19. MYTH: The National Popular Vote compact impermissibly delegates a state’s sovereign power.

QUICK ANSWER:

- Except for purely advisory compacts, the purpose of almost all interstate compacts is to shift a part of a state’s authority to another state or states.
- No court has invalidated an interstate compact on the grounds that the compact impermissibly has delegated a state’s sovereign power.

MORE DETAILED ANSWER:

No court has invalidated an interstate compact on the grounds that the compact impermissibly delegated a state’s sovereign power.

Indeed, except for purely advisory compacts, the purpose of almost all interstate compacts is, as Marian Ridgeway put it in *Interstate Compacts: A Question of Federalism*:

“[to] shift a part of a state’s authority to another state or states.”¹¹⁴

As summarized in *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority*:

“Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations

¹¹³ *Congressional Record*. September 18, 1969. Pages 25,990–25,991.

¹¹⁴ Ridgeway, Marian E. 1971. *Interstate Compacts: A Question of Federalism*. Carbondale, IL: Southern Illinois University Press. Page 300.

of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.”¹¹⁵ [Emphasis added]

The question arises as to whether the National Popular Vote compact would be an impermissible delegation of a state’s sovereign power. In particular, the following question might be raised:

“May a state delegate, under the auspices of an interstate compact, the choice of its presidential electors to the collective choice of the voters of a group of states?”

This inquiry requires an examination of whether the appointment of a state’s presidential electors is one of the state’s sovereign powers and, if so, whether that power can be shared with voters throughout the United States.

A state’s “sovereign powers” may be delegated by an interstate compact

The sovereign authority of a state is not easily defined. The federal courts have not defined sovereignty, although they have attempted to describe it on various occasions. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* in 1938, the U.S. Supreme Court traced the history of compacts during the colonial period and immediately thereafter and viewed compacts as a corollary to the ability of independent nations to enter into treaties with one another.

“The compact—the legislative means [for resolving conflicting claims]—adapts to our Union of sovereign States the age-old treaty making power of sovereign nations.”¹¹⁶

In the 1992 case of *Texas Learning Technology Group v. Commissioner of Internal Revenue*, the U.S. Court of Appeals for the Fifth Circuit wrote:

“The power to tax, the power of eminent domain, and the police power are the generally acknowledged sovereign powers.”¹¹⁷

The appropriation power is another example of a power that is viewed as fundamental to a state.

The filling of public positions that are central to the operation of state government

¹¹⁵ *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* (414 F.Supp. 408 at 409). 1976.

¹¹⁶ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* 304 U.S. 92 at 104. 1938.

¹¹⁷ *Texas Learning Technology Group v. Commissioner of Internal Revenue*. 958 F.2d 122 at 124 (5th Cir. 1992).

(including legislative, executive, or judicial positions and the position of delegate to a state constitutional convention) is regarded as a sovereign state power.^{118,119}

The historical practice of the states, the long history of approvals of interstate compacts by Congress, and court decisions all support the view that a state's sovereign powers may be granted to a group of states acting through an interstate compact. For example, New York and New Jersey delegated certain sovereign powers to the Port Authority of New York and New Jersey, including the power of eminent domain and the power to exempt property from taxation. New York and New Jersey granted the power to tax to the commission created by the 1953 New York–New Jersey Waterfront Compact. Such delegation was upheld in 1944 in *Commissioner of Internal Revenue v. Shamberg's Estate*.¹²⁰

The Ohio River Valley Water Sanitation Compact provided:

“The signatory states agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the governors of the signatory states. . . .”

In *West Virginia ex rel. Dyer v. Sims* (discussed at greater length in section 8.6.2), the U.S. Supreme Court upheld the delegation of West Virginia's appropriation power and wrote in 1950:

“The issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.

“That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated. . . . **What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river**

¹¹⁸See, e.g., *Kingston Associates Inc. v. LaGuardia*, 281 N.Y.S. 390, 398 (S.Ct. 1935) (the exercise of public offices within the legislative, executive, or judicial branches of government); *People v. Brady*, 135 N.E. 87, 89 (Ill. 1922) (same); *People v. Hardin*, 356 N.E.2d 4 (Ill. 1976) (the power to appoint officials to commissions or agencies within the three branches of state government); *State v. Schorr*, 65 A.2d 810, 813 (Del. 1948) (same); and *Forty-Second Legislative Assembly v. Lennon*, 481 P.2d 330, 330 (Mont. 1971) (the role of a delegate to a state constitutional convention).

¹¹⁹Engdahl, D. E. 1965. *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?* 64 *Michigan Law Review* 63 at 64–66.

¹²⁰*Commissioner of Internal Revenue v. Shamberg's Estate* 144 F.2d 998 at 1005–1006. (2nd Cir. 1944).

pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. . . . Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. **The Compact involves a reasonable and carefully limited delegation of power to an interstate agency.**¹²¹ [Emphasis added]

In the 1970 U.S. Supreme Court case of *Oregon v. Mitchell*, Justice Potter Stewart (concurring in part and dissenting in part) pointed out that if Congress had not acted to bring about uniformity among state durational residency requirements for voters casting ballots in presidential elections, then the states could have adopted an interstate compact to do so.¹²² The right to vote for a presidential elector is not beyond the reach of an interstate compact.

In short, there is nothing about the nature of an interstate compact that fundamentally prevents the delegation of a state's sovereign power to a group of compacting states.

As Ridgeway wrote:

“If the state chooses to inaugurate some new pattern of local government [by means of an interstate compact] that is not in conflict with the state's constitution, it can do so, as long as the people lose none of their **ultimate power to control the state itself.**”¹²³ [Emphasis added]

This statement reflects various court decisions that emphasize the ability of a sovereign entity to operate independently of any other.¹²⁴

The U.S. Supreme Court has recognized, in the 1892 case of *McPherson v. Blacker*, that a state's constitution may limit the power to choose the method of appointing presidential electors.

“The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. **What is forbidden or required to be done by a state is forbidden or required of the legisla-**

¹²¹ *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22 at 30–31. 1950.

¹²² *Oregon v. Mitchell*. 400 U.S. 112 at 286–287.

¹²³ Ridgeway, Marian E. 1971. *Interstate Compacts: A Question of Federalism*. Carbondale, IL: Southern Illinois University Press.

¹²⁴ See, for example, the 1793 case of *Chisholm v. Georgia* for a discussion of the historic origins of state sovereignty.

tive power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that ‘each state shall;’ and if the words, ‘in such manner as the legislature thereof may direct,’ had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned **in the absence of any provision in the state constitution in that regard.** Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.¹²⁵ [Emphasis added]

The U.S. Supreme Court rejected a specific argument about what constitutes an appointment by the state:

“The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment, because the state is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and **it is argued that the appointment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.**”¹²⁶ [Emphasis added]

The Court answered this argument by ruling:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, **nor that the majority of those who exercise the elective franchise can alone choose the electors.** It 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.¹²⁷ [Emphasis added]

The National Popular Vote compact does not delegate a sovereign state power

There is no authority from any court regarding whether presidential electors exercise a sovereign power of their state. Given the temporary nature of the function of presi-

¹²⁵ *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

¹²⁶ *McPherson v. Blacker*. 146 U.S. 1 at 24–25. 1892.

¹²⁷ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

dential electors, it is doubtful that a court would rule that presidential electors exercise inherent governmental authority. In contrast to members of the legislative, executive, or judicial branches of state government or members of a state constitutional convention, the function that presidential electors perform is not one that addresses the sovereign governance of the state. Instead, presidential electors decide the identity of the chief executive of the federal government. That is, the selection of electors is not a manifestation of the way in which the state itself is governed.

If the power to determine a state’s electors is deemed not to be a sovereign power of the state, then the ability to delegate it is unquestioned. No court has invalidated an interstate compact for delegating a power that is not central to the organic ability of a state to operate independently as a political and legal entity, no matter how broad the delegation. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the U.S. Supreme Court ruled that a compact to administer an interstate stream was

“binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.”¹²⁸

Given the states’ exclusive role under the Constitution to determine the manner of appointing its presidential electors,¹²⁹ if the determination of a state’s electors is a sovereign power and its delegation would shift political power to the group of compacting states, the National Popular Vote compact will not be deemed to compromise federal supremacy.¹³⁰ The fact of the delegation would not, in and of itself, violate the U.S. Constitution.

9.1.20. MYTH: Court decisions in the line item veto case and term limit case imply the unconstitutionality of the National Popular Vote plan.

QUICK ANSWER:

- The National Popular Vote compact would not evade any “requirement” of the Constitution (mentioned in the 1995 term limits case).
- The 1995 term limits case was concerned with state legislation that attempted to contravene the “requirements” of a specific clause of the U.S. Constitution, whereas the National Popular Vote compact represents the exercise of a state power that is explicitly (and exclusively) granted to the states by the U.S. Constitution.
- The method of enactment by the states would not evade any “finely wrought procedure” of the U.S. Constitution (mentioned in the 1998 line item veto case).
- The 1998 line item veto case was concerned with federal legislation that attempted to establish a “procedure” that contravened the “finely wrought

¹²⁸ *Hinderlider v. La Plata River & Cherry Creek Ditch Company*. 304 U.S. 92 at 106. 1938.

¹²⁹ *McPherson v. Blacker*. 146 U.S. 1. 1892.

¹³⁰ See *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*. 472 U.S. 159 at 176. 1985.

procedure” contained in the U.S. Constitution, whereas the National Popular Vote compact represents the use by the states of a “finely wrought procedure” explicitly contained in the Constitution.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, has argued that the decisions of the U.S. Supreme Court in *U.S. Term Limits, Inc. v. Thornton* (the 1995 term limits case) and *Clinton v. City of New York* (the 1998 line item veto case) imply that the National Popular Vote plan would be unconstitutional.

Term Limits Case

The 1995 case of *U.S. Term Limits, Inc. v. Thornton* involved the Qualifications Clause of the U.S. Constitution that establishes three requirements for serving in the U.S. House of Representatives.

“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”¹³¹

In the mid-1990s, numerous states passed statutes or state constitutional amendments to prevent members of Congress from serving more than a specified number of terms in office (typically by denying long-serving incumbents access to the ballot).

The U.S. Supreme Court ruled that states cannot impose requirements on prospective members of Congress that were stricter than those specified by the Qualifications Clause of the U.S. Constitution.

Ross argues that the Court’s decision in *U.S. Term Limits, Inc. v. Thornton* bears on the National Popular Vote compact.

“In two notable cases, the Court struck down statutes that were said to upset the compromises struck and the delicate balances achieved during the Constitutional Convention. . . .

“The Court would find support for such a holding in *U.S. Term Limits*. That case held that the Qualifications Clauses of the Constitution prevented an individual state from attempting to impose term limits on its own senators and congressmen.

“Justice Stevens’ majority opinion seemed wary of statutes that attempt to evade the Constitution’s **requirements**. Stevens wrote that a state provision

‘with the avowed purpose and obvious effect of evading the **requirements** of the Qualifications Clauses . . . cannot stand. To argue other-

¹³¹U.S. Constitution. Article I, section. 2. clause 2.

wise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.’ [Emphasis added]

“Allowing such action, he [Justice Stevens] concluded:

‘trivializes the basic principles of our democracy that underlie those Clauses. Petitioners’ argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism.

‘It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.’¹³²

The clause of the U.S. Constitution at issue in the National Popular Vote bill is Article II, section 1, clause 1 providing:

“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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” [Emphasis added]

The National Popular Vote compact is state legislation that directs the appointment of 100% of a state’s presidential electors from the political party associated with the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia.

The compact would replace state winner-take-all statutes that direct the appointment of 100% of a state’s presidential electors from the political party associated with the presidential candidate who receives the most popular votes in each separate state.

The authors of this book agree with the U.S. Supreme Court’s ruling in *U.S. Term Limits* against a state statute with the

“avowed purpose and obvious effect of evading the **requirements** of the Qualifications Clause.” [Emphasis added]

What “requirement” of Article II, section 1, clause 1 would be evaded by the National Popular Vote compact?

There certainly is no “requirement” in Article II, section 1, clause 1 mandating that 100% of a state’s presidential electors must vote in lockstep or that they must vote in accordance with the dictates of an extra-constitutional body such as the nominating caucus or convention of a political party.

Indeed, the Founding Fathers envisioned the Electoral College to be a *deliberative* body whose members would exercise individual judgment in picking the President. As Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

¹³² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 at 831. 1995.

“[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **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 such complicated investigations.**” [Emphasis added]

Moreover, there is no “requirement” in Article II, section 1, clause 1 that states appoint 100% of their presidential electors from just one political party—whether it be the party that carried the state, the party that carried the entire nation, or the party that carried particular districts within the state.

The U.S. Supreme Court ruled in the 1892 case of *McPherson v. Blacker*:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It 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. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text. . . .

“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”¹³³ [Emphasis added]

In fact, Article II, section 1, clause 1 *contains only one “requirement,”* namely that presidential electors not hold federal office. The National Popular Vote compact certainly does not have the “avowed purpose and obvious effect of evading” that “requirement.”

Aside from that single “requirement” in Article II, section 1, clause 1, the exercise of any legislative power is indisputably also subject to all the other specific “requirements” in the U.S. Constitution that may apply to the exercise of legislative power.

Five specific restrictions on a state’s power under section 1 of Article II are those contained in

- the 14th Amendment (equal protection),
- 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of servitude”),

¹³³ *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

- the 19th Amendment (woman’s suffrage),
- the 24th amendment (prohibiting poll taxes), and
- the 26th Amendment (18-year-old vote).

Three additional specific restrictions on a state’s power under section 1 of Article II are contained in Article I, section 10, clause 1 of the U.S. Constitution:

“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; **pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts,** or grant any Title of Nobility.” [Emphasis added]

Thus, under Article II, section 1, clause 1, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, a state legislature may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a *previous* presidential election.

Similarly, a state legislature may not pass a law imposing criminal penalties on specifically named persons whom the legislature believes may have committed fraudulent acts in connection with a presidential election (that is, a bill of attainder).

Also, the Constitution’s explicit prohibition against a “law impairing the obligation of contract” operates as a restraint on the delegation of power contained in section 1 of Article II.

However, after reviewing all nine of the above generic restraints on legislative action, we do not find any specific “requirement” of the U.S. Constitution that would be evaded by the National Popular Vote compact.

U.S. Term Limits was concerned with state legislation that attempted to contravene the “requirements” of a specific clause of the U.S. Constitution, whereas the National Popular Vote compact represents the exercise of a state power that is explicitly (and exclusively) granted to the states by the U.S. Constitution.

Line Item Veto Case

The second case cited by Tara Ross is the 1998 case of *Clinton v. City of New York*. That case involved the Presentment Clause of the U.S. Constitution (establishing the specific steps necessary to enact a federal law).

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House,

by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”¹³⁴

The Line Item Veto Act of 1996 gave the President the power to unilaterally amend or repeal *parts* of statutes that had been duly enacted into law in accordance with the Presentment Clause.

Tara Ross described the U.S. Supreme Court’s rejection of the line item veto by saying:

“The 1998 case of *Clinton v. New York* invalidated the federal Line Item Veto Act. Writing for the majority, Justice Stevens emphasized the

‘great debates and compromises that produced the Constitution itself,’

“and he found that the Act could not stand because it disrupted

‘the ‘finely wrought’ **procedure** that the Framers designed.’¹³⁵ [Emphasis added]

“The Constitution was the product of much give and take among the delegates.”

Ross then asserted:

“The Court could reasonably determine that NPV . . . disrupts the ‘finely wrought’ **procedures** found in the Constitution.” [Emphasis added]

The authors of this book agree with the U.S. Supreme Court’s ruling in *Clinton v. City of New York* against a statute that attempted to change “procedures” that resulted from careful deliberation by the Founding Fathers and that are laid out in explicit detail in the U.S. Constitution.

The delegates to the 1787 Constitutional Convention debated the method of electing the President on 22 separate days and held 30 votes on the topic.¹³⁶ The Convention considered a variety of methods for selecting the President, including

¹³⁴ U.S. Constitution. Article I, section 7, clause 2.

¹³⁵ *Clinton v. City of New York*. 524 U.S. 417. 1998.

¹³⁶ Edwards, George C., III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Pages 79–80.

- election of presidential electors by districts,
- having state legislatures choose the President,
- having Governors choose the President,
- nationwide direct election, and
- having Congress choose the President.

The Convention never established any of the above methods for selecting the President as the uniform nationwide method for electing the President. Instead, the Convention decided that the President would be elected by presidential electors and then established a “procedure” by which state governments could choose a method for appointing their presidential electors, namely by enacting state laws.

There is evidence that the Convention acted carefully in crafting the “procedure” by which states would choose the manner of appointing their presidential electors. For example, the Convention decided that the states would not be subject to congressional review or veto in choosing the method of choosing their presidential electors, whereas the states would be subject to such review and veto imposed in connection with choosing the method of conducting congressional elections (Article I, section 4, clause 1). This decision reflected the Convention’s concern that a sitting President might (in conjunction with a compliant national legislature) manipulate the rules governing his own re-election.

The “procedure” eventually crafted by the Constitutional Convention empowering state legislatures to decide on the method of appointing their presidential electors was explicitly stated in Article II, section 1, clause 1 and provided:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors . . .” [Emphasis added]

Note that Article II, section 1, clause 1 permits a legislature to choose its method of appointing its presidential electors by passage of state legislation—*without a federal constitutional amendment and without congressional oversight*.

We believe that the Founders’ lengthy consideration of Article II, section 1, clause 1 qualifies this constitutional provision as “the product of much give and take among the delegates” and as a “finely wrought procedure.”

State winner-take-all statutes were used by only three states in the nation’s first presidential election in 1789. The winner-take-all rule became widespread—*without a federal constitutional amendment*—by the 1830’s through enactment of state legislation authorized using the “finely wrought procedure” of Article II, section 1, clause 1. The winner-take-all rule specifies that 100% of a state’s presidential electors be appointed on the basis of the overall *intra-state* popular vote. The National Popular Vote compact specifies that 100% of an enacting state’s presidential electors be appointed on the basis of the overall *interstate* popular vote.

Why does Tara Ross think that the “finely wrought procedure” used to originally

enact state winner-take-all statutes would no longer qualify as a “finely wrought procedure” if the states chose to use it to repeal these same state statutes?

The 1998 line item veto case was concerned with federal legislation that attempted to establish a “procedure” that contravened the “finely wrought procedure” contained in the U.S. Constitution, whereas the National Popular Vote compact represents the use by the states of a “finely wrought procedure” explicitly contained in the Constitution.

9.1.21. MYTH: Respect for the Constitution demands that we go through the formal constitutional amendment process.

QUICK ANSWER:

- The Constitution contains a built-in provision for changing the method of awarding a state’s electoral votes.
- One does not show respect for the Constitution by unnecessarily and gratuitously amending it.
- The method that is built into the Constitution should be pursued before a constitutional amendment is considered. Amending the Constitution should be the last resort.
- One does not show respect for the Founding Fathers and the Constitution by ignoring the procedures that the Constitution provides. Section 1 of Article II specifically empowers the states to change the method of awarding their electoral votes.
- One does not show respect for the judgment of the Founding Fathers by passing a constitutional amendment that eliminates the states’ existing power to make future changes in the method of electing the President.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, has argued:

“Even assuming that the Electoral College should be eliminated, respect for the Constitution demands that we go through the formal amendment process.”¹³⁷

The National Popular Vote bill does not eliminate the Electoral College. It replaces state winner-take-all statutes (enacted on a piecemeal basis by the states over a period of decades after the 1787 Constitutional Convention) with a system that guarantees the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

¹³⁷ Ross, Tara. 2010. The Electoral College Takes Another Hit. September 22, 2010. <http://www.nationalreview.com/corner/247368/electoral-college-takes-another-hit-tara-ross>

The Founding Fathers did not anticipate—much less favor—the current winner-take-all method of awarding electoral votes (as discussed in detail in section 9.1.4).

The winner-take-all method is not in the U.S. Constitution and was never ratified as a federal constitutional amendment.

The winner-take-all method may be modified or replaced in the same manner it was originally adopted namely, passage of state-level legislation under the authority of section 1 of Article II.

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”¹³⁸ [Emphasis added]

One does not show respect for the Founding Fathers by ignoring the specific method they built into the U.S. Constitution for changing the method of electing the President—that is, state-level action under section 1 of Article II. The Founding Fathers gave the states exclusive and plenary control over the manner of awarding their electoral votes.

There is nothing in the Constitution that needs to be amended in order for states to switch from their current practice of awarding their electoral votes to the candidate who receives the most popular votes inside their individual states (the winner-take-all method) to a system in which they award their electoral votes to the candidate who receives the most popular votes in all 50 states and the District of Columbia (the National Popular Vote plan).

One does not show respect for the Constitution by unnecessarily amending it. Before contemplating a change in the U.S. Constitution, states should be given the chance to exercise the specific authority that the Founding Fathers gave to the states in the Constitution to change the electoral system.

The method that is built into the Constitution should be attempted first. Amending the Constitution should be the last resort.

Moreover, one does not show respect for the judgment of the Founding Fathers by passing a constitutional amendment that removes the states’ existing power to make changes in the method of electing the President.

9.1.22. MYTH: The most democratic approach for making a change in the manner of electing the President is a federal constitutional amendment.

QUICK ANSWER:

- A federal constitutional amendment favored by states representing 97% of the nation’s population can be blocked by states representing only 3% of the population.

¹³⁸ U.S. Constitution. Article II, section 1, clause 2.

MORE DETAILED ANSWER:

In her book *Enlightened Democracy: The Case for the Electoral College*, Tara Ross characterizes a federal constitutional amendment as being a fairer and more democratic means for replacing state winner-take-all statutes with the National Popular Vote compact because it turns the question of how to elect the President over to “the people.”

A federal constitutional amendment must be ratified by 38 of the 50 states. An amendment favored by states representing 97% of the nation’s population can be blocked by the 13 smallest states (representing only 3% of the population).

Given that the state-by-state winner-take-all rule is not part of the U.S. Constitution, it is difficult to see why the repeal of the winner-take-all rule would require a constitutional amendment—much less why the constitutional-amendment procedure should be considered to be a more democratic way to repeal the winner-take-all rule than the method of its original adoption.

9.1.23. MYTH: “Eleven colluding states” are trying to impose a national popular vote on the country.**QUICK ANSWER:**

- The theoretical possibility that the 11 biggest states (which possess a majority of the electoral votes) would get together to adopt the National Popular Vote compact is as unlikely as the possibility that these same 11 politically disparate states would get together and choose the President in a presidential election under the current system.
- The predicted collusion among the nation’s 11 biggest states has already been demonstrated to be false by the actual history of adoption by the states of the National Popular Vote compact. As of 2012, the compact has been enacted by nine jurisdictions, including three small states, three medium-sized states, and three big states.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, has criticized the compact on the grounds that “11 colluding states” could, if they acted in concert, impose a national popular vote on the country.

The 11 biggest states do, indeed, contain a bare majority of the electoral votes (270 of 538 according to the 2010 census). Theoretically, these same 11 states could, under the current system of electing the President, get together and impose their choice for President on the country in every presidential election.

In reality, the 11 biggest states have little in common with one another politically, and they rarely act in concert on any issue.

In 2000 and 2004, five of the 11 biggest states (Texas, Florida, Ohio, Georgia, and

North Carolina) voted Republican, and six (California, New York, Illinois, Pennsylvania, Michigan, and New Jersey) voted Democratic.

These disparate 11 states are no more likely to get together on enactment of the National Popular Vote compact than they are to get together on their choice of a President or the level of taxation.

Tara Ross' hypothesized scenario of "collusion" among the nation's 11 biggest states has already been demonstrated to be false by the actual history of adoption by the states of the National Popular Vote compact.

As of 2012, the National Popular Vote compact has been enacted by nine jurisdictions possessing a total of 132 electoral votes—49% of the 270 electoral votes needed to activate the compact. These nine jurisdictions include a mixture of small, medium, and big states.

- **Small states**
 - the District of Columbia (3 electoral votes)
 - Hawaii (4 electoral votes)
 - Vermont (3 electoral votes)
- **Medium-sized states**
 - Maryland (10 electoral votes)
 - Massachusetts (11 electoral votes)
 - Washington state (12 electoral votes)
- **Big states**
 - California (55 electoral votes)
 - Illinois (20 electoral votes)
 - New Jersey (14 electoral votes).

Ross' concern about the 11 biggest states is apparently premised on the incorrect belief that support for the National Popular Vote plan is limited to large states. In fact, the National Popular Vote plan has considerable support in small states. As of 2012, the National Popular Vote compact has been approved by a total of nine legislative chambers in small states. In addition to the five legislative chambers in Hawaii, Vermont, and the District of Columbia, the National Popular Vote compact has been approved by the Maine Senate, Delaware House, and both houses in Rhode Island.

Public opinion polls show a high level of support for a nationwide popular election for President in small states such as

- Alaska (70%),
- Delaware (75%),
- District of Columbia (76%),
- Idaho (77%),
- Maine (77%),
- Montana (72%),
- New Hampshire (69%),

- Rhode Island (74%),
- South Dakota (75%),
- Vermont (75%), and
- Wyoming (69%).¹³⁹

In fact, public support for a national popular vote runs slightly higher than the national average in most of the small states. The reason may be that small states are the most disadvantaged group of states under the current system (as discussed in section 9.4.1).

9.1.24. MYTH: A federal constitutional amendment is the superior way to change the system.

QUICK ANSWER:

- State-level action is preferable to a federal constitutional amendment because it is far easier to amend state legislation than to amend or repeal a constitutional amendment if some adjustment becomes advisable.
- State-level action is preferable to a federal constitutional amendment because it leaves existing untouched state control of presidential elections.
- Under the National Popular Vote plan, states would retain their exclusive and plenary power to choose the method of awarding their electoral votes, including the option to make other changes in the future.
- The U.S. Constitution contains a built-in mechanism for changing the winner-take-all method of awarding electoral votes, namely state legislation. This is, of course, the method originally used to adopt the winner-take-all rule (which did not become the prevailing method until decades after ratification of the Constitution). State action is the right way to make this change because it is the way specified in the Constitution.
- Building support from the bottom-up is more likely to yield success than a top-down approach involving a constitutional amendment.

MORE DETAILED ANSWER:

State action to change the winner-take-all method of awarding electoral votes is preferable to a federal constitutional amendment for several reasons.

First, it is far easier to amend or repeal state legislation than to amend or repeal a constitutional amendment if some adjustment becomes advisable. It is inconsistent for opponents of the National Popular Vote compact to argue that nationwide election of the President will usher in numerous adverse consequences, but that the change should be implemented in a manner (namely a federal constitutional amendment) that is not easily amended or repealed.

¹³⁹These polls (and many others) are available on National Popular Vote's web site at <http://www.nationalpopularvote.com/pages/polls>.

Second, the National Popular Vote compact leaves untouched existing state control over presidential elections. Many of the constitutional amendments concerning the Electoral College that have been introduced and debated in Congress over the years would have reduced or eliminated state control over presidential elections. The Constitution's delegation of power over presidential elections (section 1 of Article II) is not a historical accident or mistake, but was intended as a "check and balance" on a sitting President who, with a compliant Congress, might be inclined to manipulate election rules to perpetuate himself in office.¹⁴⁰ The Founders dispersed the power to control presidential elections among the states, knowing that no single "faction" would simultaneously be in power in all the states.

Third, under the National Popular Vote approach, states would retain their exclusive and plenary power to choose the method of awarding their electoral votes, including the option to make other changes in the future. A federal constitutional amendment would eliminate this state power.

Fourth, state action is the right way to make the change. The U.S. Constitution provides a built-in mechanism for changing the method of electing the President. Section 1 of Article II permits the states to choose the manner of awarding their electoral votes. The right way to make a change is the way already contained in the Constitution.

Fifth, passing a constitutional amendment requires an enormous head of steam at the front-end of the process (i.e., getting a two-thirds vote in both houses of Congress). Only 17 constitutional amendments have been ratified since passage of the Bill of Rights. The last time Congress successfully launched a federal constitutional amendment (voting by 18-year-olds) was in 1971. The last constitutional amendment to be ratified was the 27th Amendment in 1992.¹⁴¹ In contrast, state action permits support to bubble up from the people through the state legislative process. The genius of the U.S. Constitution is that it provides a way for both the central government and state governments to initiate change. Building support from the bottom-up is more likely to yield success than a top-down approach.

Debates over the process to be employed to achieve a particular election reform have frequently delayed achievement of that objective. The passage of women's suffrage, for example, was delayed by decades as a result of a long-running argument within the women's suffrage movement over whether to pursue changes at the state level versus a federal constitutional amendment. Women's suffrage was first adopted by individual states using the state's power, under the U.S. Constitution, to conduct elections. It was 50 years between the time when Wyoming permitted women to vote (1869) and the passage of the 19th Amendment by Congress (1919). By the time Con-

¹⁴⁰In October 2008, the Mayor of New York City, in conjunction with the City Council, amended the City's term-limits law to permit the Mayor to run for a third term.

¹⁴¹The 27th Amendment provides, "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."

gress finally passed the 19th Amendment, women had already won the right to vote in 30 of the then-48 states.

9.1.25. MYTH: It is inappropriate for state legislatures to consider changing the method of electing the President.

QUICK ANSWER:

- The U.S. Constitution specifically gives state legislatures exclusive control over the awarding of electoral votes.

MORE DETAILED ANSWER:

The Founding Fathers specifically gave state legislatures the exclusive power to choose the manner of awarding their state’s electoral votes. Article II of the U.S. Constitution provides:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”¹⁴² [Emphasis added]

The Founding Fathers had good reason to give states the power to control the conduct of presidential elections. They specifically wanted to thwart the possibility that a sitting President, in conjunction with a possibly compliant Congress, could manipulate the manner of conducting presidential elections in a politically advantageous way.

The U.S. Constitution also gives states the primary power over the manner of conducting congressional elections.¹⁴³

Control over elections is a state power under the U.S. Constitution.

For additional information, see section 1.1 and chapter 2.

9.1.26. MYTH: The National Popular Vote compact is unconstitutional because it would prevent a tie in the Electoral College and thereby deprive the U.S. House of Representatives of its rightful opportunity to choose the President.

QUICK ANSWER:

- Most historians do not subscribe to the view that the Founding Fathers expected the U.S. House of Representatives to routinely choose the President, and most Americans today would oppose that practice.
- If it were unconstitutional for a statute to have the effect, as a matter of practical politics, of preventing a tie in the Electoral College (thereby depriving the U.S. House of Representatives of the opportunity to choose the

¹⁴²U.S. Constitution. Article II, section 1, clause 2.

¹⁴³U.S. Constitution. Article I, section 4, clause 1. State power over congressional elections in Article I (unlike state power over presidential elections in Article II) is subject to oversight by Congress.

President), then the federal statutes establishing the size of the U.S. House of Representatives created a constitutionally impermissible structure for the House for about half of American history.

MORE DETAILED ANSWER:

In a 2007 article in the *Akron Law Review*, Adam Schleifer stated:

“The Framers assumed that the election of the President would often require resort to the House of Representatives; in the absence of a stable two-party system, it did not seem inevitable that all presidential elections would result in a majority vote total for any single candidate. Under the [National Popular Vote] plan, there could never be a situation where the House selected the President, as the electoral vote is guaranteed to constitute a majority of the total as a precondition of enactment of [the National Popular Vote plan].”¹⁴⁴

Tara Ross, an opponent of the National Popular Vote plan, has stated:

“**NPV affects the balance of power between federal and state governments** because the House’s role in presidential elections will be effectively removed.”¹⁴⁵ [Emphasis added]

It is true that the National Popular Vote compact would guarantee an absolute majority of the electoral votes (at least 270 out of 538) to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia.

Most people would consider the elimination of the possibility that the House of Representatives might elect the President as a highly desirable collateral benefit of the National Popular Vote plan.

Nonetheless, let us consider the argument made by Schleifer and Ross in detail.

A candidate can fail to win an absolute majority in the Electoral College either because of a tie in the Electoral College (which occurred in 1800) or because of a fragmenting of votes among numerous candidates. As Alexander Hamilton (the presumed author of *Federalist* No. 68) noted in 1788:

“A majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that . . . the House of Representatives shall [elect the President].”

In the 1824 election, four candidates received substantial numbers of electoral votes (99, 84, 41, and 37) and, as a result, no presidential candidate received an absolute majority in the Electoral College.

¹⁴⁴ Schleifer, Adam. 2007. Interstate agreement for electoral reform. 40 *Akron Law Review* 717 at 739–40.

¹⁴⁵ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Pages 37–44.

In the context of present-day two-party politics, each presidential election presents numerous scenarios for a 269–269 tie in the Electoral College. A recent example is Dan Amira’s article entitled “16 Plausible Ways the Electoral College Could Tie in 2012.”¹⁴⁶

In the event that no candidate wins an absolute majority in the Electoral College, the U.S. Constitution provides for a “contingent election” in which the Congress chooses the President and Vice President. The procedures for the contingent election were specified in Article II of the original Constitution. They were revised (and restated) by the 12th Amendment.

In the contingent election, the U.S. House of Representatives would choose the President (with each state having one vote), and the U.S. Senate would choose the Vice President (with each Senator having one vote).

Under the 12th Amendment, the House must make its choice from among the three presidential candidates who received the most electoral votes. The Senate must make its choice from between the two vice-presidential candidates with the most electoral votes.

In a contingent election, if there is no absolute majority in a state’s delegation in the House, the state loses its vote for President. Regardless of how many delegations lose their vote in this way, an absolute majority of the states (currently 26 of 50) is necessary to elect a President. Given that many states have divided congressional delegations, the possibility exists that no presidential candidate could amass an absolute majority. If the House is unable to make a choice, the Vice President chosen by the Senate becomes the acting President. Because the Senate is limited to choosing between the two vice-presidential candidates with the most electoral votes, the candidates who competed for the Presidency are precluded from being chosen as the acting President by the Senate.

These choices are made by the newly elected U.S. House of Representatives and Senate in January.

It is, of course, possible that the House and Senate would be controlled by different political parties at the time of the contingent election.

Some have argued that the Founding Fathers did not intend or expect that the Electoral College would elect the President in most elections. Instead, it has been suggested that the Founders anticipated that, after George Washington, no candidate would win a majority of the Electoral College, and the choice for President would routinely devolve on the U.S. House of Representatives. Under this “designed to fail” interpretation of the Constitution’s history, the Electoral College would ordinarily serve as a body that would, in effect, merely nominate candidates for President, and the U.S. House of Representatives would ordinarily make the final decision. Gary Gregg II dis-

¹⁴⁶ Amira, Dan. 2010. 16 Plausible ways the electoral college could tie in 2012. *New York*. December 23, 2010.

cusses this “designed to fail” interpretation of the method of electing the President in his article entitled “The Origins and Meaning of the Electoral College.”¹⁴⁷

Based on the “designed to fail” interpretation, it is then argued that the National Popular Vote compact is unconstitutional because the compact would have the almost-certain practical political effect of depriving the U.S. House of Representatives of its rightful constitutional opportunity to choose the President by preventing a tie in the Electoral College and guaranteeing an absolute majority of the electoral votes to the candidate receiving the most popular votes in all 50 states and the District of Columbia.

Gary Gregg II of the University of Louisville, a strong supporter of the current system of electing the President and editor of a book defending the current system, has dismissed this interpretation of the Constitution by writing:

“Some interpreters have claimed that the system of presidential election outlined in Article II of the Constitution was designed as a type of grand political shell game. On paper it would seem the president would be elected by a select group close to the people in the states, but in reality, the argument goes, it was established to routinely fail and send the actual selection of the president to the House . . . ”

“If one looks closely at the debates during the Constitutional Convention and the votes of the men who drafted the Constitution, one can see quite clearly that there is little evidence for the thesis that the Electoral College was a jerry-rigged system designed to regularly “fail” and send the ultimate decision to Congress.”¹⁴⁸

Prior to 1961, the number of votes in the Electoral College was the sum of the number of members of the U.S. House of Representatives and the U.S. Senate. After ratification of the 23rd Amendment giving the District of Columbia three electoral votes in 1961, the number of votes in the Electoral College has been three more than the sum of the number of members of the U.S. House of Representatives and the U.S. Senate.

The size of the U.S. Senate is twice the number of states (and hence, always an even number).

Prior to ratification of the 23rd Amendment giving the District of Columbia three electoral votes in 1961, the size of the Electoral College was an odd number or an even number, depending on whether the size of the House of Representatives was odd or even, respectively. Since 1961, the size of the Electoral College has been odd or even, depending on whether the size of the House of Representatives was even or

¹⁴⁷ Gregg, Gary L. II 2008. The origins and meaning of the Electoral College. In Gregg, Gary L. II (editor). *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books. Pages 1–26.

¹⁴⁸ Gregg, Gary L. II 2008. The origins and meaning of the Electoral College. In Gregg, Gary L. II (editor). *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books. Pages 7–9.

odd, respectively. The size of the House has been an odd number (435) since 1961, and therefore the size of the Electoral College has been an even number (538) since 1961.

The original size of the U.S. House of Representatives was established in the U.S. Constitution for the nation's first election (at 65 members). Since the 1790 census, the size of the House has been set by federal statute. The statute has been changed on numerous occasions.

It is difficult to sustain the argument that preserving the opportunity for the U.S. House of Representatives to choose the President was ever a significant guiding factor (much less a constitutional imperative) in the choice of the size of the House. In the time between ratification of the 12th Amendment and 2012, the size of the House has been such as to make the size of the Electoral College an even number in only about half of the years in which presidential elections were held.

The Solicitor General's brief to the U.S. Supreme Court in 2010 in the case of *John Tyler Clemons et al. v. United States Department of Commerce* traces the history of the various statutes that set the size of the U.S. House of Representatives.

The (ultimately unsuccessful) plaintiff in that case argued that the present-day size of the U.S. House of Representatives is unconstitutionally small because it creates unconstitutionally large differences in the number of people represented by congressmen from different states.¹⁴⁹

The Solicitor General's brief shows that Congress did not view protection of its own prerogative to elect the President and Vice President as a factor in setting the size of the House.

“After each decennial census from 1790 to 1910, Congress reconsidered the number of Representatives, enacting new apportionment legislation ‘within two years after the taking of the census.’ H.R. Rep. No. 2010, 70th Cong., 2d Sess. 1 (1929) (1929 House Report). Until 1850, Congress first determined the number of persons that would be represented by each Representative, then divided that number into the population of each State, assigned the resulting number of Representatives (less any fractional remainder) to each State, **and summed those numbers to arrive at the overall size of the House of Representatives.** See *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 449-451 (1992). Although Congress repeatedly increased the number of persons represented by each Member of the House, the size of the House continued to grow steadily, rising from 105 Members in 1790 to 243 Members by 1850.” [Emphasis added]

If Congress thought that the opportunity to break a tie in the Electoral College was a constitutional imperative—or even a worthy secondary objective—Congress

¹⁴⁹The lower courts rejected the argument advanced by Clemons, and the U.S. Supreme Court declined to hear the case.

could have easily accommodated that factor when it periodically adjusted the size of the House.

If it were unconstitutional to enact an electoral arrangement that has the almost-certain practical effect of depriving the U.S. House of Representatives of the opportunity to occasionally choose the President, then the House has operated with a constitutionally impermissible structure for about half of American history.

The contingent election procedure exists in order to resolve a deadlock if one should arise in the Electoral College. The existence of a contingent procedure does not create a constitutional imperative that other statutes be fashioned so as to guarantee that the contingent procedure will be invoked.

If the U.S. House of Representatives were intended to be a routine part of the procedure for electing the President, the Founding Fathers could have easily specified that the size of the House always be chosen so as to result in an even-numbered size of the Electoral College.

Moreover, if it were important to protect the opportunity of the U.S. House of Representatives to play a routine part in most presidential elections, the country had two convenient opportunities shortly after ratification of the original Constitution to increase the likelihood of House participation.

The first Congress in 1789 debated the issue of the size of the House of Representatives and approved a constitutional amendment on that topic.¹⁵⁰ That particular constitutional amendment (part of a package of 12 amendments that included the 10 amendments that are now called “the Bill of Rights”) was never ratified by the states. The amendment proposed in 1791 did not require that the size of the House (and hence the Electoral College) be an even number.

Second, the 1800 presidential election (which produced a tie in the Electoral College) led to a significant reexamination of the procedure of electing the President. Congress then approved, and the states ratified, the 12th Amendment in time for the 1804 election. Congress could easily have included, in the amendment, a requirement that the size of the U.S. House of Representatives always be an even number.^{151 152 153}

In addition, the Congress had a convenient opportunity when it drafted the 23rd Amendment (giving the District of Columbia three electoral votes) to increase the likelihood of House participation by requiring that the size of the House always be chosen (odd or even) so as to ensure that the size of the Electoral College be an even number.

¹⁵⁰ Res. 3, 1st Cong., 1st Sess., Art. I, 1 Stat. 97.

¹⁵¹ Dunn, Susan. 2004. *Jefferson's Second Revolution: The Elections Crisis of 1800 and the Triumph of Republicanism*. Boston, MA: Houghton Mifflin.

¹⁵² Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press.

¹⁵³ Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press.

9.1.27. MYTH: The National Popular Vote bill is unconstitutional because it circumvents the Constitution’s amendment procedures.

QUICK ANSWER:

- Observing that a statute was enacted without employing the Constitution’s amendment procedure merely establishes that the legislative body involved believed that a constitutional amendment was not necessary and it had authority to enact that statute.
- Making the observation that a statute was enacted without employing the Constitution’s amendment procedure cannot serve as a substitute for a *specific* legal argument as to why the statute in question violates the Constitution.

MORE DETAILED ANSWER:

John Samples of the Cato Institute argues that the National Popular Vote compact

“circumvent[s] the Constitution’s amendment procedures.”¹⁵⁴

It is a truism that *every* statute enacted by *every* state legislature circumvents the Constitution’s amendment procedures.

If a piece of legislation is a valid exercise of a state legislature’s power, then there is no reason for it to be enacted using the Constitution’s amendment procedures.

If the piece of legislation is not a valid exercise of powers granted by the Constitution (that is, if it is unconstitutional), then everyone would agree that the Constitution’s amendment procedure is the only way to enact the policy involved.

Observing that a statute was enacted without employing the Constitution’s amendment procedure cannot serve as a substitute for a *specific* legal argument as to why the statute violates the Constitution.

The fact that a legislative body decided to implement a particular policy by means of a statute is evidence that the legislative body believed that it had authority to enact that statute and that it believed that it was not necessary to implement the policy by means of a constitutional amendment.

The state legislatures that have enacted the National Popular Vote compact believed that section 1 of Article II of the U.S. Constitution provided them with authority to act:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”¹⁵⁵ [Emphasis added]

¹⁵⁴ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008.

¹⁵⁵ U.S. Constitution. Article II, section 1, clause 2.

That belief is supported by the decision of the U.S. Supreme Court in the leading case on the awarding of electoral votes:

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It 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. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text. . . .

“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”¹⁵⁶ [Emphasis added]

Ultimately, John Sample’s argument attempts to use his own desired conclusion (namely that the National Popular Vote compact is unconstitutional) as the justification for his claim that the compact is unconstitutional (and, therefore, requires a constitutional amendment).

9.2. MYTHS THAT CANDIDATES REACH OUT TO ALL THE STATES UNDER THE CURRENT SYSTEM

9.2.1. MYTH: The current system ensures that presidential candidates reach out to all states.

QUICK ANSWER:

- Far from ensuring that presidential candidates reach out to all states, the current state-by-state winner-take-all method of electing the President resulted in four out of five states being ignored in the 2012 general-election campaign for President.
- In 2012, Obama conducted campaign events in just eight states after being nominated, and Romney did so in only 10 states.
- In 2012, only 12 states received even one post-convention campaign event involving a presidential or vice-presidential candidate.
- Two thirds of the presidential and vice-presidential post-convention campaign events were conducted in just four states in 2012 (Ohio, Florida, Virginia, and Iowa).

¹⁵⁶ *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

- Only three of the 25 smallest states received any attention in the post-convention campaign period in 2012.
- The South is largely ignored in presidential elections because of the state-by-state winner-take-all system.
- Advertising spending was also heavily concentrated in the 12 states where the presidential and vice-presidential candidates held post-convention general-election campaign events in 2012.
- Campaign field offices were also heavily concentrated in the 12 states where the presidential and vice-presidential candidates held post-convention general-election campaign events in 2012.
- The number of battleground states has been consistently shrinking in recent decades.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, has asserted in testimony at various state legislative hearings:

“Ultimately, **the Electoral College ensures that the political parties must reach out to all the states.**”¹⁵⁷ [Emphasis added]

“[Under the current system] candidates can’t win unless they build **nation-wide support.**”¹⁵⁸ [Emphasis added]

Nothing could be further from the truth.

Because of state winner-take-all statutes (i.e., awarding all of a state’s electoral votes to the candidate who receives the most popular votes in each separate state), four out of five states and four out of five Americans were systematically ignored in the general-election campaign for President in 2012.

The reason that four out of five states are ignored is that presidential candidates have no incentive to visit, advertise in, organize in, poll in, or pay attention to the voters in states where they are comfortably ahead or hopelessly behind.

There is simply no benefit to a presidential candidate to spend his limited campaigning time and money visiting, advertising in, and building a grassroots organization in a state in order to win that state with, say, 58% of a state’s popular vote as compared to, say, 55%. Similarly, it does not help a presidential candidate to lose a state with 45% of a state’s popular vote as compared to, say, 42%.

Because of this political reality, candidates understandably concentrate their attention on a small handful of closely divided battleground states.

As a general rule, a state needs to be approximately in the 46%–54% range (and

¹⁵⁷ Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

¹⁵⁸ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

preferably closer) to be worthy of attention in the general-election campaign for President.¹⁵⁹ Because most political polls have a margin of error of plus or minus 3% or 4%, another way to state this informal rule-of-thumb is to say that battleground states are those where the difference between the candidates is inside the margin of error of a typical political poll.

2004 Presidential Campaign

In 2004, the presidential candidates concentrated two-thirds of their campaign events and money in the post-convention general election campaign in just five states, 80% in just nine states, and 99% in just 16 states. That's hardly "reach[ing] out to all the states."

2008 Presidential Campaign

In the spring of 2008—even before the nominating process was completed—the major political parties acknowledged that there would be only about 14 battleground states in 2008.¹⁶⁰

In the 2008 post-convention general election campaign, candidates concentrated over two-thirds of their campaign events and ad money in just six states, and 98% in 15 states.¹⁶¹ All of the campaign events occurred in just 19 states.

Table 9.1 shows the states in which the presidential and vice-presidential candidates held their 300 post-convention general election campaign events in 2008. The table is sorted according to Obama's percentage of the two-party vote in order to highlight the fact that the states that received campaign events are those where the two-party vote was close (that is, the states where Obama's percentage of the two-party vote was near 50%).¹⁶² The data comes from the *Washington Post* campaign tracker and was compiled by FairVote. The data cover the period from September 5 to November 4, 2008.¹⁶³

Referring to the 2008 election, Professor George C. Edwards III pointed out in his book *Why the Electoral College Is Bad for America*:

¹⁵⁹ Virtually all of the states that were considered "battleground states" in 2008 (e.g., the states in table 9.1 that received campaign events and the states in table 9.2 that received substantial amounts of advertising money) lie in this range. This same pattern persisted in 2012 and applied to 2004 and 2000.

¹⁶⁰ Already, Obama and McCain Map Fall Strategies. *New York Times*. May 11, 2008.

¹⁶¹ <http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230>.

¹⁶² For the reader's convenience, this same data are sorted according to the number of campaign events in table 1.10 and sorted by state size in table 9.7.

¹⁶³ This table is based on *public* campaign events (e.g., rallies, speeches, town hall meetings). It does not include private fund-raisers, private meetings (e.g., Palin's meetings with world leaders in New York), non-campaign events (e.g., the Al Smith Dinner in New York City or the Clinton Global Initiative dinner), televised national debates (e.g., flying into Mississippi, New York, Tennessee, and Missouri for the sole purpose of participating in the debate), or interviews in television studios (e.g., flying into New York City to do an interview). A "visit" to a state may consist of one or more individual events held at different places and times within the state. A joint appearance of a presidential and vice-presidential candidate is counted as one event.

Table 9.1 POST-CONVENTION CAMPAIGN EVENTS IN 2008

OBAMA PERCENT	STATE	CAMPAIGN EVENTS
33.4%	Wyoming	
34.4%	Oklahoma	
35.5%	Utah	
37.0%	Idaho	
38.9%	Alaska	
39.1%	Alabama	
39.8%	Arkansas	
40.5%	Louisiana	
41.8%	Kentucky	
42.4%	Tennessee	1
42.4%	Kansas	
42.4%	Nebraska	
43.3%	West Virginia	1
43.4%	Mississippi	
44.1%	Texas	
45.5%	South Carolina	
45.6%	North Dakota	
45.7%	Arizona	
45.7%	South Dakota	
47.4%	Georgia	
48.8%	Montana	
49.9%	Missouri	21
50.2%	North Carolina	15
50.5%	Indiana	9
51.4%	Florida	46
52.3%	Ohio	62
53.2%	Virginia	23
54.6%	Colorado	20
54.8%	Iowa	7
54.9%	New Hampshire	12
55.2%	Minnesota	2
55.2%	Pennsylvania	40
56.4%	Nevada	12
57.1%	Wisconsin	8
57.7%	New Mexico	8
57.9%	New Jersey	
58.4%	Michigan	10
58.4%	Oregon	
58.8%	Washington	
58.8%	Maine	2
61.3%	Connecticut	
62.3%	California	
62.6%	Delaware	
62.7%	Illinois	
62.9%	Maryland	
63.2%	Massachusetts	
63.6%	New York	
64.2%	Rhode Island	
68.9%	Vermont	
73.0%	Hawaii	
93.4%	D. C.	1
	Total	300

“Barack Obama campaigned in only fourteen states, representing only 33 percent of the American people, during the entire general election.”¹⁶⁴
[Emphasis added]

Senator John McCain campaigned in only 19 states in the post-convention period.

As table 9.1 shows, only 14 states received seven or more of the 300 post-convention general election campaign events in 2008.

- Ohio—62 events,
- Florida—46 events,
- Pennsylvania—40 events,
- Virginia—23 events,
- Missouri—21 events,
- Colorado—20 events,
- North Carolina—15 events,
- Nevada—12 events,
- New Hampshire—12 events,
- Michigan—10 events,¹⁶⁵
- Indiana—9 events,
- New Mexico—8 events,
- Wisconsin—8 events, and
- Iowa—7 events.

These 14 closely divided battleground states accounted for 97.7% of the 300 post-convention campaign events in the 2008 general election campaign (that is, 293 of the 300 events).¹⁶⁶

Moreover, half of these 300 post-convention campaign events in 2008 (148 of 300) were in Ohio (62 events), Florida (46 events), and Pennsylvania (40 events).

Defenders of the current state-by-state winner-take-all system not only incorrectly assert that it “ensures that the political parties must reach out to all the states,” but they also incorrectly assert that the current system forces candidates to pay attention to small states. Their claim about small states is not supported by the facts.

Campaign events were held in only seven of the 25 smallest states in 2008. Moreover, the vast majority of the events held in the 25 smallest states (39 of 43) occurred in just four states, namely

¹⁶⁴ Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 3–5.

¹⁶⁵ On October 2, 2010, the McCain campaign abruptly pulled out of Michigan after it concluded that McCain could not win Michigan. Thus, Michigan appears on this list even though it was a “jilted battleground” state.

¹⁶⁶ The remaining six of the 300 post-convention events (representing 2% of the events) occurred in five additional places, namely Maine (2 events), Minnesota (2 events), the District of Columbia (1 event), Tennessee (1 event), and West Virginia (1 event).

- New Hampshire (12 events),
- New Mexico (8 events),
- Nevada (12 events), and
- Iowa (7 events).

The 25 smallest states together (with 115 electoral votes in 2008) received 43 post-convention campaign events. In contrast, Ohio (with only 20 electoral votes in 2008) received 62 of the 300 post-convention campaign events. The fact that small states are ignored by the current system of electing the President is made clear by table 9.7 in which the data from table 9.1 are sorted according to each state's number of electoral votes.

The South is also largely ignored by presidential campaigns. In an article entitled “The Electoral College is stacked against the South” in *Southern Political Report*, Professor John A. Tures summarized the political effect on the South of the current state-by-state winner-take-all system:

“The South is largely disenfranchised by the Electoral College.”¹⁶⁷

As one might expect, the money that presidential candidates spend in the various states generally parallels the distribution of campaign events.

Table 9.2 shows the states ranked in order of their total contributions (column 2) to the 2008 presidential campaign (using data from Federal Elections Commission records compiled by FairVote).¹⁶⁸ Column 3 shows the percentage of total national donations for each state. Column 4 shows the peak-season candidate advertising expenses (using data compiled by CNN) covering the period from September 24, 2008 (two days before the first presidential debate) to Election Day. Column 5 shows the percentage of total national peak-season candidate advertising expenses for each state.¹⁶⁹

Table 9.2 shows that:

- 99.75% of all advertising spending was in just 18 states in 2008. This allocation substantially parallels the allocation of the 300 post-convention campaign events to just 19 states, and
- 32 states received a *combined* total of only ¼% of the advertising money in 2008.

Table 9.2 also shows that the 18 net “importers” of campaign money received 99.75% of all advertising money (while providing only 27.70% of all donations). The top six “exporting” states (California, New York, Illinois, Texas, Virginia, and the District of Columbia) made 60% of the donations, but received only 0.06% of the advertising

¹⁶⁷Tures, John A. 2009. The Electoral College is stacked against the South. *Southern Political Report*. November 30, 2009.

¹⁶⁸<http://www.fairvote.org/following-the-money-campaign-donations-and-spending-in-the-2008-presidential-race>.

¹⁶⁹An alternative way of looking at these data is available in table 1.11 where the states are ranked in order of the data in column 4.

Table 9.2 CAMPAIGN DONATIONS AND ADVERTISING SPENDING FOR 2008

STATE	DONATIONS	PERCENT OF DONATIONS	AD SPENDING	PERCENT OF ADVERTISING
California	\$151,127,483	17.76%	\$28,288	0.02%
New York	\$89,538,628	10.52%	\$2,235	—
Illinois	\$50,900,675	5.98%	\$53,896	0.03%
Texas	\$46,327,287	5.44%	\$4,641	—
Virginia	\$44,845,304	5.27%	\$16,634,262	10.34%
D.C.	\$44,275,246	5.20%	\$0	—
Florida	\$41,770,516	4.91%	\$29,249,985	18.18%
Massachusetts	\$36,230,225	4.26%	\$20	—
Maryland	\$28,723,600	3.37%	\$0	—
Washington	\$24,666,430	2.90%	\$5,062	—
Pennsylvania	\$23,929,821	2.81%	\$24,903,675	15.48%
New Jersey	\$22,756,469	2.67%	\$0	—
Colorado	\$18,800,854	2.21%	\$7,944,875	4.94%
Connecticut	\$16,526,530	1.94%	\$0	—
Georgia	\$16,507,714	1.94%	\$177,805	0.11%
Ohio	\$15,984,435	1.88%	\$16,845,415	10.47%
Arizona	\$15,334,618	1.80%	\$75,042	0.05%
Michigan	\$15,007,118	1.76%	\$5,780,198	3.59%
North Carolina	\$14,337,669	1.68%	\$9,556,598	5.94%
Minnesota	\$10,894,627	1.28%	\$4,262,784	2.65%
Oregon	\$10,155,182	1.19%	\$2,754	—
Missouri	\$9,997,747	1.17%	\$7,970,313	4.95%
Wisconsin	\$8,133,046	0.96%	\$8,936,200	5.56%
Tennessee	\$7,934,886	0.93%	\$9,955	0.01%
New Mexico	\$6,418,313	0.75%	\$3,134,146	1.95%
Indiana	\$6,225,848	0.73%	\$8,964,817	5.57%
South Carolina	\$5,744,471	0.67%	\$910	—
Nevada	\$5,273,523	0.62%	\$7,108,542	4.42%
Hawaii	\$5,045,151	0.59%	\$0	—
Oklahoma	\$4,359,169	0.51%	\$4,170	—
Kentucky	\$4,338,611	0.51%	\$635	—
Alabama	\$4,333,420	0.51%	\$1,385	—
Louisiana	\$4,330,756	0.51%	\$2,279	—
New Hampshire	\$4,045,877	0.48%	\$2,924,839	1.82%
Iowa	\$3,649,836	0.43%	\$3,713,223	2.31%
Maine	\$3,344,447	0.39%	\$832,204	0.52%
Kansas	\$3,333,235	0.39%	\$3,141	—
Utah	\$3,287,184	0.39%	\$66	—
Vermont	\$2,852,896	0.34%	\$0	—
Arkansas	\$2,446,323	0.29%	\$1,897	—
Mississippi	\$2,400,625	0.28%	\$1,731	—
Rhode Island	\$2,343,926	0.28%	\$0	—
Montana	\$1,882,200	0.22%	\$971,040	0.60%
Nebraska	\$1,867,197	0.22%	\$807	—
Delaware	\$1,745,123	0.21%	\$0	—
Alaska	\$1,611,031	0.19%	\$310	—
Idaho	\$1,610,072	0.19%	\$368	—
Wyoming	\$1,488,479	0.17%	\$0	—
West Virginia	\$1,236,993	0.15%	\$733,025	0.46%
South Dakota	\$758,626	0.09%	\$980	—
North Dakota	\$442,998	0.05%	\$18,365	0.01%
Total	\$851,122,440	100.00%	\$160,862,883	100.00%

money. For example, California donors contributed \$151,127,483 (about one-sixth of the national total), but California received a mere \$28,288 in advertising. New York donors contributed \$89,538,628 (about one-tenth of the national total), while New York received only \$2,235 in advertising.

2012 Presidential Campaign

The number of battleground states has been declining for many decades, as detailed in FairVote’s 2005 report entitled *The Shrinking Battleground*.¹⁷⁰ This shrinkage continued into the 2012 presidential election.

A mere four weeks after the November 2010 congressional elections, a televised debate on C-SPAN among candidates for the chairmanship of the Republican National Committee focused on the question of how the party would conduct the 2012 presidential campaign in the 14 states that were expected to matter.¹⁷¹

Five and a half months before Election Day in 2012, Governor Mitt Romney acknowledged that the number of battleground states in 2012 would be even smaller than in 2008. In the now-famous May 17, 2012, *Mother Jones* video (made at the same fund-raising dinner in Boca Raton, Florida, containing Romney’s comments about “the 47%”), Romney said:

“All the money will be spent in 10 states.”

On June 6, 2012 (five months before Election Day), the *New York Times* reported that the 2012 presidential campaign was effectively being conducted in nine battleground states (Florida, Ohio, Virginia, North Carolina, Iowa, Pennsylvania, Colorado, Nevada, and New Hampshire). The article noted that the number of battleground states was considerably smaller than in 2000, 2004, and 2008.¹⁷²

Table 9.3 shows the states in which the presidential and vice-presidential candidates held their 253 post-convention general-election campaign events in 2012. This table is based on CNN’s “On the Trail” campaign tracker and covers the period from September 7, 2012 (the day after the Democratic National Convention) to November 6 (Election Day).¹⁷³ The data was compiled by FairVote. The table is sorted according to column 2 (showing the total number of campaign events per state).¹⁷⁴ Columns 3,

¹⁷⁰ FairVote. 2005. *The Shrinking Battleground: The 2008 Presidential Election and Beyond*. Takoma Park, MD: The Center for Voting and Democracy. <http://archive.fairvote.org/?page=1555>.

¹⁷¹ Freedomworks debate on December 1, 2010, available at <http://www.freedomworks.org/rmc>.

¹⁷² Peters, Jeremy W. Campaigns Blitz 9 Swing States in a Battle of Ads. *New York Times*. June 8, 2012.

¹⁷³ This count is based on *public* campaign events (e.g., rallies, speeches, town hall meetings). It does not include private fund-raisers, private meetings, non-campaign events (e.g., the Al Smith Dinner in New York City, the Clinton Global Initiative dinner), televised national debates (e.g., flying into a state just to participate in the debate), or interviews in television studios (e.g., flying into New York to do an interview). A “visit” to a state may consist of one or more individual events held at different places and times within the state. A joint appearance of a presidential and vice-presidential candidate is counted as one event. Additional information is available at <http://www.fairvote.org/presidential-tracker>.

¹⁷⁴ For the reader’s convenience, the same information is also presented in table 9.8 where it is sorted by state size.

Table 9.3 POST-CONVENTION CAMPAIGN EVENTS IN 2012

STATE	TOTAL	OBAMA	BIDEN	ROMNEY	RYAN
Ohio	73	15	13	27	18
Florida	40	9	8	15	8
Virginia	36	6	4	17	9
Iowa	27	5	6	7	9
Colorado	23	5	3	6	9
Wisconsin	18	5	6	1	6
Nevada	13	4	2	3	4
New Hampshire	13	4	4	3	2
Pennsylvania	5			3	2
North Carolina	3		2	1	
Michigan	1				1
Minnesota	1				1
Alabama					
Alaska					
Arizona					
Arkansas					
California					
Connecticut					
Delaware					
D.C.					
Georgia					
Hawaii					
Idaho					
Illinois					
Indiana					
Kansas					
Kentucky					
Louisiana					
Maine					
Maryland					
Massachusetts					
Mississippi					
Missouri					
Montana					
Nebraska					
New Jersey					
New Mexico					
New York					
North Dakota					
Oklahoma					
Oregon					
Rhode Island					
South Carolina					
South Dakota					
Tennessee					
Texas					
Utah					
Vermont					
Washington					
West Virginia					
Wyoming					
Total	253	53	48	83	69

4, 5, and 6 show the number of events by President Barack Obama, Vice President Joe Biden, Governor Mitt Romney, and Congressman Paul Ryan, respectively.

As can be seen from table 9.3:

- In 2012, President Obama conducted post-convention campaign events in just eight states after being nominated, and Governor Romney did so in only 10 states. In comparison, in 2008, Obama conducted post-convention events in 14 states, and McCain did so in 19 states.
- Four out of five states (and four out of five Americans) were ignored by the candidates in the post-convention campaign period in 2012.
- Ohio received 73 of the 253 post-convention campaign events (29%).
- Over two-thirds (69%) of the post-convention campaign events were conducted in just four states (Ohio, Florida, Virginia, and Iowa).
- Only one of the 13 smallest states (i.e., those with three or four electoral votes) received any post-convention campaign events (New Hampshire).
- Only three of the 25 smallest states (i.e., those with seven or fewer electoral votes) received any post-convention campaign events (New Hampshire, Iowa, and Nevada).
- In 2012, only 12 states received at least one post-convention campaign event involving a presidential or vice-presidential candidate.
- The battle was fully joined in only eight states. That is, only eight states received campaign events from all four major-party candidates (i.e., Obama, Romney, Biden, and Ryan).

Figure 9.1 is a graphical representation of the same information as table 9.3 concerning the states in which the presidential and vice-presidential candidates held their 253 post-convention general-election campaign events in 2012.

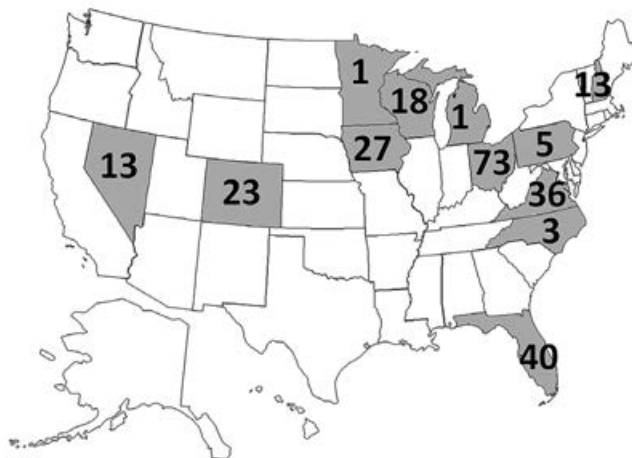


Figure 9.1 Post-convention campaign events in 2012

The top eight battleground states shown in table 9.3 accounted for 96% of the 253 campaign events. They had a combined population of 56,334,828 out of the total U.S. population of 309,785,186 (according to the 2010 census). That is, these eight states had 18.1% of the nation's population.

North Carolina was generally regarded as the ninth significant battleground state in 2012. It was sixth in terms of advertising spending (table 9.4) but tenth in terms of campaign events in table 9.3. These nine states had a combined population of 65,900,609—that is, 21.3% of the nation's population.

Thus, in round numbers, the 2012 presidential campaign ignored about four out of five Americans.

Although defenders of the current state-by-state winner-take-all system often incorrectly assert that the current system forces candidates to pay attention to small states, that claim is not supported by the facts.

Campaign events were held in only three of the 25 smallest states in 2012, namely

- Iowa (27 events),
- Nevada (13 events), and
- New Hampshire (13 events).

The 25 smallest states together (possessing 116 electoral votes in 2012) received 53 of the 253 post-convention campaign events. In contrast, Ohio (with only 18 electoral votes in 2012) received 73 of the 253 post-convention campaign events.¹⁷⁵

The advertising money that was spent in the various states was just as skewed as the distribution of campaign events.

Table 9.4 shows the advertising spending by the presidential campaign organizations and their supportive outside groups (e.g., super-PACs, 501(c)4 corporations) for each of the 12 states (shown in table 9.3) where at least one of the four candidates of the major parties (Obama, Romney, Biden, and Ryan) conducted at least one campaign event. The table is arranged in descending order according to the total advertising spending by state (shown in column 2). Column 3 shows each state's percentage of the total of \$939,370,708 for the 12 states. Column 4 shows the total for the Obama campaign (Obama for America) and supportive Democratic groups (Priorities USA Action and Planned Parenthood Action Fund).¹⁷⁶ Column 5 shows the total for the Romney campaign (Romney for President) and supportive Republican groups (American Crossroads, Restore Our Future, Crossroads GPS, Americans for Prosperity, Republican National Committee, Americans for Job Security, American Future Fund, and Concerned Women for America). These data were compiled by *National Journal*.¹⁷⁷

¹⁷⁵ These facts are highlighted in table 9.3 in which the data from table 9.8 are sorted according to each state's number of electoral votes.

¹⁷⁶ Note that the Democratic National Committee did not run any advertising for the 2012 Obama campaign.

¹⁷⁷ Bell, Peter and Wilson, Reid. Ad Spending in presidential battleground states. *National Journal*. November 4, 2012. <http://www.nationaljournal.com/hotline/ad-spending-in-presidential-battleground-states-20120620>. This web site also details the spending by each individual group.

Table 9.4 POST-CONVENTION ADVERTISING SPENDING IN 12 STATES IN 2012

STATE	TOTAL	PERCENTAGE OF TOTAL	DEMOCRATIC	REPUBLICAN
Ohio	\$192,275,664	20.5%	\$91,675,838	\$100,599,826
Florida	\$182,040,734	19.4%	\$77,705,000	\$104,335,734
Virginia	\$149,217,380	15.9%	\$66,767,983	\$82,449,397
Colorado	\$79,830,466	8.5%	\$38,347,150	\$41,483,316
Iowa	\$71,150,666	7.6%	\$28,586,032	\$42,564,634
North Carolina	\$69,374,780	7.4%	\$24,184,071	\$45,190,709
Nevada	\$58,276,511	6.2%	\$25,831,984	\$32,444,527
Wisconsin	\$45,784,603	4.9%	\$14,749,375	\$31,035,228
New Hampshire	\$43,540,413	4.6%	\$21,456,476	\$22,083,937
Pennsylvania	\$28,089,978	3.0%	\$10,896,718	\$17,193,260
Michigan	\$17,483,109	1.9%	\$461,008	\$17,022,101
Minnesota	\$1,499,045	0.2%	—	\$1,499,045
Total	\$939,370,708	100.0%	\$400,661,635	\$538,709,073

The data cover the period between September 4, 2012 (the middle of the Democratic National Convention) and November 4, 2012 (two days before Election Day).¹⁷⁸

The battle for the White House was not meaningfully joined in the three states in table 9.4 with the lowest non-zero advertising expenditures, namely Minnesota, Michigan, and Pennsylvania.

In Minnesota, Democrats spent nothing in pursuit of the state's 10 electoral votes, while Republicans spent a mere 5% of what they spent trying to win the 10 electoral votes in neighboring Wisconsin. Moreover, neither Obama, Romney nor Biden conducted any post-convention events in the state (as shown in table 9.3).

In Michigan, Democrats spent next to nothing (\$461,008) in pursuit of the state's 16 electoral votes, while Republican spent (mostly at the last minute) a mere one-sixth of what they spent trying to win Ohio's 18 electoral votes. Congressman Ryan conducted one post-convention event in Michigan (as shown in table 9.3).

Although Pennsylvania was a major battleground state in 2008 (receiving 40 of the 300 post-convention campaign events), the battle was never meaningfully joined in Pennsylvania in 2012. Neither Obama nor Biden conducted any post-convention events in Pennsylvania (as shown in table 9.3). The three last-minute events by Romney and the two last-minute events by Ryan were a token effort (a tiny fraction of the 253 post-

¹⁷⁸The cost per electoral vote of reaching voters in battleground states varies considerably from state to state. Television advertising is highly inefficient for many battleground states. For example, reaching voters in the populous southern part of the battleground state of New Hampshire (with four electoral votes) is highly inefficient because it requires advertising on premium-priced metropolitan Boston TV stations (that primarily reaches politically irrelevant voters in Massachusetts and Rhode Island). Similarly, reaching the northern part of the battleground state of Virginia requires advertising on pricey metropolitan Washington stations (that reaches many politically irrelevant voters in Maryland and the District of Columbia). In contrast, television advertising in the states of Florida, Colorado, and Nevada is more efficient in that it is seen mostly by voters living inside those battleground states.

Table 9.5 LOCATION OF 690 OF OBAMA'S 790 CAMPAIGN OFFICES IN 2012

STATE	OBAMA OFFICES
Colorado	62
Florida	104
Iowa	67
Michigan	28
Minnesota	12
Nevada	26
New Hampshire	22
North Carolina	54
Ohio	131
Pennsylvania	54
Virginia	61
Wisconsin	69
Total	690

Table 9.6 LOCATION OF 262 OF ROMNEY'S 284 CAMPAIGN OFFICES IN 2012

STATE	ROMNEY OFFICES
Colorado	13
Florida	48
Iowa	14
Michigan	24
Minnesota	0
Nevada	12
New Hampshire	9
North Carolina	24
Ohio	40
Pennsylvania	25
Virginia	29
Wisconsin	24
Total	262

convention campaign events). The spending in pursuit of Pennsylvania's 20 electoral votes (mostly last-minute) was less than one-sixth of what was spent in pursuit of Ohio's 18 electoral votes.

Overall, 98% of the \$939,370,708 spent on advertising in the 12 states in 2012 shown in table 9.4 was concentrated in just 10 states, and 95% was spent in just nine states.

The location of field offices confirms the degree to which presidential campaigns concentrated their efforts on the closely divided battleground states.

As discussed in a report entitled "Tracking Presidential Campaign Field Operations" by Andrea Levien of Fair Vote,¹⁷⁹ President Obama's field operation had a total of 790 campaign offices, with at least one in every state. However, there was only one Obama office in 25 states.

Governor Romney's field operation had a total of 284 offices; however, all were located in just 16 states. That is, 34 states had no Romney office.

Table 9.5 shows that 87% of Obama's campaign offices (690 of 790) were in the 12 states where either President Obama, Vice President Biden, Governor Romney, or Congressman Ryan conducted at least one campaign event (shown in table 9.3)

Table 9.6 shows that 92% of Romney's campaign offices (262 of 284) were in the 12 states where either President Obama, Vice President Biden, Governor Romney, or Congressman Ryan conducted at least one campaign event (shown in table 9.3).

In summary, about 90% of all campaign offices were concentrated in 12 states in 2012.

¹⁷⁹Levien, Andrea. Tracking presidential campaign field operations. Fair Vote report. November 14, 2012. <http://www.fairvote.org/tracking-presidential-campaign-field-operations/>.

Campaigns Solicit Votes Based on Issues of Concern to Battleground States

The practical political effect of presidential candidates ignoring four out of five states and four out of five voters is that they pay inordinate attention to the issues of concern to the voters living in closely divided battleground states.

Candidates direct their campaign appeals to the issues of concern to the voters of the closely divided battleground states.

For example, an article entitled “Romney Campaign Releases 15 New Commercials in Eight States” illustrates how presidential campaigns solicit votes based on particular issues relevant to voters in particular battleground states:

“All 15 spots begin identically—with convention footage of Romney’s acceptance speech. . . .

“From there, it starts getting less generic. . . .

“[The] Florida [ad discusses] . . . the importance of residential real estate to the state’s economy. . . .

“A Virginia commercial [deals with] residential real estate . . .

“One of [the] commercials . . . deals with losses resulting from defense-budget cuts and sequestrations, is running in Colorado, Florida, North Carolina, Ohio and Virginia. . . .

“Another [commercial] discussing how government overregulation kills small-business jobs runs in Colorado and Iowa. . . .

“[Another commercial] about government regulatory, trade and tax policies . . . killing manufacturing jobs, runs in North Carolina and Ohio. . . .

“[There is] a New Hampshire commercial about high taxes and energy costs. . . .

“[There is] a Virginia :30 [30-second ad] about how tax cuts can help the lives of middle-class families.”¹⁸⁰ [Emphasis added]

A 2012 *Washington Post* article entitled “Obama Showering Ohio with Attention and Money” reported:

“After President Obama pledged in March to create up to 15 manufacturing centers nationwide, the first federal grant went to a place at the heart of his affections: Ohio.

¹⁸⁰ Goldman, Bruce. Romney campaign releases 15 new commercials in eight states. *Examiner*. September 7, 2012.

“When the Obama administration awarded tax credits to promote clean energy, the \$125 million taken home by Ohio companies was nearly four times the average that went to other states.

“And when a Cleveland dairy owner wanted to make more ricotta cheese, he won what was then the largest loan in the history of the U.S. Small Business Administration.

“One of the tastiest investments the government has ever made,’ the president joked as he mentioned the dairy and other businesses his administration has helped in the state.”¹⁸¹ [Emphasis added]

The same article also noted:

“Either Obama or Vice President Biden has popped up in the Buckeye State every three weeks on average since they took office.”

Not only do presidential candidates pay inordinate attention to the issues of concern to voters in the closely divided battleground states, they simply do not care about issues of concern to voters in non-battleground states. Because of the state-by-state winner-take-all method of awarding electoral votes, candidates do not even bother to conduct public opinion polls in the remaining states, because issues concerning voters in the non-battleground states are simply not relevant to winning the White House.

As Charlie Cook reported in 2004:

“Senior Bush campaign strategist Matthew Dowd pointed out yesterday that **the Bush campaign hadn’t taken a national poll in almost two years; instead, it has been polling 18 battleground states.**”^{182,183} [Emphasis added]

If candidates (and sitting Presidents contemplating re-election) are not even aware of the issues that concern voters in four out of five states, they are making policy based on the desires of a few at the expense of the many.

As Former White House Press Secretary Ari Fleischer said in 2009:

“If people don’t like it, they can move from a safe state to a swing state and see their president more.”¹⁸⁴ [Emphasis added]

¹⁸¹ Markon, Jerry and Crites, Alice. Obama showering Ohio with attention and money. *Washington Post*. September 25, 2012.

¹⁸² Cook, Charlie. 2004. Convention dispatches—As the nation goes, so do swing states. *Charlie Cook’s Political Report*. August 31, 2004.

¹⁸³ John Kerry’s 2004 campaign similarly concentrated on a small handful of states in the general election campaign.

¹⁸⁴ *Washington Post*. June 21, 2009.

State winner-take-all statutes are the reason why four out of five states and four out of five Americans are ignored in presidential elections. Under the current state-by-state winner-take-all system, voters in non-battleground states receive no attention from either political party because neither party has anything to gain or lose in the state.

The time that candidates spend in various states, as well as the amount of money that they spend, indicates the value that candidates place on the issues of concern to the voters of those states. Policy issues important to voters in the battleground states are more important to a presidential campaign than policy issues important to the voters in the 40-or-so spectator states. When a sitting President is governing (and contemplating his own re-election or the election of his preferred successor), policy issues important to voters in the battleground states are more important than policy issues important to voters in spectator states.

As former Illinois Governor Jim Edgar has said:

“People who are in elected office remember what they learned when they were campaigning. It’s important that the candidates campaign in all states, not just the swing states.” [Emphasis added]

Consider the reliably Republican state of Idaho as an example of a spectator state. Given George W. Bush’s 68% margin of victory in 2004, no amount of campaigning will alter the fact that the Republican nominee for President is virtually certain to win Idaho’s four electoral votes in the foreseeable future under the current system. Therefore, the Republican candidate for President risks nothing by ignoring Idaho voters, Idaho issues, and Idaho values. Similarly, the Democratic candidate has nothing to gain in Idaho and can simply write it off. The fact that Idaho is not a battleground state means that Idaho issues are irrelevant to *both* parties.

Under a national popular vote, every vote in Idaho would matter to both the Democratic and Republican nominee in every election. A vote in Idaho would become as valuable as a vote anywhere else in the country. It would be foolish for a Republican nominee to take Idaho voters for granted, because he or she would want to expand his margin of victory or, failing that, at least maintain his party’s historically large margin in the state. Similarly, it would be folly for the Democratic nominee to ignore Idaho voters, because he or she would want to decrease the magnitude of his loss or, at a minimum, limit his loss to his party’s historical level. Idaho’s reliably large Republican margin would no longer be wasted, and the votes of Idaho Democrats would no longer be counted as if they had voted for the Republican presidential candidate. Idaho voters are ignored because the state-by-state winner-take-all rule makes it pointless for either party’s presidential candidates to pay any attention to the state.

Note that Idaho is not ignored in presidential elections because it is small—it is ignored because it is not a closely divided battleground state. In 2012, the battleground state of New Hampshire (with the same four electoral votes as Idaho) received 13 of

the 253 campaign events in the post-convention general election campaign, while all 12 of the other smallest states (including Idaho) received no attention at all.

If every vote was politically relevant in a presidential campaign, one would reasonably expect each of the 13 smallest states (that is, those with three or four electoral votes) to receive approximately one of the 13 campaign events that are currently conducted in New Hampshire. That is, it would be reasonable to expect each of the six Republican-leaning small states (Alaska, Idaho, Montana, Wyoming, North Dakota, and South Dakota) and each of the seven Democratic-leaning small states (Hawaii, Vermont, Maine, Rhode Island, Delaware, the District of Columbia, and New Hampshire) would receive one of these 13 campaign events.

9.2.2. MYTH: A national popular vote will simply make a different group of states irrelevant in presidential elections.

QUICK ANSWER:

- Candidates must solicit every potential voter in an election in which the winner is the candidate who receives the most popular votes. Every vote, regardless of location, would matter equally under a national popular vote.
- The best indicator of how campaigns would be run under a national popular vote is the way campaigns are conducted today for offices where the winner is the candidate who receives the most votes. Serious candidates for Governor solicit voters throughout their entire state. No serious candidate ignores any part of a state if he or she is running in an election where the winner is the candidate who receives the most votes in the entire state. Inside battleground states, presidential candidates solicit voters throughout the entire state.
- When it is suggested that a national popular vote would make any state irrelevant in presidential elections, the obvious question is “Which state would that be?” Which 40 states would a presidential candidate totally ignore under a national popular vote? Which 240,000,000 Americans would a presidential candidate totally ignore in an election in which the winner is the candidate who receives the most popular votes?

MORE DETAILED ANSWER:

Four out of five states and four out of five Americans are ignored in present-day presidential elections conducted under the state-by-state winner-take-all method of awarding electoral votes.

John Samples, an opponent of the National Popular Vote plan, states:

“Many states now ignored by candidates will continue to be ignored under NPV.”¹⁸⁵

¹⁸⁵ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1.

We do not have to speculate on how a campaign would be conducted in an election in which the winner is the candidate who receives the most popular votes, because there is ample evidence available to answer this question. We *know*, from actual experience, how elections are conducted for every other office in the United States.

Serious candidates for Governor or U.S. Senator pay attention to their *entire* constituency. The reason is that every vote is equally important in winning an election in which the winner is the candidate who receives the most popular votes. Focus, for a moment, on a state's congressional districts (remembering that congressional districts within a state contain virtually identical numbers of people). Serious candidates for Governor do not limit their campaigns to just one out of five of their state's congressional districts while totally ignoring four-fifths of the state. Taking Massachusetts as a specific example, it would be inconceivable for a serious candidate for Governor to campaign only in the 1st and 2nd congressional districts, while totally ignoring the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th districts.

The same principle applies today in present-day presidential races *inside* each closely divided battleground state. Inside a battleground state, every vote is equal. Every vote helps a candidate get closer to winning the most votes in the state and thereby capturing all of the state's electoral votes. Inside Ohio, for example, presidential candidates campaign throughout the state. Presidential candidates seek votes in Cleveland and Columbus as well as suburbs, exurbs, small towns, and rural areas. None of Ohio's 16 congressional districts is ignored. Every method of communication (including television, radio, newspapers, magazines, direct mail, billboards, telephone, and the Internet) is used to reach *every* voter in Ohio. It would be politically preposterous to suggest that any presidential candidate would campaign in only certain parts of Ohio, to the exclusion of other parts. Every vote inside Ohio matters.

As David J. Owsiany of the Buckeye Institute wrote in the *Columbus Dispatch*:

“In a swing state such as Ohio, the candidates will visit every area of the state, not just the big cities, because they know winning the popular vote in Ohio—regardless of the margin—means the candidate will get all 18 of the Buckeye State's electoral votes.”¹⁸⁶

Similarly, the same is true *inside* Florida in present-day presidential elections. It would be preposterous to suggest that any presidential candidate would ignore any part of Florida because the winner of all of Florida's 29 electoral votes is the candidate who receives the most votes in the state as a whole.

An NPR story entitled “Ads Slice Up Swing States With Growing Precision” reported on presidential campaigning in Colorado's small media markets:

“Republicans outnumber Democrats in El Paso County more than 2 to 1. Barack Obama lost this part of Colorado to John McCain by 19 points in 2008.

¹⁸⁶Owsiany, David J. Electoral College helps to make sure that president represents entire nation. *Columbus Dispatch*. September 22, 2012.

“It’s not a matter of just winning; it’s winning by how much,” says Rich Beeson, a fifth-generation Coloradan and political director for the Romney campaign.

“Presidential campaigns know exactly the margin of victory or defeat that they have to hit in each town in order to carry an entire state. Democratic media strategist Tad Devine says campaigns set extremely specific goals based on hard data. . . .

“Although no one suggests that President Obama will win Colorado Springs, whether he loses it by 15 or 25 points could determine whether he carries Colorado.

“Beeson of the Romney campaign says smaller cities are vital to this chess game, especially since they’re cheaper to advertise in.

“A lot of secondary markets are very key to the overall map, whether it’s a Charlottesville in Virginia or a Colorado Springs in Colorado,” he says. “You can’t ever cede the ground to anyone.”¹⁸⁷ [Emphasis added]

When it is suggested that a national popular vote will make a different group of states irrelevant in presidential elections, the obvious question is “Which states would that be?” Which 40 states would a presidential candidate totally ignore? “Which 240,000,000 Americans (four-fifths of the total U.S. population of 309,000,000) would a presidential candidate totally ignore?

The question answers itself.

Under the National Popular Vote plan, the winner would be the candidate who receives the most popular votes in the entire country. *Every* voter in *every* state would be politically relevant in *every* presidential election.

9.2.3. MYTH: The disproportionate attention received by battleground states is not a problem because spectator states frequently become battleground states and vice versa.

QUICK ANSWER:

- Although spectator states do occasionally become battleground states, and vice versa, a state’s political complexion generally changes very slowly.
- A person can easily live out most or all of his or her life without ever being politically relevant in a general-election presidential campaign. In contrast, a person’s vote for Governor, U.S. Senator, or any other elective office is politically relevant in *every* election—not just once or twice in a lifetime.

¹⁸⁷ Shapiro, Ari. Ads slice up swing states with growing precision. *NPR*. September 24, 2012. <http://www.npr.org/2012/09/24/161616073/ads-slice-up-swing-states-with-growing-precision>.

- Thirty-two states have voted for the same political party in the six presidential elections between 1992 and 2012—19 states possessing 242 electoral votes voted Democratic and 13 states possessing 102 electoral votes voted Republican.

MORE DETAILED ANSWER:

Opponents of the National Popular Vote plan often argue that the current system forces presidential candidates to pay attention to all the states. For example, Tara Ross has asserted in testimony at various state legislative hearings:

“Ultimately, **the Electoral College ensures that the political parties must reach out to all the states.**”¹⁸⁸ [Emphasis added]

“[Under the current system] candidates can’t win unless they build **nation-wide support.**”¹⁸⁹ [Emphasis added]

When facts are presented that contradict this manifestly incorrect claim (as they are in section 9.2.1), these same opponents then retreat to the argument that the disproportionate attention received by battleground states is not a problem because spectator states sometimes become battleground states and vice versa.

For example, Tara Ross, has argued that

“safe states and swing states—they change all the time.” . . .

“California, used to vote Republican. Now they vote Democrat.”¹⁹⁰

Although it is true that spectator states do occasionally become battleground states (and vice versa), the rate of change in a state’s political complexion is generally rather slow.

A person can easily live out most or all of his or her entire life without ever having a meaningful vote in a general-election presidential campaign. The year 2012 is the 100th anniversary of the last time the popular-vote margin in Utah and Nebraska was less than 6%.

Moreover, battleground status is generally fleeting. Battleground status typically occurs during the relatively brief period when a state is in the process of switching its allegiance from one political party to another. In most cases, a state is a battleground state for one or two (and occasionally three) consecutive presidential elections.

New Mexico voted Republican in presidential elections for decades prior to 2000. Between 2000 and 2008, New Mexico was a closely divided battleground state and con-

¹⁸⁸ Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

¹⁸⁹ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

¹⁹⁰ Debate at the Dole Institute in Lawrence, Kansas, between Tara Ross and John Koza on November 7, 2011. Time stamp 16:30.

sequently received considerable attention. However, New Mexico was totally ignored in the 2012 presidential campaign (receiving not a single post-convention campaign event).

After decades of voting solidly Republican in presidential elections, Virginia and North Carolina suddenly emerged as battleground states in 2008 (and they remained so in 2012).

California voted Republican in all six presidential elections between 1968 and 1988. During this period, California was meaningfully contested only in 1976 (when Ford won by 1.7%) and 1988 (when George H.W. Bush won by 3.5%). However, between 1992 and 2012, California has consistently voted Democratic in all six presidential elections.

Missouri was a battleground state in 2000 and 2008, but ignored in 2004. Moreover, Missouri was totally ignored in 2012.

Ohio was ignored (“dark” in the parlance of campaign consultants) as recently as the 2000 election. Al Gore and George W. Bush both stopped campaigning there shortly after being nominated.

In 2012, Pennsylvania was not a battleground state, even though it enjoyed battleground status in several previous elections. Pennsylvania received 40 of the 300 post-convention campaign events in 2008, but only a token (last-minute) five of 253 in 2012. Neither President Obama nor Vice President Biden campaigned there after being nominated.

Battleground status is so fleeting that a state can find itself jilted in the middle of the post-convention campaign. On October 2, 2008, the McCain campaign (quite reasonably) decided it could not win Michigan and abruptly pulled out of the state. Michigan was not a battleground state in 2012. It received only one of the 253 post-convention campaign events (from Congressman Ryan).

Despite isolated examples of states whose battleground status has changed, the overall picture is one of great stability and only gradual change.

Table 9.41 shows that 32 states voted for the same political party in all six presidential elections between 1992 and 2012. These 32 states possess about two-thirds (64%) of the 538 votes in the Electoral College. Of these 32 states, 19 states (possessing 242 electoral votes after the 2010 census) voted Democratic in all six presidential elections, and 13 states (possessing 102 electoral votes after the 2010 census) voted Republican in all six presidential elections.

In presidential elections, the importance of a vote depends on whether other voters in the voter’s state favor one candidate by 54% or so. Unless the voter happens to live in a state where opinion is closely divided (that is, between 46% and 54%), a person’s vote is politically irrelevant in presidential elections.

If the 2016 presidential election is conducted under the state-by-state winner-take-all rule and is reasonably close, it is likely that all (or almost all) of the 32 states that have voted for the same party in the past six presidential elections will support that same party.¹⁹¹

¹⁹¹ Nine of the states in table 9.41 that voted Democratic once or twice between 1992 and 2012 (Arkansas, Kentucky, Louisiana, Missouri, Tennessee, West Virginia, Arizona, Georgia, and Montana) did so during the

When a voter votes for Governor, U.S. Senator, or any other office in the United States, *every* vote in *every* precinct (and town and county) is equally relevant in *every* election. A person's vote in a particular county is not ignored in an election for Governor simply because more than 54% of the voter's neighbors in that county favor a particular candidate.

A nationwide vote for President would guarantee that *every* vote in *every* state would be equally relevant in *every* presidential election.

9.3. MYTH THAT “WRONG WINNER” ELECTIONS ARE RARE

9.3.1. MYTH: “Wrong winner” elections are rare, and therefore not a problem.

QUICK ANSWER:

- Far from being rare, there have been four elections out of the nation's 57 presidential elections in which a candidate has won the Presidency without winning the most popular votes nationwide—a failure rate of 1 in 14.
- The failure rate is 1 in 7 among non-landslide presidential elections (i.e., elections where the nationwide margin is less than 10%).
- The country has experienced a string of seven consecutive non-landslide elections since 1988. Because we appear to be in an era of non-landslide presidential elections, additional “wrong winner” elections can be expected in the future.

MORE DETAILED ANSWER:

There have been four “wrong winner” elections out of the nation's 57 presidential elections between 1789 and 2012—a failure rate of 1 in 14.

Moreover, about half of American presidential elections are popular-vote landslides (i.e., those in which the winner's nationwide margin is greater than 10%). Among the *non*-landslide elections, the failure rate for the current system is 1 in 7.

Although landslide presidential elections were common for much of the 20th century, the nation currently appears to be in an era of consecutive non-landslide presidential elections (1988, 1992, 1996, 2000, 2004, 2008, and 2012).

Therefore, it should not be surprising that there has been one “wrong winner” election in the recent string of seven non-landslide presidential elections between 1988 and 2012.

If the country continues to experience non-landslide presidential elections, we can expect additional “wrong winner” elections in the future.

An article on July 24, 2012, by Nate Silver in the *New York Times*, entitled “State

Clinton years. Since then, these nine states have consistently voted Republican in presidential elections between 2000 and 2012. Thus, there are 41 states that have voted for the same party between 2000 and 2012.

and National Polls Tell Different Tales About State of Campaign”¹⁹² makes the point that the national popular vote often disagrees with the candidates’ status in the closely divided battleground states. The article pointed out that President Obama had a nationwide lead of 1.3% in the *Real Clear Politics* average of national polls at the time. However, at the same moment, Obama led by a mean of 3.5% in the *Real Clear Politics* averages for 10 battleground states (Ohio, Virginia, Florida, Pennsylvania, Colorado, Iowa, Nevada, Michigan, New Hampshire and Wisconsin) that were considered (at the time) to be most likely to determine the outcome of the 2012 election. Thus, on July 24 (when both party’s nominees were known), the Republicans were within 1.3% of winning the national popular vote, but considerably farther away from winning the states necessary to elect Mitt Romney as President. See tables 9.42 and 9.43 in Section 9.31.9 for additional discussion.

In an October 31, 2012, article in the *New York Times*, Nate Silver observed:

“Mitt Romney and President Obama remain roughly tied in national polls, while state polls are suggestive of a lead for Mr. Obama in the Electoral College.”¹⁹³

The precariousness of the current state-by-state winner-take-all system is further highlighted by the fact that a shift of a handful of votes in one or two states would have elected the second-place candidate in five of the 13 presidential elections since World War II.

For example, in 1976, Jimmy Carter led Gerald Ford by 1,682,970 votes nationwide; however, a shift of 3,687 votes in Hawaii and 5,559 votes in Ohio would have elected Ford.

In 2004, President George W. Bush was ahead by over 3,000,000 popular votes nationwide on Election Night; however, the outcome of the election remained in doubt until the next day because it was not clear which candidate would win Ohio’s 20 electoral votes. In the end, Bush received 118,785 more popular votes than John Kerry in Ohio—thus winning all of Ohio’s 20 electoral votes and ensuring his re-election. However, if 59,393 voters in Ohio had switched from Bush to Kerry, Kerry would have become President despite Bush’s lead of over 3,000,000 popular votes nationwide.

In 2012, a shift of 214,390 popular votes in four states would have elected Mitt Romney, despite President Obama’s nationwide lead of 4,966,945 votes. The four states involved are Florida (29 electoral votes), Ohio (18), New Hampshire (4), and Virginia (13). They cumulatively possess 64 electoral votes. A shift of 64 electoral votes would have given Mitt Romney the 270 electoral votes needed for election.

Other examples are presented in section 1.2.2.

¹⁹² Silver, Nate. State and national polls tell different tales about state of campaign. FiveThirtyEight column in *New York Times*. July 24, 2012.

¹⁹³ Silver, Nate. What state polls suggest about the national popular vote. FiveThirtyEight column in *New York Times*. October 31, 2012.

9.4. MYTHS ABOUT THE SMALL STATES

9.4.1. MYTH: The small states would be disadvantaged by a national popular vote.

QUICK ANSWER:

- The small states (the 13 states with only three or four electoral votes) are the most disadvantaged and ignored group of states under the current state-by-state winner-take-all method of awarding electoral votes. The reason is that political power in presidential elections comes from being a closely divided battleground state, and almost all of the small states are non-competitive states in presidential elections.
- The small states are not ignored because of their low population, but because they are not closely divided battleground states. The 12 small non-battleground states have about the same population (12 million) as the closely divided battleground state of Ohio. The 12 small states have 40 electoral votes—more than twice Ohio’s 18 electoral votes. However, Ohio received 73 of 253 post-convention campaign events in 2012, while the 12 small non-battleground states received none.
- The current state-by-state winner-take-all system actually shifts power from voters in the small and medium-sized states to voters in a handful of big states that happen to be closely divided battleground states in presidential elections.
- The fact that the small states are disadvantaged by the current state-by-state winner-take-all system has long been recognized by prominent officials from those states. In 1966, Delaware led a group of 12 predominantly small states in suing New York (then a closely divided battleground state) in the U.S. Supreme Court in an effort to get state winner-take-all statutes declared unconstitutional.
- Under the current state-by-state winner-take-all system, a vote for President in Wyoming is equal to a vote in California—both are politically irrelevant.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, writes:

“NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in small states.”¹⁹⁴

A brochure published in 2010 by the Evergreen Freedom Foundation of Olympia, Washington states:

¹⁹⁴ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

“The seven smallest states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming) and the District of Columbia each have three electoral votes. **A national popular vote would render all low-population states almost permanently irrelevant in presidential political strategy.**”¹⁹⁵ [Emphasis added]

Ross has also stated:

“Minority political interests, particularly the **small states, are protected** [by the current system].”¹⁹⁶ [Emphasis added]

“Ultimately, **the Electoral College ensures that the political parties must reach out to all the states.**”¹⁹⁷ [Emphasis added]

Professor Robert Hardaway of the University of Denver Sturm College of Law has said:

“If we had National Popular Vote, you take a state like Alaska, which has a very low population. If it was a national popular vote no presidential candidate would be interested in going up there, because the population is so low. But, as you pointed out, if they have 3 electoral votes, that’s the compromise that brought this nation together, that’s a lot of votes, that’s a lot of electoral votes compared to the population, so you’ll see presidential candidates visiting some of those outlying areas.”¹⁹⁸

Referring to the National Popular Vote plan, Senator Mitch McConnell said:

“If the only vote total that counted was just running up the score, query, when would be the next time if you had a state with one congressmen or 2 congressmen and you had a tiny population, when would be the next time you would see or hear from any candidate for president?”¹⁹⁹

Professor Walter E. Williams of George Mason University says:

“Were it not for the Electoral College, presidential candidates could safely ignore less populous states.”²⁰⁰

¹⁹⁵ Evergreen Freedom Foundation. 2010. Brochure. Olympia, Washington.

¹⁹⁶ Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

¹⁹⁷ *Id.*

¹⁹⁸ Debate at the Larimer County, Colorado, League of Women Voters on June 28, 2012 with Robert Hardaway of the University of Denver Sturm College of Law, Professor Robert Hoffert of Colorado State University, Elena Nunez of Colorado Common Cause, and Patrick Rosenstiel of Ainsley-Shea. 18:00 minute mark. http://www.youtube.com/watch?v=U_yCSqgm_dY.

¹⁹⁹ McConnell, Mitch. The Electoral College and National Popular Vote Plan. December 7, 2011. Washington, DC. 19:36 minute mark.

²⁰⁰ Williams, Walter E. In defense of the Electoral College. *Gaston Gazette*. November 21, 2012.

Gary Gregg II, a strong supporter of the current system of electing the President and editor of a book defending the current system, says that a national popular vote for President:

“would mean ignoring every rural and small-state voter in our country.”²⁰¹

The facts directly contradict all of the above statements.

Far from being “protected,” the small states are the most disadvantaged and ignored group of states under the current system of electing the President.

Table 9.7 shows the states in which the presidential and vice-presidential candidates held their 300 post-convention general election campaign events in 2008. The table is organized according to each state’s number of electoral votes.²⁰² The data come from the *Washington Post* campaign tracker. The data cover the period from September 5, to November 4, 2008.²⁰³

Table 9.7 shows that, with the exception of New Hampshire (the sole battleground state among the 13 smallest states), the 13 smallest states (those with three or four electoral votes) received hardly any attention in the 2008 campaign.

Table 9.8 shows the states in which the presidential and vice-presidential candidates held their 253 post-convention general-election campaign events in 2012. This table is based on CNN’s “On the Trail” campaign tracker and covers the period from September 7, 2012 (the day after the Democratic National Convention) to November 6 (Election Day).^{204,205} The data was compiled by FairVote. The table is sorted according to a state’s number of electoral votes.

As can be seen from table 9.3, only three of the 25 smallest states received any campaign events in 2012, namely:

²⁰¹ Gregg, Gary. Keep Electoral College for fair presidential votes. *Politico*. December 5, 2012.

²⁰² For the reader’s convenience, the same information is presented in table 1.10 (where it is sorted according to the number of post-convention campaign events in 2008) and in table 9.1 (where it is sorted according to Obama’s percentage of the two-party vote in 2008).

²⁰³ This count is based on *public* campaign events (e.g., rallies, speeches, town hall meetings). It does not include private fund-raisers, private meetings (e.g., Palin’s meetings with world leaders in New York), non-campaign events (e.g., the Al Smith Dinner in New York City or the Clinton Global Initiative dinner), televised national debates (e.g., flying into Mississippi, New York, Tennessee, and Missouri just to participate in the debate), or interviews in television studios (e.g., flying into New York City to do an interview). A “visit” to a state may consist of one or more individual events held at different places and times within the state. A joint appearance of a presidential and vice-presidential candidate is counted as one event.

²⁰⁴ This count is based on *public* campaign events (e.g., rallies, speeches, town hall meetings). It does not include private fund-raisers, private meetings, non-campaign events (e.g., the Al Smith Dinner in New York City, the Clinton Global Initiative dinner), televised national debates (e.g., flying into a state just to participate in the debate), or interviews in television studios (e.g., flying into New York to do an interview). A “visit” to a state may consist of one or more individual events held at different places and times within the state. A joint appearance of a presidential and vice-presidential candidate is counted as one event. Additional information is available at <http://www.fairvote.org/presidential-tracker>.

²⁰⁵ For the reader’s convenience, the same information (including breakdowns for Obama, Biden, Romney, and Ryan) is presented in table 9.3 and table 1.10 where it is sorted according to the number of post-convention campaign events.

Table 9.7 POST-CONVENTION CAMPAIGN EVENTS IN 2008

ELECTORAL VOTES	STATE	CAMPAIGN EVENTS
3	Wyoming	
3	District of Columbia	1
3	Vermont	
3	North Dakota	
3	Alaska	
3	South Dakota	
3	Delaware	
3	Montana	
4	Rhode Island	
4	Hawaii	
4	New Hampshire	12
4	Maine	2
4	Idaho	
5	Nebraska	
5	West Virginia	1
5	New Mexico	8
5	Nevada	12
5	Utah	
6	Kansas	
6	Arkansas	
6	Mississippi	
7	Iowa	7
7	Connecticut	
7	Oklahoma	
7	Oregon	
8	Kentucky	
9	Louisiana	
8	South Carolina	
9	Alabama	
9	Colorado	20
10	Minnesota	2
10	Wisconsin	8
10	Maryland	
11	Missouri	21
11	Tennessee	1
11	Indiana	9
11	Arizona	
11	Washington	
12	Massachusetts	
13	Virginia	23
15	New Jersey	
15	North Carolina	15
15	Georgia	
17	Michigan	10
20	Ohio	62
21	Pennsylvania	40
21	Illinois	
27	Florida	46
31	New York	
34	Texas	
55	California	
538	Total	300

- New Hampshire (4 electoral votes),
- Nevada (6 electoral votes), and
- Iowa (6 electoral votes).

The 25 smallest states (possessing 116 electoral votes in 2012) received 53 of the 253 post-convention campaign events. In contrast, Ohio (with only 18 electoral votes in 2012) received 73 of the 253 post-convention campaign events.

Although the small states theoretically benefit from receiving two extra electoral votes (corresponding to their two U.S. Senators), this “bonus” does not, in practice, translate into political influence. Political power in presidential elections comes from being a closely divided battleground state—not from the two-vote bonus conferred on all states in the Electoral College.

Under the winner-take-all rule (i.e., awarding all of a state’s electoral votes to the candidate who receives the most popular votes in each separate state), candidates have no reason to visit, advertise, build a grassroots organization, poll, or pay attention to the concerns of voters in states where they are comfortably ahead or hopelessly behind. Instead, candidates concentrate their attention on a small handful of closely divided battleground states.

The small states are the most disadvantaged and ignored group of states under the current state-by-state winner-take-all system because all but one of them are reliably Democratic or Republican in presidential races. Consequently, presidential candidates have nothing to lose by ignoring and nothing to gain by soliciting votes in the small states. Under the current system, the small states are not ignored because they are small, but because they are not closely divided battleground states.

In the last seven presidential elections (1988 through 2012), six of the 13 small states (i.e., those with three or four electoral votes) have regularly gone Republican:

- Alaska,
- Idaho,
- Montana,
- North Dakota,
- South Dakota, and
- Wyoming.

Six others have regularly gone Democratic:

- Delaware,
- District of Columbia,
- Hawaii,
- Maine,
- Rhode Island, and
- Vermont.

Table 9.8 POST-CONVENTION CAMPAIGN EVENTS IN 2012 (BY STATE SIZE)

ELECTORAL VOTES	STATE	TOTAL
3	Alaska	
3	Delaware	
3	D.C.	
3	Montana	
3	North Dakota	
3	South Dakota	
3	Vermont	
3	Wyoming	
4	New Hampshire	13
4	Hawaii	
4	Idaho	
4	Maine	
4	Rhode Island	
5	Nebraska	
5	New Mexico	
5	West Virginia	
6	Iowa	27
6	Nevada	13
6	Arkansas	
6	Kansas	
6	Mississippi	
6	Utah	
7	Connecticut	
7	Oklahoma	
7	Oregon	
8	Kentucky	
8	Louisiana	
9	Colorado	23
9	Alabama	
9	South Carolina	
10	Wisconsin	18
10	Minnesota	1
10	Maryland	
10	Missouri	
11	Arizona	
11	Indiana	
11	Massachusetts	
11	Tennessee	
12	Washington	
13	Virginia	36
14	New Jersey	
15	North Carolina	3
16	Michigan	1
16	Georgia	
18	Ohio	73
20	Pennsylvania	5
20	Illinois	
29	Florida	40
29	New York	
38	Texas	
55	California	
538	Total	253

The exceptions to this currently prevailing 6–6 split were minor and occurred years ago.²⁰⁶

New Hampshire has been the only closely divided battleground state among the 13 small states in the last seven presidential elections (1988 through 2012).²⁰⁷

The 12 small non-battleground states (named above) have a combined population of 11.5 million. Coincidentally, Ohio has almost the same number of people as these 12 small states. Because of the bonus of two electoral votes that every state receives, the 12 small non-battleground states have 40 electoral votes, whereas Ohio has less than half as many (18 after the 2010 census).

However, political power does not arise from the number of electoral votes that a state possesses, but instead, from whether the state is a closely divided battleground state.

In 2008, there were 62 post-convention campaign events in the closely divided battleground state of Ohio (out of a nationwide total of 300 events), whereas the 12 small non-battleground states received only three (and all three of these events were “exceptions that prove the rule”).²⁰⁸

In 2012, there were 73 post-convention campaign events (out of 253) in the closely divided battleground state of Ohio, whereas the 12 non-battleground small states each received none.

In short, in 2012, the 11.5 million people in the 12 small non-battleground states received no campaign events, advertising, polling, or policy consideration by presidential candidates because the outcome of the presidential race in those states was a foregone conclusion. In contrast, the state-by-state winner-take-all rule makes the same number of people in Ohio the center of attention.

Note that the 12 small non-battleground states are not ignored because they are small. They are ignored because they are not closely divided politically.

Indeed, presidential candidates pay considerable attention to New Hampshire (with four electoral votes) because it is a closely divided battleground state. As a re-

²⁰⁶There were only four exceptions to this 6–6 split in the 60 state-level presidential elections conducted in these 12 states between 1988 and 2012. In 1992, Bill Clinton carried Montana (presumably due to Ross Perot’s presence on the ballot). In 1988, George H.W. Bush carried Delaware, Maine, and Vermont. Since then, these states have become reliably Democratic in presidential elections.

²⁰⁷New Hampshire went Republican in 1988, Democratic in 1992 and 1996, Republican in 2000, and Democratic in 2004, 2008, and 2012.

²⁰⁸The two campaign events in Maine in 2008 were the “exceptions that prove the rule.” Maine awards two of its electoral votes by congressional district. The two events in Maine in 2008 were in the state’s 2nd congressional district. That particular district was closely divided—that is, it was a “battleground district.” When there is even one electoral vote to be won or lost, candidates pay attention. The presidential candidates ignored Maine’s other congressional district because it was reliably Democratic. Therefore, neither party had anything to gain by paying any attention to it. The third campaign event in a small jurisdiction in 2008 was another “exception that proves the rule.” This event occurred in the District of Columbia (which occasionally receives campaign events because it is convenient to the candidates).

sult, New Hampshire received 12 of the 300 post-convention campaign events in 2008 and 13 of the 253 events in 2012.²⁰⁹

Meanwhile, the voters of the 12 other small states were ignored because the political division of their voters was outside the 46%–54% range that determines (more or less) whether presidential candidates consider a state to be worth contesting.²¹⁰

A national popular vote would make a voter in each of the 12 small non-battleground states as important as a voter in battleground states such as New Hampshire. In fact, the National Popular Vote plan would make every vote in every state politically relevant in every presidential election.

Under the current state-by-state winner-take-all system, New Hampshire received 13 of the 253 campaign events in 2012, while the 12 other smallest states each received none. Under the National Popular Vote plan, it would be inconceivable that presidential candidates would campaign in only one small state, while ignoring the 12 other small states. Most likely, *each* of the 13 smallest states would *each* receive one campaign event under a nationwide vote for President.

Most of the states with five or six electoral votes are similarly non-competitive in presidential elections (and therefore disadvantaged in the same way as almost all of the 13 small states).

The fact that the small states are disadvantaged by the current state-by-state winner-take-all system has long been recognized by prominent officials from those states.

In a 1979 Senate speech, U.S. Senator Henry Bellmon (R–Oklahoma) described how his views on the Electoral College had changed as a result of serving as national campaign director for Richard Nixon and a member of the American Bar Association’s commission studying electoral reform.

“While the consideration of the electoral college began—and I am a little embarrassed to admit this—I was convinced, as are many residents of smaller States, that the present system is a considerable advantage to less-populous States such as Oklahoma. . . . As the deliberations of the American Bar Association Commission proceeded and as more facts became known, **I came to the realization that the present electoral system does not give an advantage to the voters from the less-populous States. Rather, it works to the disadvantage of small State voters who are largely ignored in the general election for President.**”²¹¹ [Emphasis added]

²⁰⁹ It should be noted that it is only since 1992 that New Hampshire has been a closely divided battleground state in the post-convention campaign period. Prior to 1992, New Hampshire received virtually no attention in general election campaigns because it reliably voted Republican in presidential elections.

²¹⁰ See table 1.2.

²¹¹ *Congressional Record*. July 10, 1979. Page 17748.

Senator Robert E. Dole of Kansas, the Republican nominee for President in 1996 and Republican nominee for Vice President in 1976, stated in a 1979 floor speech:

“Many persons have the impression that the electoral college benefits those persons living in small states. I feel that this is somewhat of a misconception. Through my experience with the Republican National Committee and as a Vice Presidential candidate in 1976, it became very clear that the populous states with their large blocks of electoral votes were the crucial states. It was in these states that we focused our efforts.

“Were we to switch to a system of direct election, I think we would see a resulting change in the nature of campaigning. While urban areas will still be important campaigning centers, there will be a new emphasis given to smaller states. **Candidates will soon realize that all votes are important, and votes from small states carry the same import as votes from large states. That to me is one of the major attractions of direct election. Each vote carries equal importance.**

“Direct election would give candidates incentive to campaign in States that are perceived to be single party states.”²¹² [Emphasis added]

Because so few of the small states are closely divided battleground states in presidential elections, the current state-by-state winner-take-all system actually shifts power from voters in the small and medium-sized states to voters in a handful of big states that happen to be battleground states in presidential elections.

The fact that the small states are disadvantaged by the current state-by-state winner-take-all system has long been recognized by prominent officials from those states.

In 1966, the state of Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York (then a closely divided battleground state) in the U.S. Supreme Court in an effort to get state winner-take-all statutes declared unconstitutional.²¹³

David P. Buckson (Republican Attorney General of Delaware at the time) led the effort. Delaware’s brief in *State of Delaware v. State of New York*²¹⁴ stated:

“The state unit-vote system [the ‘winner-take-all’ rule] **debases the national voting rights and political status of Plaintiff’s citizens and those of other small states** by discriminating against them in favor of citizens of the larger states. A citizen of a small state is in a position to influ-

²¹² *Congressional Record*. January 14, 1979. Page 309.

²¹³ *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

²¹⁴ In the 1960s, New York was a battleground state and also the state with the most electoral votes (43).

ence fewer electoral votes than a citizen of a larger state, and therefore his popular vote is less sought after by major candidates. **He receives less attention in campaign efforts and in consideration of his interests.**²¹⁵ [Emphasis added]

In their brief, Delaware and the other plaintiffs stated:

“This is an original action by the State of Delaware as *parens patriae* for its citizens, against the State of New York, all other states, and the District of Columbia under authority of Article III, Section 2 of the United States Constitution and 28 U.S. Code sec. 1251. The suit challenges the constitutionality of the respective state statutes employing the ‘general ticket’ or ‘state unit-vote’ system, by which the total number of presidential electoral votes of a state is arbitrarily misappropriated for the candidate receiving a bare plurality of the total number of citizens’ votes cast within the state.

“The Complaint alleges that, although the states, pursuant to Article II, Section 1, Par. 2 of the Constitution, have some discretion as to the manner of appointment of presidential electors, they are nevertheless bound by constitutional limitations of due process and equal protections of the laws and by the intention of the Constitution that all states’ electors would have equal weight. Further, general use of the state unit system by the states is a collective unconstitutional abridgment of all citizens’ reserved political rights to associate meaningfully across state lines in national elections.”

The plaintiff’s brief argued that the votes of the citizens of Delaware and the other plaintiff states are

“diluted, debased, and misappropriated through the state unit system.”

The U.S. Supreme Court declined to hear the case (presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision). Ironically, the defendant (New York) is no longer an influential closely divided battleground state (as it was in the 1960s). Today, New York suffers the very same disadvantage as the plaintiff states because it, too, has become politically non-competitive in presidential elections. Today, a vote in New York in a presidential election is equal to a vote in Delaware—both are equally irrelevant.

The Electoral College is not the bulwark of influence for the small states in the U.S. Constitution. The bulwark of influence for the small states is the equal representation of the states in the U.S. Senate. The 13 small states (with 3% of the nation’s population)

²¹⁵ Delaware’s brief, New York’s brief, and Delaware’s argument in its request for a re-hearing in the 1966 case of *State of Delaware v. State of New York* may be found at http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php.

have 25% of the votes in the U.S. Senate—a very significant source of political clout. However, the 13 small states (i.e., those with three or four electoral votes) have only 26 extra votes in the Electoral College by virtue of the two-vote bonus—not a large number in relation to the overall total of 538 electoral votes. Although the 13 small states cast 3% of the nation’s popular vote while possessing 6% of the electoral votes, the extra 3% is a minor numerical factor in the context of a presidential election. More importantly, this small theoretical advantage is negated by the fact that the small states are equally divided between the two major political parties and because the one-party character of 12 of the 13 small states makes them irrelevant to presidential campaigns.

The states that are important in the presidential election can usually be identified very early in each election cycle—even before the party nominations are settled. In the spring of 2008, both major political parties acknowledged that there would be 14 battleground states (involving only 166 of the nation’s 538 electoral votes) in the 2008 presidential election.²¹⁶ In other words, two-thirds of the states were acknowledged to be irrelevant even before the national nominating conventions were held. New Hampshire (with 4 electoral votes) was the only small state that was identified as being a battleground state. The net result is that the current system shifts power from voters in the small states to voters in a handful of closely divided battleground states (almost all of which are big states).

A mere four weeks after the November 2010 congressional elections, a debate was televised on C-SPAN among candidates for chair of the Republican National Committee. The debate touched on the question of how the party would conduct the presidential campaign in the 14 states that were expected to matter in 2012.²¹⁷ Thus, two years before the 2012 presidential election, 36 states had been written off.

Tara Ross claims that

“NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in small states.”²¹⁸

The political reality is that the National Popular Vote plan cannot possibly “lessen the need” of candidates to win the support of small states because candidates have *no need* whatsoever to solicit the support of the small states under the current state-by-state winner-take-all system. In fact, it is the winner-take-all rule that renders the small states “almost permanently irrelevant in presidential political strategy.”²¹⁹

In fact, a national popular vote is the *only* way to give voters in the nation’s small states a voice in presidential elections. For example, proposals to award electoral votes by congressional district or proportionally (section 9.23) would have no meaningful effect in states with only three or four electoral votes. Under a national popular

²¹⁶ Already, Obama and McCain Map Fall Strategies. *New York Times*. May 11, 2008.

²¹⁷ Freedomworks debate on December 1, 2010, available at <http://www.freedomworks.org/rnc>.

²¹⁸ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²¹⁹ See section 9.31.10 for a discussion of rural states..

vote, a voter in a reliably one-party small state would become as important as a voter anywhere else in the country.

9.4.2. MYTH: Thirty-one states would lose power under a national popular vote.

QUICK ANSWER:

- Morton Blackwell’s calculation purportedly showing that 31 states would “lose power” under a national popular vote is based on a politically irrelevant calculation comparing each state’s percentage of the nation’s 132 million voters with its percentage of the 538 electoral votes.
- This arithmetic calculation gives the impression that the 31 smallest states have clout in presidential elections because their percentage of the 538 electoral votes is larger than their percentage of the nation’s voters (because of each state’s two senatorial presidential electors). However, this calculation ignores the political reality that clout in presidential elections comes from being a closely divided battleground state.
- Under the current state-by-state winner-take-all method for awarding electoral votes, the political reality is that a vote for President in most below-average-sized states is politically irrelevant.

MORE DETAILED ANSWER:

Morton C. Blackwell (who hails from the battleground state of Virginia) stated in a 2011 article entitled “National Popular Vote Plan Would Hurt Most States” that

“31 states would lose power in presidential elections under [the National Popular Vote] plan.”²²⁰

Blackwell bases this statement upon an arithmetic calculation that compares each state’s percentage of the nation’s 132 million voters to its percentage of the 538 electoral votes.

For example, Wyoming’s three electoral votes is 0.56% of the 538 votes in the Electoral College. The 256,035 popular votes cast in Wyoming in 2008 were 0.19% of the nation’s 132 million voters—a much smaller percentage than 0.56%. The difference between 0.56% and 0.19% is 0.37%, and this 0.37% difference represents a loss of 66% from the original 0.56%.

Blackwell then interprets this 0.37% drop as meaning that Wyoming would “lose power.”

As Blackwell says:

²²⁰ Blackwell, Morton C. National Popular Vote plan would hurt most states. June 25, 2011. <http://www.westernjournalism.com/national-popular-vote-plan-would-hurt-most-states/>.

“If NPV had been in effect in 2008, Delaware would have lost 44% of its power. Rhode Island would have lost 51.49% of its power. Wyoming’s power would have dropped by 65.48%. The pattern is the same for all the smaller-population states.

“Gainers under NPV would be the larger states.”

Table 9.7 shows that 33 states have fewer electoral votes than 11—the number of electoral votes possessed by the average-sized state. For each of these 33 states, the state’s percentage of the 538 electoral votes is (because of each state’s two senatorial electoral votes) larger than the state’s percentage of the nation’s population.

A calculation similar to Blackwell’s creates the impression that these states would “lose power” under a national popular vote; however, this arithmetic calculation ignores the political reality (as explained in detail in section 9.4.1) that political clout in presidential elections comes from being a closely divided battleground state—not from a state’s number of electoral votes.

As can be seen from a glance at table 9.7, most of the 33 below-average-sized states are ignored under the current state-by-state winner-take-all system because they are not battleground states. Only 10 of these below-average-sized states received any of the 300 post-convention campaign events in 2008. These 10 states together received 72 of the 300 post-convention events. Moreover, six states received 67 of these 72 events:

- New Hampshire—12
- New Mexico—8
- Nevada—12
- Iowa—7
- Colorado—20
- Wisconsin—8.

Twenty-three of the 33 below-average-sized states received no campaign events. Yet, Blackwell claims that the below-average-sized states somehow benefit from the current state-by-state winner-take-all system.

In summary, far from having enhanced influence under the current system, most below-average-sized states have no clout in presidential elections because they are not battleground states.

9.4.3. MYTH: The small states are so small that they will not attract any attention under any system.

QUICK ANSWER:

- The small states (those with three or four electoral votes) are not ignored because they are small, but because almost all of them are non-competitive one-party states in presidential elections. The battleground state of New Hampshire received 13 of the 253 post-convention campaign events in 2012, while the 12 other small non-battleground states received none.

- Serious candidates for office solicit every vote *that matters*. Every vote in every state would matter in every presidential election under the National Popular Vote plan.
- Under a national popular vote, a voter in a small state would become as important as any other voter in the United States.
- The 13 small states together have approximately the same population as Ohio, and no one would suggest that Ohio would be ignored in a national popular vote for President.
- In most cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs.

MORE DETAILED ANSWER:

Some argue that the small states have so few people that they will not attract any attention from presidential candidates under any system. However, the fact is that serious candidates for office solicit every voter *that matters* regardless of location.

Table 9.9 addresses the argument that small states are too small to attract the attention of presidential candidates. For the 13 small states (i.e., those with three or four electoral votes), the table shows the distribution of presidential and vice-presidential campaign events during the post-convention general election campaign for 2008.

The table shows that the determinant of whether a state receives attention is whether it is a closely divided battleground state—not its size.

Because it was a closely divided battleground state, New Hampshire received 12 of the 300 post-convention general election campaign events in 2008 and 13 of the 253 post-convention events in 2012.

Because Maine awards electoral votes by congressional district, and its 2nd congressional district is a closely divided district, Maine's 2nd district received two post-convention campaign events in 2008.

Aside from one campaign event in the District of Columbia, all of the other small states received no attention whatsoever.

Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, Hawaii, and Idaho were all ignored not because they were small, but because presidential candidates had nothing to gain by paying any attention to them under the state-by-state winner-take-all system.

The fact that serious candidates solicit every voter *that matters* was also demonstrated in 2008 by Nebraska's 2nd congressional district (the Omaha area). Even though each congressional district in the country contains only 1/4% of the country's population, the Obama campaign operated three separate campaign offices staffed by 16 people there. The Campaign Media Analysis Group at Kantar Media reported that \$887,433 in ads were run in the Omaha media market in 2008.²²¹ The reason for this

²²¹The 2008 ad spending figure was reported in Steinhauser, Paul. Nevada number one in ad spending per electoral vote. *CNN Politics*. July 4, 2012.

**Table 9.9 CAMPAIGN EVENTS IN THE
13 SMALLEST STATES IN 2008**

STATE	CAMPAIGN EVENTS
Wyoming	-
District of Columbia	1
Vermont	-
North Dakota	-
Alaska	-
South Dakota	-
Delaware	-
Montana	-
Rhode Island	-
Hawaii	-
New Hampshire	12
Maine	2
Idaho	-

activity in the Omaha area was that Nebraska awards electoral votes by congressional district. Both parties paid attention to the 2nd district because it was a closely divided battleground district where one electoral vote was at stake. The outcome in 2008 was that Barack Obama carried the 2nd district by 3,378 votes and thus won one electoral vote from Nebraska.

The fact that serious candidates solicit every voter *that matters* was also demonstrated by the fact that Mitt Romney opened a campaign office in Omaha in July 2012 in order to compete in Nebraska's 2nd district²²² and that the Obama campaign was also active in the Omaha area.²²³

One Nebraska state senator whose district lies partially in the 2nd congressional district reported a heavy concentration of lawn signs, mailers, precinct walking, telephone calls to voters, and other campaign activity related to the 2008 presidential race in the portion of his state senate district that was inside the 2nd congressional district, but no such activity in the remainder of his state senate district. Indeed, neither the Obama nor the McCain campaigns paid the slightest attention to the people of Nebraska's heavily Republican 1st district or heavily Republican 3rd district, because it was a foregone conclusion that McCain would win both of those districts. The issues relevant to voters of the 2nd district (the Omaha area) mattered, while the (very different) issues relevant to the remaining (mostly rural) two-thirds of Nebraska were irrelevant.

Similarly, in Maine (which also awards electoral votes by congressional district), the closely divided 2nd congressional district (in the northern part of the state) re-

²²² Walton, Don. Romney will compete for Omaha electoral vote. *Lincoln Journal Star*. July 19, 2012.

²²³ Henderson, O. Kay. Obama trip targets seven electoral college votes in Iowa, Nebraska. *Radio Iowa*. August 13, 2012.

ceived campaign events in 2008, whereas Maine’s predictably Democratic 1st district was ignored.

When votes matter, presidential candidates vigorously solicit those voters. When votes don’t matter, they ignore those areas.

In many cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs (as discussed in section 9.31.7).

Although no one can predict exactly how a presidential campaign would be run under the National Popular Vote plan, we do know how candidates conduct campaigns when running for other offices in elections in which the winner is the candidate who receives the most popular votes in the entire jurisdiction. In campaigns for Governor, U.S. Senator, mayor, and state legislator, candidates pay attention to their entire constituency.

It would be inconceivable for a serious candidate for Governor to ignore four out of five voters in the state.

The 13 small states have approximately the same population as Ohio (about 12 million people). No one would suggest that Ohio would be ignored in a national popular vote for President. Therefore, there is no reason to expect that the 12 million people in the 13 small states would be ignored. Under a national popular vote, a vote in a small state would be equal to a vote in Ohio.

9.4.4. MYTH: The small states oppose a national popular vote for President.

QUICK ANSWER:

- The National Popular Vote bill has been enacted by Hawaii, Vermont, and the District of Columbia. As of 2012, the bill has been approved by a total of nine legislative chambers in small states (i.e., those with three or four electoral votes).
- Public support for a national popular vote for President runs slightly higher than the national average in most of the small states.
- In a 1966 lawsuit, the state of Delaware and a group of 12 predominantly small states argued that the state-by-state winner-take-all rule “debases the national voting rights and political status of Plaintiff’s citizens and those of other small states.”

MORE DETAILED ANSWER:

The facts speak for themselves. As of 2012, the National Popular Vote bill has been enacted into law by Hawaii, Vermont, and the District of Columbia. In addition, it has passed a total of nine legislative chambers in small states (i.e., those with three or four electoral votes), including the Delaware House, Maine Senate, and both houses in Rhode Island.

The concept of a national popular vote for President has a high level of support in small states.

- Alaska (70%),
- Delaware (75%),
- District of Columbia (76%),
- Idaho (77%),
- Maine (77%),
- Montana (72%),
- New Hampshire (69%),
- Rhode Island (74%),
- South Dakota (75%),
- Vermont (75%), and
- Wyoming (69%).²²⁴

In fact, public support for a national popular vote runs slightly higher than the national average in most of the small states. The *Washington Post*, Kaiser Family Foundation, and Harvard University poll in 2007 showed 72% support for direct nationwide election of the President. The reason may be that small states are the most disadvantaged group of states under the current system (as discussed in section 9.2).

As discussed in greater detail in section 9.4.1, the state of Delaware and a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) argued in a 1966 lawsuit before the U.S. Supreme Court that the state-by-state winner-take-all rule

“debases the national voting rights and political status of **Plaintiff’s citizens and those of other small states.**” [Emphasis added]

9.4.5. MYTH: Equal representation of the states in the U.S. Senate is threatened by the National Popular Vote plan.

QUICK ANSWER:

- The equal representation of the states in the U.S. Senate is explicitly established and protected in the U.S. Constitution and cannot be affected by passage of any state law or interstate compact.
- The National Popular Vote plan does not affect the equal representation of the states in the U.S. Senate.

²²⁴These polls (and many others) are available on National Popular Vote’s web site at <http://www.national-popularvote.com/pages/polls>.

MORE DETAILED ANSWER:

Equal representation of the states in the U.S. Senate is explicitly established in the U.S. Constitution. This feature cannot be changed by any state law or an interstate compact.

In fact, equal representation of the states in the U.S. Senate may not even be amended by an ordinary federal constitutional amendment. Article V of the U.S. Constitution provides:

“No State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

Thus, this feature of the U.S. Constitution may only be changed by a constitutional amendment approved by *unanimous* consent of all 50 states.

In contrast, the U.S. Constitution explicitly assigns the power of selecting the manner of appointing presidential electors to the states. The enactment by a state legislature of the National Popular Vote bill is an exercise of a state legislature’s existing powers under the U.S. Constitution.

In short, enactment of the National Popular Vote compact has no bearing on the federal constitutional provisions establishing equal representation of the states in the U.S. Senate.

9.4.6. MYTH: The distribution of political influence envisioned by the Great Compromise would be upset by a national popular vote.

QUICK ANSWER:

- The distribution of political influence among the states in the Electoral College changed dramatically after political parties emerged in 1796 and winner-take-all statutes became widespread (by 1832).
- Political influence in the Electoral College today is not based on the distribution of electoral votes among the states, but instead on whether a state is a closely divided battleground state.

MORE DETAILED ANSWER:

The “Great Compromise” (also known as the “Connecticut Compromise” and “Sherman’s Compromise”) was adopted by the Constitutional Convention in July 1787. It was one of the most important compromises that permitted the Constitutional Convention to proceed to a successful conclusion.

The Great Compromise established a bicameral national legislature in which the U.S. House of Representatives was apportioned on the basis of population, and the Senate was structured on the basis of equal representation of the states (i.e., two Senators per state).

The National Popular Vote compact deals exclusively with the method of appointing presidential electors. It would, therefore, have no effect on the structure of the

nation’s national legislature (that is, Congress). Changing the structure of Congress would require a federal constitutional amendment.

The delegates to the Constitutional Convention did not reach a compromise on the method of electing the President until the end of the Convention in September.²²⁵ By that time, all of the other major issues had been settled. In particular, the notion of having a bicameral national legislature was settled at that time.

When the Convention finally agreed that the President would be elected by an Electoral College, each state was allocated as many presidential electors as it had members in the two houses of Congress. That is, the allocation of votes in the Electoral College mirrored the overall allocation of votes in Congress, and the Electoral College became a “shadow” Congress (in which members of Congress are ineligible to serve).

The National Popular Vote bill is state legislation and therefore would have no effect on the formula in the U.S. Constitution for allocating electoral votes among the states. Changing the formula for allocating electoral votes among the states would require a federal constitutional amendment.

A posting to an election blog questioned the constitutionality of the National Popular Vote interstate compact on the basis of the Great Compromise:

“The NPVIC also undercuts the Great Compromise which was necessary to creation of the Constitution, by in effect **changing the balance of power in choice of the President so that it does not reflect the two electoral votes that each state is to have** as a result of simply being a state.”²²⁶ [Emphasis added]

The “balance of power in [the] choice of the President” has been dramatically changed by state legislation in the past—most notably by the widespread adoption of the winner-take-all rule in the 1820s and 1830s by means of state legislation.²²⁷

Once the winner-take-all rule became widespread, a state’s “power in [the] choice of the President” was primarily determined by whether the state was a closely divided battleground state, not its number of electoral votes.

The Great Compromise intended to confer a certain amount of extra influence on the less populous states by giving every state a bonus of two electoral votes corresponding to its two U.S. Senators. The Founders also intended that the Constitution’s formula for allocating electoral votes would give the bigger states a larger amount of influence in presidential elections.

²²⁵ Edwards, George C. III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press.

²²⁶ In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution.

²²⁷ The U.S. Supreme Court has ruled the winner-take-all rule is constitutional. *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 - Dist. Court, ED Virginia 1968. The full opinion may be found in appendix FF. The U.S. Supreme Court affirmed this decision in a *per curiam* decision in 1969. *Williams v. Virginia State Board of Elections*. 393 U.S. 320 (1969) (*per curiam*).

The Founding Fathers' goals with respect to *both* small states and big states were never achieved because of the widespread adoption by the states of the winner-take-all rule.

Despite the Great Compromise, small states (i.e., those with three and four electoral votes such as Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, Hawaii, Maine, and Idaho) have no “power in choice of the President” because they are one-party states that are consistently ignored because of state winner-take-all statutes. The small states still nominally retain the number of electoral votes assigned to them by the Constitution, and they still dutifully cast their full number of electoral votes in the Electoral College in mid-December. However, their political “power in [the] choice of the President” was extinguished in the 1830s as a result of state winner-take-all statutes.

Similarly, numerous big states (e.g., New York, Texas, Illinois, and New Jersey) have had no “power in [the] choice of the President” for decades because of state winner-take-all statutes. These big states still nominally retain the number of electoral votes assigned to them by the Constitution, and they still cast their full number of electoral votes in the Electoral College. However, everyone knows that they don't matter in presidential elections.

The fact that “power in [the] choice of the President” flows from a state's battleground status rather than its number of electoral votes can be seen by comparing two states with an identical number of electoral votes. New York and Florida each have 29 electoral votes. Since 1996, Florida has received considerable attention in presidential campaigns because it has been a closely divided battleground state. Meanwhile, New York (with the same 29 electoral votes as Florida) has been ignored.

One can similarly compare New Hampshire with any small state (say, Rhode Island) possessing the same four electoral votes. For many decades prior to 1992, New Hampshire was consistently ignored in the post-convention general-election campaigns because it was safely Republican. However, since 1992, the issues of concern to New Hampshire voters have been foremost in the minds of the presidential candidates because it has been a closely divided battleground state. Meanwhile, safely democratic Rhode Island was ignored.

The National Popular Vote compact would not change the Constitution's allocation of electoral votes among the states. Nonetheless, like the winner-take-all rule, it would decidedly change “the balance of power in [the] choice of the President.” Under the National Popular Vote compact, *every* voter in *every* state would be politically relevant in *every* presidential election.

The Great Compromise still governs a state's relative political influence in terms of the process of activating the National Popular Vote compact. Small states have greater influence than their population would warrant in the process of determining whether the compact has the support of states possessing a majority of the electoral votes.

In short, the Great Compromise relates to the formal structure and numerical allocation of electoral votes among the states—a state's “power in choice of the President.”

9.5. MYTHS ABOUT BIG CITIES

9.5.1. MYTH: Big cities, such as Los Angeles, would control a nationwide popular vote for President.

QUICK ANSWER:

- Under a national popular vote, every vote would be equal throughout the United States. A vote cast in a big city would be no more (or less) valuable or controlling than a vote cast anywhere else.
- Los Angeles does not control the outcome of statewide elections in California and therefore is hardly in a position to dominate a nationwide election. The fact that Los Angeles does not control the outcome of statewide elections in its own state is evidenced by the fact that Republicans such as Ronald Reagan, George Deukmejian, Pete Wilson, and Arnold Schwarzenegger were elected Governor in recent years without ever winning Los Angeles.
- The origins of the myth about big cities may stem from the misconceptions that big cities are bigger than they actually are, and that big cities account for a greater fraction of the nation's population than they actually do. In fact, 85% of the population of the United States lives in places with a population of fewer than 365,000 (the population of Arlington, Texas—the nation's 50th biggest city).

MORE DETAILED ANSWER:

In a nationwide vote for President, a vote cast in a big city would be no more (or less) valuable or important than a vote cast in a suburb, an exurb, a small town, or a rural area.

When every vote is equal, candidates know that they need to solicit voters throughout their *entire* constituency in order to win.

A candidate cannot win a statewide election in California by concentrating on Los Angeles. When Ronald Reagan, George Deukmejian, Pete Wilson, and Arnold Schwarzenegger ran for Governor, Los Angeles did not receive all the attention. In fact, none of these four recent Republican Governors ever carried Los Angeles (or San Francisco, San Jose, or Oakland). Los Angeles certainly does not control the outcome of statewide elections in California. If Los Angeles cannot control statewide elections in its own state, it can hardly control a nationwide election.

It is certainly true that most of the biggest cities in the country vote Democratic. However, the exurbs, small towns, and rural areas usually vote Republican.

If big cities controlled the outcome of elections, every Governor and every U.S. Senator in every state with a significant city would be a Democrat. The facts are that there are examples from every state with a significant city of Republicans who have won races for Governor and U.S. Senator without ever carrying the big cities of their respective states.

Perhaps the best illustration of the fact that big cities do not control elections comes from looking at the way that presidential races are actually run today inside battleground states.

Inside a battleground state in a presidential election *today*, every vote is equal, and the winner is the candidate who receives the most popular votes in that state.

When presidential candidates campaign to win the electoral votes of a closely divided battleground state, they campaign throughout the state. The big cities do not receive all the attention—much less control the outcome. Cleveland and Miami certainly do not receive all the attention when presidential candidates have campaigned in the closely divided battleground states of Ohio and Florida. Moreover, Cleveland and Miami manifestly do not control the statewide outcomes in Ohio and Florida, as evidenced by the outcome of the 2000 and 2004 presidential elections in those states. The Democrats carried both Cleveland and Miami in 2000 and 2004, but the Republicans carried both states. In fact, Senator John Kerry won the five biggest cities in Ohio in 2004, but he did not win the state.

The origins of the myth about big cities may stem from the misconceptions that big cities are bigger than they actually are, and that big cities account for a greater fraction of the nation's population than they actually do.

A look at our country's actual demographics contradicts these misconceptions concerning big cities.

Table 9.37 in section 9.31.6 shows the population of the nation's 50 biggest cities according to the 2010 census.

As can be seen from table 9.37, the population of the nation's five biggest cities (New York, Los Angeles, Chicago, Houston, and Philadelphia) represents only 6% of the nation's population of 308,745,538 (based on the 2010 census).

The population of the nation's 20 biggest cities represents only 10% of the nation's population. To put this group of 20 cities in perspective, Memphis is the nation's 20th biggest city. Memphis had a population of 647,000 in 2010.

The population of the 50 biggest cities together accounts for only 15% of the nation's population. To put this group of 50 cities in perspective, Arlington, Texas is the nation's 50th biggest city (and had a population of 365,438 in 2010).

To put it another way, 85% of the population of the United States lives in places with a population of less than 365,000 (the population of Arlington, Texas).

Moreover, the population of the nation's 50 biggest cities is declining. In 2000, the 50 biggest cities together accounted for 19% of the nation's population (compared to 15% in 2010).

Even if one makes the far-fetched assumption that a candidate could win 100% of the votes in the nation's 50 biggest cities, that candidate would have won only 15% of the national popular vote.

In a nationwide vote for President, a vote cast in a big city would be no more (or less) valuable or controlling than a vote cast in a suburb, an exurb, a small town, or a rural area.

The current state-by-state winner-take-all system does not throttle the political importance of big cities in presidential elections. Big cities, such as Cleveland, Philadelphia, and Miami that are located in closely divided battleground states are critically important in presidential races (as are the suburban, ex-urban, and rural parts of their states). However, big cities such as Houston, Atlanta, and Seattle that are located in spectator states are politically irrelevant (as are all other parts of those states).

The current state-by-state winner-take-all system elevates the political importance of a city such as Milwaukee that is located in the battleground state of Wisconsin, while minimizing the importance of cities such as Minneapolis and Baltimore that are located in spectator states such as Minnesota and Maryland (each of which has the same 10 electoral votes as Wisconsin).

Under the National Popular Vote compact, every vote would be equal throughout the United States. A vote cast in a big state would be no more, or less, valuable or controlling than a vote cast anywhere else.

An additional indication of the way that a nationwide presidential campaign would be run comes from the way that national advertisers conduct nationwide sales campaigns. National advertisers (e.g., Ford, Coca-Cola) seek out customers in small, medium-sized, and large towns as well as rural areas in every state. National advertisers do not advertise exclusively in big cities. Instead, they go after every potential customer, regardless of where the customer is located. In particular, national advertisers do not write off a particular state merely because a competitor already has an 8% lead in sales in that state (whereas presidential candidates routinely do this because of the current state-by-state winner-take-all system). Furthermore, a national advertiser with an 8% edge in a particular state does not stop trying to make additional sales because they are already No. 1 in sales in that state (whereas presidential candidates routinely do this under the current system).

See section 9.31.6 for additional discussion about big cities.

9.5.2. MYTH: A major reason for establishing the Electoral College was to prevent elections from becoming contests where presidential candidates would simply campaign in big cities.

QUICK ANSWER:

- Given the historical fact that 95% of the U.S. population in 1790 lived in places with fewer than 2,500 people, it is unlikely that the Founding Fathers were concerned about presidential candidates campaigning only in big cities.

MORE DETAILED ANSWER:

Hans von Spakovsky has stated that the National Popular Vote compact:

“would undermine the protections of the Electoral College, elevating the importance of big urban centers like New York and Los Angeles while diminishing the influence of smaller states and rural areas. **That was a major**

reason for establishing the Electoral College in the first place: to prevent elections from becoming contests where presidential candidates would simply campaign in big cities for votes.²²⁸ [Emphasis added]

Table 9.10 shows the only five places in the United States with a population of over 10,000 in 1790. The total population of these five places was 109,835—2.8% of the country's population of 3,929,214, according to the 1790 census.

There were only 24 places with a population over 2,500 in 1790. The total population of those 24 places was 201,655—5% of the country's total population.

Thus, it is implausible that the Founding Fathers were concerned that “presidential candidates would simply campaign in big cities for votes.”

Moreover, it is not likely that the Founding Fathers were concerned about “campaigning” *anywhere* because they envisioned that the Electoral College would be a deliberative body.

As John Jay (the presumed author of *Federalist No. 64*) said of presidential electors in 1788:

“As the **select assemblies for choosing the President . . .** will in general be **composed of the most enlightened and respectable citizens**, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues.”²²⁹ [Emphasis added]

As Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

“[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **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 such complicated investigations.**”²³⁰ [Emphasis added]

In any event, the current state-by-state winner-take-all system does not throttle the political importance of big cities in presidential elections. Big cities that are located in closely divided battleground states (such as Cleveland, Philadelphia, and Miami) are important in presidential races, while big cities that are located in spectator states (such as Chicago, Houston, and Seattle) are politically irrelevant.

In any case, the facts today are that rural areas are highly disadvantaged under the current state-by-state winner-take-all system (as discussed in section 9.31.10).

²²⁸ von Spakovsky, Hans A. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

²²⁹ The powers of the senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

²³⁰ Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

Table 9.10 POPULATION OF THE ONLY FIVE PLACES IN THE U.S. WITH POPULATION OVER 10,000 IN 1790

RANK	PLACE	POPULATION
1	New York	33,131
2	Philadelphia	28,522
3	Boston	18,320
4	Charleston	16,359
5	Baltimore	13,503
Total		109,835

Moreover, the small states are the most disadvantaged of all under the current state-by-state winner-take-all system (as discussed in section 9.4.1).

Under the National Popular Vote compact, every vote would be equal throughout the United States. A vote cast in a big city would be no more, or less, valuable or controlling than a vote cast anywhere else.

9.5.3. MYTH: Candidates would only campaign in media markets, while ignoring the rest of the country.

QUICK ANSWER:

- Every person in the United States lives in a media market, including the media markets for television, radio, newspapers, magazines, direct mail, billboards, telephone, and the Internet.

MORE DETAILED ANSWER:

This myth appears to be a carry-over from the early days of over-the-air television when political advertising did not reach significant parts of the country.

Today, every person in the United States lives in a media market, including the media markets for television, radio, newspapers, direct mail, billboards, magazines, telephone, and the Internet.

Focusing on television (the largest single component of spending in presidential campaigns), virtually everyone in the United States has access to television. This has been true for decades. No one in the United States will be left out of a presidential campaign because they do not live in a media market, because everyone in the United States lives in some media market.

People are, however, left out of presidential campaigns under the current system because of the state-by-state winner-take-all method of awarding electoral votes. Candidates have no incentive to pay any attention to voters who do not live in closely divided battleground states. Under a national popular vote, every voter would be politically relevant. Every person's vote in every state would matter in every presidential election.

For a comparison of media costs in big cities and other parts of the country, see section 9.31.7.

9.6. MYTH ABOUT STATE IDENTITY

9.6.1. MYTH: The public strongly desires that electoral votes be cast on a state-by-state basis because it provides a sense of “state identity.”

QUICK ANSWER:

- A state’s political “identity” is based on how *all* its citizens voted—not just how a plurality voted. The National Popular Vote plan would give voice to every voter in every state, as opposed to treating the minority within each state as if it did not exist.
- The choice presented by the National Popular Vote plan is whether it is more important for the winner of the most popular votes in the entire country to become President or for the winner of the popular vote in a particular state to receive that state’s electoral votes.
- The most important aspect of a presidential election is to elect someone to serve for four years as the nation’s chief executive—not to enable a group of largely unknown party activists to meet for a half hour in mid-December for the ceremonial purpose of casting electoral votes.
- In public opinion polls since the 1940s and in recent state-level polls, the public has strongly favored the idea that the President should be the candidate who receives the most popular votes in the entire country. Support remains strong when people are pointedly asked whether it is more important that a state’s electoral votes be cast for the presidential candidate who receives the most popular votes in their own particular state, or whether it is more important to guarantee that the candidate who receives the most popular votes in all 50 states and the District of Columbia becomes President.
- State-level election returns would continue to be published under the National Popular Vote plan, so there would be no lack of information about how the plurality voted in a particular state.

MORE DETAILED ANSWER:

Under the National Popular Vote compact, all the electoral votes from the states belonging to the compact would be awarded to the presidential candidate who receives the most popular votes in all 50 states (and the District of Columbia). The bill would take effect only when enacted by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538).

The Democrats and Republicans each win the national popular vote in about half of all presidential elections (table 9.25). As a result, in about half of all elections, the presidential electors from a state belonging to the compact will not be from the same political party that received the most votes in that state.

The choice presented by the National Popular Vote plan is whether it is more im-

portant for the winner of the most popular votes in the entire country to become President or for the winner in a particular state to receive the state’s electoral votes.

It is sometimes asserted that “the voters would rebel” when they discover that, as a result of the National Popular Vote compact, their state’s electoral votes were awarded to a candidate who did not carry their own state.

This conjectured voter rebellion is based on the incorrect assumptions that:

- the voters care more about which candidate won their state than who is going to occupy the White House for four years;
- the voters would be surprised and shocked if the National Popular Vote compact resulted in the election of the presidential candidate who receives the most popular votes nationwide; and
- the voters are devoted and attached to the current state-by-state winner-take-all method of electing the President and would be unhappy if it were gone.

First, when voters watch presidential election returns on Election Night, they are primarily interested in finding out which candidate won the Presidency. The question of whether their preferred candidate won their state, county, city, congressional district, or precinct is a secondary concern. When a voter’s preferred candidate loses the White House, it is no consolation if the voter’s own candidate happened to win a plurality in the voter’s own state.

On Election Night in 2008, Senator McCain’s supporters in Texas were not celebrating because McCain won the most popular votes in Texas. Barack Obama’s supporters in Texas were not disconsolate because McCain won the popular vote in Texas.

Most voters are not concerned about the ceremonial position of presidential elector. The average voter does not derive any satisfaction, on Election Night, from knowing that some little-known person associated with his or her own political party won the honorary position of presidential elector. It is the rare voter who knows the name of any presidential elector. Moreover, most voters are concerned with which candidate won the White House, not which candidate carried their state (or district or county or precinct). Certainly, on Election Night in 2008, McCain’s Texas supporters were not celebrating because the Republican Party’s 34 nominees for the position of presidential electors would be meeting in Austin, Texas, on December 15, 2008.

Under the National Popular Vote plan, the focus of public attention in the months prior to a presidential election would be on polls of the popular vote from the entire United States—not just on state-level polls from a small handful of closely divided battleground states. In fact, the concept of a battleground state would become obsolete under the National Popular Vote compact, because every voter would matter in every state in every presidential election.

Tellingly, there was no voter rebellion in reaction to the enactment by Maine (in 1969) and Nebraska (in 1992) of state laws that permit the awarding of electoral votes to a candidate who does not carry the state. Similarly, there was no voter rebellion in

Nebraska after Barack Obama carried the 2nd congressional district (the Omaha area) in the 2008 presidential election. The district system was the choice of the people's elected representatives in Nebraska, and it was the law that governed the conduct of the presidential election in Nebraska in 2008. Nebraska's law operated exactly as advertised in that it delivered one of the state's five electoral votes to the winner of the 2nd district (Barack Obama), despite the fact that John McCain won the state as a whole.

Not only was there no voter rebellion in Nebraska in the immediate aftermath of Obama receiving one of the state's electoral votes on December 15, 2008, there was no voter rebellion in 2009, 2010, 2011, or 2012, when the Nebraska legislature had ample opportunity to replace Nebraska's current law for awarding electoral votes on a district-by-district basis with the winner-take-all rule (i.e., awarding all of Nebraska's five electoral votes to the candidate who receives the most popular votes in Nebraska). A bill to switch Nebraska to the winner-take-all rule was introduced in the Nebraska legislature in 2009, 2010, 2011, and 2012. However, the winner-take-all bill never moved out of legislative committee even though Republicans (the party that lost the one electoral vote to Obama in 2008) controlled the legislature by roughly a two-to-one margin during this entire period.²³¹

Second, the voters would not be surprised or shocked when the national popular vote winner becomes President under the National Popular Vote plan. The environment of a future presidential election under the National Popular Vote plan would consist of the following elements:

- A nationwide presidential campaign will have been conducted, over a period of many months, with everyone in the United States understanding that the presidential candidate receiving the most votes in all 50 states and the District of Columbia is legally entitled to win the Presidency.
- About 70% of the voters believe that the presidential candidate receiving the most votes in all 50 states and the District of Columbia should win the Presidency.
- The state legislature responded to their voters' wishes and enacted the National Popular Vote law in their state.
- The legislatures and Governors of states possessing a majority of the electoral votes similarly responded to their voters and, as a result, the National Popular Vote compact had sufficient support to take effect nationally.
- The public noticed that presidential candidates were, for the first time, paying attention to voters in every state instead of just the voters in a handful of closely divided battleground states.
- On Election Day in November, the National Popular Vote compact operated

²³¹The Nebraska legislature is officially non-partisan; however, two-thirds of the legislators are known Republicans.

exactly as advertised and delivered a majority of the electoral votes to the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

Third, the conjectured voter rebellion would not occur, because most voters are not attached to the current state-by-state winner-take-all method of electing the President. To the contrary—most voters favor a national popular vote for President.

For example, a survey of 800 Utah voters conducted on May 19–20, 2009, showed 70% overall support for the idea that the President of the United States should be the candidate who receives the most popular votes in all 50 states. Voters were asked:

“How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?”

By political affiliation, support for a national popular vote on the first question was 82% among Democrats, 66% among Republicans, and 75% among others. By gender, support was 78% among women and 60% among men. By age, support was 70% among 18–29 year-olds, 70% among 30–45 year-olds, 70% among 46–65 year-olds, and 68% for those older than 65.

Then, voters were pointedly asked a “push” question that specifically highlighted the fact that Utah’s electoral votes would be awarded to the winner of the national popular vote in all 50 states under the National Popular Vote compact.

“Do you think it more important that a state’s electoral votes be cast for the presidential candidate who receives the most popular votes in that state, or is it more important to guarantee that the candidate who receives the most popular votes in all 50 states becomes President?”

Support for a national popular vote dropped in this “push” question, but only from 70% to 66%.

On this second question, support by political affiliation was as follows: 77% among Democrats, 63% among Republicans, and 62% among others. By gender, support was 72% among women and 58% among men. By age, support was 61% among 18–29 year-olds, 64% among 30–45 year-olds, 68% among 46–65 year-olds, and 66% for those older than 65.²³²

Similarly, a survey of 800 South Dakota voters conducted on May 19–20, 2009, showed 75% overall support for a national popular vote for President for the first question and 67% for the “push” question.

A survey of 800 Connecticut voters conducted on May 14–15, 2009, showed 74% overall support for a national popular vote for President on the first question. The re-

²³²The Utah survey (and the others cited in this section) was conducted by Public Policy Polling and had a margin of error of plus or minus 3 1/2%. See <http://www.nationalpopularvote.com/pages/polls>.

sults of the first question, by political affiliation, were 80% support among Democrats, 67% among Republicans, and 71% among others.

Then, voters were asked the following “push” question that specifically highlighted the fact that Connecticut’s electoral votes would be awarded to the winner of the national popular vote in all 50 states.

“Do you think it more important that Connecticut’s electoral votes be cast for the presidential candidate who receives the most popular votes in Connecticut, or is it more important to guarantee that the candidate who receives the most popular votes in all 50 states becomes President?”

Support for a national popular vote dropped in this “push” question, but only from 74% to 68%.

On the second question, support by political affiliation was 74% among Democrats, 62% among Republicans, and 63% among others.

In Gallup polls since 1944, only about 20% of the public has supported the current system of awarding all of a state’s electoral votes to the presidential candidate who receives the most votes in each separate state (with about 70% opposed and about 10% undecided). The 2007 *Washington Post*, Kaiser Family Foundation, and Harvard University poll showed 72% support for direct nationwide election of the President.

For those concerned about “state identity,” official election returns showing the popular vote for President would continue to be certified and documented (as required by existing federal and state laws), so the information as to which presidential candidate received a plurality of the votes in a particular state would be known to all.

The concern that a state’s electoral votes might be cast, in some elections, in favor of a candidate who did not carry a particular state is a matter of form over substance.

The essence of a nationwide popular vote for President is that the winner would be determined by the nationwide popular vote—not by separate state-by-state outcomes. The National Popular Vote law would be a legally binding agreement among the compacting states to award their electoral votes to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. It is a method to reform the Electoral College so that it reflects the nationwide will of the people.

The purpose of the National Popular Vote bill is to replace the state-by-state method of awarding electoral votes with a system based on the national popular vote. State winner-take-all statutes are what enable a second-place candidate to win the White House. It is the current state-by-state winner-take-all system that makes voters unequal in presidential elections. It is the current state-by-state system that makes four out of five states and four out of five Americans politically irrelevant in presidential elections. Under the state-by-state winner-take-all method, candidates have no reason to poll in, conduct campaign events in, advertise in, build a grassroots organization in, or pay attention to the concerns of voters in states where they are comfortably ahead or hopelessly behind. Instead, candidates concentrate their attention on a small handful of closely divided battleground states.

One way to view the National Popular Vote compact is to consider it from the perspective of two states from opposite ends of the political spectrum—say, Alaska and Vermont. Politically, these states are almost mirror images of each other. They have approximately the same population, and they each possess three electoral votes. Alaska is reliably Republican, and Vermont is reliably Democratic in presidential elections. In 2004, Alaska generated a 65,812-vote margin for the Republican presidential nominee, and Vermont generated a 62,911-vote margin for the Democrat.

Under the current state-by-state winner-take-all system of awarding electoral votes, both Alaska and Vermont are totally ignored in presidential elections because neither party has anything to gain by paying any attention to them. Alaska and Vermont are not ignored because they are small. They are ignored because the winner-take-all rule makes them irrelevant in presidential politics.

Consider, for the sake of argument, a hypothetical Alaska–Vermont interstate compact in which both states agree to award their combined six electoral votes to the winner of the combined popular vote in those two states. Such a bi-state compact would create a closely divided political battleground “super-state” that would immediately get the attention of both presidential campaigns. (Note that this hypothetical Alaska–Vermont compact operates differently from the National Popular Vote compact in that Alaska and Vermont would award their six electoral votes based on the total popular vote *inside* those two states, whereas the National Popular Vote compact would award the electoral votes of the enacting states based on the total popular vote in *all* 50 states and the District of Columbia). Under the hypothetical Alaska–Vermont compact, voters in both states would suddenly matter to both parties. Presidential candidates would start thinking about Alaska issues and Vermont issues. We can confidently make this statement about the Alaska–Vermont “super-state” attracting the attention of presidential candidates because the closely divided state of Nevada (which has six electoral votes) received 12 of the 300 post-convention events in 2008. In contrast, neither Alaska nor Vermont received any attention from the presidential campaigns in 2008 (or any other year within memory).

The *benefit* of this hypothetical Alaska–Vermont interstate compact would be that Alaska and Vermont issues would become relevant in presidential campaigns. Presidential candidates would solicit votes in those states.

The *price* of this hypothetical Alaska–Vermont compact would be that Alaska’s three presidential electors would be Democrats in about half of all presidential elections and that Vermont’s three presidential electors would be Republicans about half of the time.

That is, under this hypothetical Alaska–Vermont compact, the presidential electors who meet in mid-December in Juneau and Montpelier would reflect the outcome of the combined popular vote in the two states—not just the vote in Alaska or just the vote in Vermont.

This hypothetical Alaska–Vermont interstate compact focuses attention on the benefit and cost trade-off inherent in the National Popular Vote compact, namely

whether it is more important for the winner in a particular state to receive the state's electoral votes or for the winner of the nationwide vote to receive enough electoral votes to become President. You can't have it both ways.

Currently, the vast majority of states and the vast majority of America's voters are ignored by the presidential candidates because of the state-by-state winner-take-all method of awarding electoral votes. The National Popular Vote compact would put every voter from all 50 states and the District of Columbia into a single pool of votes for purposes of electing the President. For the first time in American history, *every* voter in *every* state would be politically relevant in *every* presidential election. The Electoral College would reflect the choice of the people in all 50 states and the District of Columbia.

9.7. MYTHS ABOUT PROLIFERATION OF CANDIDATES, ABSOLUTE MAJORITIES, AND BREAKDOWN OF THE TWO-PARTY SYSTEM

9.7.1. MYTH: The National Popular Vote plan is defective because it does not require an absolute majority of the popular vote to win.

QUICK ANSWER:

- Under the current system of electing the President, there is no requirement that the winner receive an absolute majority of the national popular vote to win the White House. Fourteen Presidents have been elected with less than a majority of the popular vote.
- An absolute majority of the statewide popular vote is not necessary to win any state's electoral votes under the current system.
- The National Popular Vote plan reflects the nation's consensus that the winner of an election should be the candidate who receives the most popular votes (that is, a plurality of the votes).

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote compact, objects to the compact by saying:

“The compact contemplated by [the National Popular Vote bill] would give the presidency to the candidate winning the ‘largest national popular vote total.’ Note that it says the ‘largest’ total.’ It is not looking for a majority winner.”²³³

John Samples of the Cato Institute, an opponent of the National Popular Vote compact, has said:

²³³ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

“NPV does not necessarily impose election by a majority. If a plurality suffices for election, **a majority of voters may have chosen someone other than the winner.**”²³⁴ [Emphasis added]

Both of these observations apply equally to the current system.

Nothing in the U.S. Constitution requires that a candidate receive an absolute majority of the national popular vote in order to become President. The following 14 Presidents have been elected with less than a majority of the popular vote:

- James Polk,
- Zachary Taylor,
- James Buchanan,
- Abraham Lincoln (1860),
- Rutherford Hayes,
- James Garfield,
- Grover Cleveland (twice),
- Benjamin Harrison,
- Woodrow Wilson (twice),
- Harry Truman,
- John Kennedy,
- Richard Nixon (1968),
- Bill Clinton (twice), and
- George W. Bush (2000).

Nothing in the law of any state requires that a candidate receive an absolute majority of the state’s popular vote in order to win all of that state’s electoral votes. In fact, it is common, under existing state laws, for a presidential candidate to win all of a state’s electoral votes without receiving an absolute majority of the state’s popular vote. In 2008, no candidate received an absolute majority of the popular vote in four states. In 1992, no candidate received an absolute majority of the popular vote in 49 states.²³⁵

The public seems content with elections that are conducted on the basis that the candidate who receives the most popular votes wins the office. That is how the vast majority of elections are conducted in the United States.

The National Popular Vote plan reflects the nation’s consensus that the winner of an election should be the candidate who receives the most popular votes. There was certainly no outcry from the public, the media, Congress, or state legislators when Truman (1948), Kennedy (1960), Nixon (1968), or Clinton (1992 and 1996) were elected with less than an absolute majority of the national popular vote.

²³⁴ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 2.

²³⁵ Bill Clinton received 53% of the popular vote in Arkansas in 1992. He also won 84% of the popular vote in the District of Columbia.

If, at some time in the future, the public demands that an absolute majority be required for election to office, that desire can be accommodated at that time.

9.7.2. MYTH: The National Popular Vote plan is defective because it does not provide for a run-off.

QUICK ANSWER:

- Under the current system, there is no procedure for a run-off. No run-off was conducted when Presidents Lincoln, Wilson, Truman, Kennedy, Nixon, or Clinton failed to receive an absolute majority of the national popular vote.
- Under the current system, there is no requirement for a run-off in a state where no candidate receives an absolute majority of the statewide popular vote.
- The National Popular Vote plan reflects the nation's consensus that the winner of an election should be the candidate who receives the most popular votes. There is no national consensus in favor of run-offs.

MORE DETAILED ANSWER:

Tara Ross complains that the National Popular Vote plan does not require an absolute majority of the national popular vote to win.²³⁶

Ross' criticism applies equally to the current system. There is no provision in current law for a run-off when no presidential candidate receives an absolute majority of the national popular vote.

Moreover, there is no provision in any state today for a run-off when no presidential candidate receives an absolute majority of the state's popular vote. In fact, it is common, under existing state laws, for a presidential candidate to win all of a state's electoral votes without receiving an absolute majority of the state's popular vote. For example, in 2008, no candidate received an absolute majority of the popular vote in four states.

Tara Ross says:

“States that have agreed to participate in NPV can't force the other states to take any particular action—including a runoff or other secondary election procedure.”²³⁷

After the 1992 election in which no candidate received an absolute majority of the popular vote in 49 states,²³⁸ we cannot recall any demand from legislators, the public, the media, or anyone else for a run-off presidential election.

²³⁶ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²³⁷ Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition. Page 160.

²³⁸ Bill Clinton received 53% of the popular vote in Arkansas in 1992. He also won 84% of the popular vote in the District of Columbia.

The National Popular Vote compact operates in a manner consistent with the widely held view in the United States that the winner of an election should be the candidate who receives the most popular votes (that is, a plurality).

Note that traditional run-off elections present a number of difficulties. A run-off election would be expensive to administer. It is already difficult to recruit the mass of citizen volunteers needed to operate elections. Given that the President has to be inaugurated on January 20 and that the Electoral College meets in mid-December, it is already difficult to finish the initial counting of votes (and also conduct recounts, litigate disputes, and conduct required audits) in the limited amount of time available after Election Day in November. Turnout in a run-off election could be low. Perhaps most importantly, a run-off election would significantly alter the dynamics of financing of presidential campaigns because it would tilt the playing field in favor of the candidate who is in a position to raise vast amounts of *additional* money on very short notice.²³⁹

If, at some time in the future, the public demands run-offs, that change can be implemented at that time.

9.7.3. MYTH: A national popular vote will result in a proliferation of candidates, Presidents being elected with as little as 15% of the vote, and a breakdown of the two-party system.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for avoiding a proliferation of candidates and preventing candidates from winning office with as little as 15% of the vote, we should see evidence of these conjectured problems in elections that do not employ such an arrangement (such as elections for Governor).
- Historical experience in over 5,000 elections for state chief executive shows no evidence of the conjectured proliferation of candidates or the conjectured 15% winners in elections in which the winner is the candidate who receives the most popular votes.
- Duverger's law (which is based on worldwide studies of elections) asserts that plurality-vote elections do not result in a proliferation of candidates or candidates being elected with tiny percentages of the vote.

²³⁹ If, at some time in the future, the public decides that it wants the benefits of a run-off election without the problems of a traditional run-off system, instant run-off voting (also called "ranked voting") offers a method for combining a run-off into the original election. In instant run-off voting, voters have the option of indicating their second choice for the office involved (and, in some variations of the system, additional choices). If no candidate receives an absolute majority of the first-place votes, the votes of the candidate receiving the fewest votes are distributed according to the second choices of those voters. This process of redistributing the votes received by the lowest candidate continues until one candidate receives an absolute majority of the voters expressing a choice. Instant run-off voting is currently used in a number of municipalities around the country. It is also used in many elections conducted among delegates at conventions of various organizations. Information about instant run-off voting is available from www.FairVote.org.

- The two-party system is, in fact, sustained by the plurality-vote rule—not the state-by-state winner-take-all rule.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, predicts that a national popular vote would lead to a proliferation of candidates and a fracturing of the electorate, and that Presidents would be elected with only 15% of the vote:

“[The National Popular Vote plan] is not even looking for a minimum plurality. Thus, a candidate could win with only 15 percent of votes nationwide.”²⁴⁰

We do not have to speculate as to whether Ross’ prediction is likely to materialize because we can refer to the nation’s actual experience in the numerous elections that have been conducted in which the winner was the candidate who received the most popular votes.

If an Electoral College type of arrangement were essential for avoiding Ross’ conjectured outcome, we should see evidence of this outcome in elections that did not employ an Electoral College.

When elections are conducted in which the winner is the candidate who receives the most popular votes, candidates do not, in actual practice, win the office with low percentages of the vote (and certainly not percentages such as 15%).

In the 975 general elections for Governor in the United States between 1948 and 2011:²⁴¹

- 90% of the winning candidates received more than 50% of the vote,
- 98% of the winning candidates received more than 45% of the vote,
- 99% of the winning candidates received more than 40% of the vote, and
- 100% of the winning candidates received more than 35% of the vote.

There were only 25 general elections (out of 975) for Governor between 1948 and 2011 in which the winning candidate received less than 45% of the popular vote, as shown in table 9.11.

Over half of the elections in table 9.11 (13 of 25) were in small states (Alaska, Hawaii, Idaho, Maine, New Hampshire, and Vermont).

Elections for U.S. Senate, other statewide offices, Congress, state legislature, and other offices confirm this pattern. In the real world, there are never any 15% winners in general elections in which the winner is the candidate with the most votes. There is no proliferation of candidates. There is no fracturing of the electorate.

Moreover, elections in other countries around the world show a similar pattern.

Duverger’s law asserts that a plurality-rule election system tends to favor a two-party system. Maurice Duverger, the French sociologist who observed this tendency

²⁴⁰ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²⁴¹ <http://www.fairvote.org/plurality-in-gubernatorial-elections/>.

Table 9.11 THE 25 GENERAL ELECTIONS FOR GOVERNOR BETWEEN 1948 AND 2011 (OUT OF 975) IN WHICH THE WINNING CANDIDATE RECEIVED LESS THAN 45% OF THE VOTE

WINNING PERCENTAGE	WINNER	STATE	YEAR
35.4%	Angus King	Maine	1994
36.1%	Lincoln Chafee	Rhode Island	2010
36.2%	John G. Rowland	Connecticut	1994
36.6%	Benjamin J. Cayetano	Hawaii	1994
37.0%	Jesse Ventura	Minnesota	1998
38.1%	John Baldacci	Maine	2006
38.2%	Paul LePage	Maine	2010
38.2%	George D. Clyde	Utah	1956
38.9%	Walter J. Hickel	Alaska	1990
39.0%	Rick Perry	Texas	2006
39.1%	Jay S. Hammond	Alaska	1978
39.1%	James B. Longley	Maine	1974
39.7%	Evan Mecham	Arizona	1986
39.9%	John R. McKernan Jr.	Maine	1986
40.1%	Norman H. Bangerter	Utah	1988
40.4%	Lowell P. Weicker Jr.	Connecticut	1990
41.1%	Tony Knowles	Alaska	1994
41.4%	Meldrim Thomson Jr.	New Hampshire	1972
41.4%	Don Samuelson	Idaho	1966
42.2%	Michael O. Leavitt	Utah	1992
43.3%	Brad Henry	Oklahoma	2002
43.7%	Mark Dayton	Minnesota	2010
44.4%	Tim Pawlenty	Minnesota	2002
44.6%	Nelson A. Rockefeller	New York	1966
44.9%	Jim Douglas	Vermont	2002

in election systems around the world, suggests that plurality voting favors a two-party system because political groups with broadly similar platforms tend to form alliances because it increases their chances of winning office. Voters generally desert weak parties or candidates on the grounds that they have no chance of winning. In practice, ordinary plurality voting discourages the formation of niche parties and candidacies by rewarding the formation of broad coalitions in which various groups and interests join together in order to win the most votes (and thereby win office).

The reason that ordinary plurality voting has this effect is that a vote cast for a splinter candidate frequently produces the politically counter-productive effect of helping the major-party candidate whose views are diametrically opposite of those of the voter. For example, votes cast for Bob Barr (the Libertarian Party candidate for President in 2008) enabled Barack Obama to win the electoral votes of North Carolina,²⁴²

²⁴² In North Carolina in 2008, Bob Barr (the Libertarian candidate) received considerably more votes than the margin between Barack Obama (the winner of the state) and John McCain (the second-place candidate).

and votes cast for Ralph Nader (the Green Party candidate) in 2000 enabled George W. Bush to win the electoral votes of Florida and New Hampshire.²⁴³

Ross' criticism of the National Popular Vote plan concerning third-party candidates is an example of a criticism that actually applies more to the current state-by-state winner-take-all system than the National Popular Vote plan.

Under the current system of electing the President, minor-party candidates have significantly affected the outcome in 38% (six out of 17) of the presidential elections since World War II. Specifically, minor-party candidates affected the outcome by either shifting states from one candidate to another or winning electoral votes outright in the 1948, 1968, 1980, 1992, 1996, and 2000 presidential elections.

Segregationists such as Strom Thurmond and George Wallace each won electoral votes in various Southern states. Thurmond won 39 electoral votes in 1948, and George Wallace won 46 electoral votes in 1968. Candidates such as John Anderson (1980), Ross Perot (1992 and 1996), and Ralph Nader (2000) each managed to affect the national outcome by switching electoral votes in numerous states.

None of these third-party candidates had any reasonable expectation of winning the most popular votes nationwide. The reason that the current system has encouraged so many minor-party candidacies is that a third-party candidate has 51 separate opportunities to find particular states that he might win outright or where he might be able to shift electoral votes from one major party to another.

Tara Ross writes:

“The most likely consequence of a change to a direct popular vote is the breakdown of the two-party system.”²⁴⁴

Ross' prediction can be tested against actual historical facts.

In 1787, Connecticut, Massachusetts, New Hampshire, and Rhode Island conducted popular elections for the office of Governor.²⁴⁵

Today, 100% of the states conduct a direct popular vote for Governor. Yet, after over 5,000 direct popular elections for Governor since 1789, the two-party system has yet to collapse.

The two-party system in the United States (which dominates the electoral landscape for the vast majority of elective offices in the country) is not sustained by the existence of the state-by-state winner-take-all rule for filling the single office of the Presidency.

²⁴³ In Florida and New Hampshire in 2000, Ralph Nader received considerably more votes than the margin between George W. Bush (the winner of these two states) and Al Gore (the second-place candidate).

²⁴⁴ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²⁴⁵ Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Page xx.

About three-quarters of the elections for Governor occur in non-presidential years—that is, they stand entirely apart from the presidential election cycle.

Returning to the history of presidential elections, only three states had winner-take-all statutes in the nation's first presidential election in 1789. Only three states used the winner-take-all rule in 1792 and 1796. Given that political parties first emerged in the 1796 presidential election, it can hardly be argued that the existence of the state-by-state winner-take-all rule in just three states was the force that created the two-party system in the United States.

Instead, the two-party system is the consequence of the plurality voting system in which the candidate who receives the most popular votes wins the office.

There is no reason to expect the emergence of some unique, new political dynamic that would promote multiple candidacies if the President were elected in the same manner as virtually every other elected official in the United States.

What can be said about third-party candidacies in presidential elections is that the current system often perversely discriminates against third-party candidates who have a broad national base of support, while encouraging regional third-party candidates. In 1948, Henry Wallace (a leftist candidate for President) and Strom Thurmond (a pro-segregation candidate for President) each received 1.2 million popular votes. However, Strom Thurmond (whose support was concentrated in the South) won 39 electoral votes in 1948, whereas Henry Wallace (whose support was distributed more evenly throughout the country) received no electoral votes.

Ross Perot's percentage of the national popular vote in 1992 was twice the percentage received in 1968 by George Wallace (a pro-segregation candidate). However, Perot won no electoral votes in 1992, whereas George Wallace won 46 electoral votes in 1968.

Although Ross Perot received eight times Strom Thurmond's percentage of the popular vote in 1948, Perot won no electoral votes in 1992, while Thurmond won 39 electoral votes.²⁴⁶

The current state-by-state winner-take-all system certainly does not prevent the proliferation of candidates; however, it does perversely reward regional third-party candidacies while punishing broad-based third-party candidates.

Some argue that third parties are inherently undesirable and that the election system should be skewed so as to strengthen and favor the two-party system. Even if one subscribes to this viewpoint, it is difficult to see what public purpose is served by the current system's perverse discrimination in favor of regionally divisive third parties and against broad-based third parties with nationwide support.

²⁴⁶A simulation conducted by FairVote suggests that if Ross Perot had doubled his national popular vote from 19% to 38%, he probably would have won a majority of the electoral votes. <http://www.fairvote.org/the-perot-simulator>. But with 19% of the national popular vote broadly spread out over the entire country, Perot won no electoral votes.

9.7.4. MYTH: The current system requires an absolute majority of the popular vote to win.

QUICK ANSWER:

- Under the current system of electing the President, there is no requirement that the winner receive an absolute majority of the national popular vote to win the Presidency. Presidents Lincoln, Cleveland, Wilson, Truman, Kennedy, Nixon, and Clinton were non-majority Presidents.
- An absolute majority of the statewide popular vote is not necessary to win any state's electoral votes under the current system.

MORE DETAILED ANSWER:

In an article entitled “The Electoral College Is Brilliant, and We Would Be Insane to Abolish It,” Walter Hickey writes:

“Without the electoral college system, a President could be elected with a plurality rather than an outright majority.

“Without it—and with a compelling third party—**someone could become president with only 34 percent of the vote.** When 66 percent of the country voted against the President, that doesn't scream stability. How many governments has Italy had in the past fifty years?”²⁴⁷ [Emphasis added]

Hickey appears to be unaware that nothing in the U.S. Constitution requires that a candidate receive an absolute majority of the national popular vote in order to become President. The following 14 Presidents have been elected with less than a majority of the popular vote: James K. Polk, Zachary Taylor, James Buchanan, Abraham Lincoln (1860), Rutherford B. Hayes, James Garfield, Grover Cleveland (twice), Benjamin Harrison, Woodrow Wilson (twice), Harry Truman, John Kennedy, Richard Nixon (1968), Bill Clinton (twice), and George W. Bush (2000).

Hickey also appears to be unaware that nothing in the law of any state requires that a candidate receive an absolute majority of the state's popular vote in order to win all of that state's electoral votes. In fact, presidential candidates frequently win a state's electoral votes without receiving an absolute majority of the state's popular vote. In 1992, no candidate received an absolute majority of the popular vote in 49 states.²⁴⁸ In 2008, no candidate received an absolute majority of the popular vote in four states.

Lincoln was elected with 39% of the nationwide popular vote in 1860. There is nothing in the current system to prevent another occurrence of a candidate being elected President with 39% of the nationwide popular vote. A June 1992 nationwide

²⁴⁷Hickey, Walter. 2012. The Electoral College is brilliant, and we would be insane to abolish it. *Business Insider*. October 3, 2012. <http://www.businessinsider.com/the-electoral-college-is-brilliant-2012-10>.

²⁴⁸In 1992, Bill Clinton received 53% of the popular vote in Arkansas and 84% of the popular vote in the District of Columbia.

poll showed that Ross Perot had 39% support, incumbent President George H.W. Bush had 31%, and Bill Clinton had 25%.²⁴⁹

9.8. MYTHS ABOUT EXTREMIST AND REGIONAL CANDIDATES

9.8.1. MYTH: Extremist candidates will proliferate under a national popular vote.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for avoiding extremist candidates, we would see evidence of extremism in elections (such as gubernatorial elections) that do not employ an Electoral College type of arrangement.
- Actual experience is that extremist candidates are rarely elected in elections in which the winner is the candidate who receives the most votes.

MORE DETAILED ANSWER:

Tara Ross has asserted that if the President were elected by a national popular vote,

“extremist candidates could more easily sway an election.”²⁵⁰

Hans von Spakovsky has stated that the National Popular Vote plan:

“could also radicalize American politics.”²⁵¹

History Professor Daniel J. Singal of Hobart and William Smith Colleges warns:

“Tom Golisano’s proposal in his essay ‘Make Every State Matter’ to elect presidents on the basis of the popular vote rather than the Electoral College may sound appealing at first, but would in fact **wreak havoc on our national political system** in ways that he clearly does not understand.

“Put simply, the Electoral College has turned out to be one of the most brilliant innovations the Founding Fathers devised when writing the Constitution. Its virtue is that **it directs our politics to the center of the political spectrum, helping us to avoid the extremism that might otherwise rule the day. . . .**

“In states that are up for grabs independent voters in the middle of the political spectrum become crucial. Since those states are usually decided by a few percentage points, the **candidates must gear their mes-**

²⁴⁹ The 1992 poll was cited in Stanley, Timothy. Why Romney is stronger than he seems. *CNN Election Center*. April 10, 2012.

²⁵⁰ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²⁵¹ Von Spakovsky, Hans. Popular vote scheme. *The Foundry*. October 18, 2011.

sages to appeal to those ‘swing voters,’ who by definition are not strong partisans and thus open to either side.”²⁵² [Emphasis added]

If an Electoral College type of arrangement were essential for avoiding extremist candidates, we would see evidence of Singal’s conjectured “havoc” in elections that do not employ an Electoral College type of arrangement. However, Singal presents no evidence of “havoc” in elections in which the winner is the candidate who receives the most popular votes.

At the time the U.S. Constitution came into effect in 1789, Governors were elected in Rhode Island, Massachusetts, New Hampshire, and Connecticut. The idea of popularly electing the Governor was adopted piecemeal, on a state-by-state basis. Today, Governors are elected in 100% of the states.

After over two centuries of actual experience in over 5,000 statewide elections for state chief executive, the lack of moderation in political discourse predicted by Ross, the radicalization of politics predicted by von Spakovsky, and the “havoc” predicted by Singal have yet to materialize. History indicates that extremist candidates are almost never elected in elections in which the winner is the candidate who receives the most popular votes.

U.S. Senators were elected by state legislatures under the original U.S. Constitution. Since ratification of the 17th Amendment in 1913, U.S. Senators have been elected by the people. After nearly 100 years of actual experience under the 17th Amendment, how many U.S. Senators have been extremists?

Given this historical record, there is no reason to expect the emergence of some new and currently unknown political dynamic if the President were elected in the same manner as virtually every other public official in the United States.

Candidates attempting to win any election have a strong incentive to capture “the middle” of their electorate. Counting the votes on a nationwide basis (instead of a statewide basis) would not change this imperative.

Singal provides no explanation as to why “independent voters in the middle of the political spectrum” would not be similarly “crucial” if the President were elected from a nationwide electorate.

Singal also overlooks the fact that there are millions of “swing voters” in the states that get no attention under the current state-by-state winner-take-all system. What is the justification for making “swing voters” in today’s non-battleground states less important than the “swing voters” in battleground states?

Criticism of the National Popular Vote plan on the basis of extremism is yet another example of a criticism that is actually more appropriately applied to the current state-by-state winner-take-all system.

Segregationists such as Strom Thurmond (1948) or George Wallace (1968) won

²⁵² Singal, Daniel J. The genius of the Electoral College. *Democrat and Chronicle*. Rochester, New York. August 23, 2012.

electoral votes in numerous Southern states. Neither Strom Thurmond nor George Wallace had any reasonable expectation of winning the most popular votes nationwide. Under the current state-by-state winner-take-all system, third-party candidates have 51 separate opportunities to find particular states that they might win outright or where they might be able to shift electoral votes from one major party to another.

The current state-by-state winner-take-all system encourages regional third-party candidates such as Strom Thurmond and George Wallace because it offers them the hope of being able to deny a majority of the Electoral College to the major-party candidates, and thereby throw the election of the President to the U.S. House of Representatives or, alternatively, to bargain with the major-party candidates prior to the meeting of the Electoral College.

9.8.2. MYTH: Regional candidates will proliferate under a national popular vote.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for avoiding regional candidates, we should see evidence of regional candidates in elections (such as gubernatorial elections) that do not employ an Electoral College type of arrangement.
- There is no evidence of the emergence of regional candidates or regional parties in statewide elections in which the winner is the candidate who receives the most popular votes.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, raises the following question:

“What if voters in New York and Massachusetts throw all their weight behind one regional candidate?”²⁵³

We can easily test Ross’ hypothetical scenario about regional candidates against actual historical experience and facts.

If an Electoral College type of arrangement were essential for avoiding Ross’ conjectured outcome, we would see evidence of regional parties and regional candidates in elections that do not employ an Electoral College.

When Governors are chosen in elections in which the winner is the candidate who receives the most popular votes, we do not see a Philadelphia Party and a Pittsburgh Party competing for the Governor’s office. There is no Eastern Shore Party in Maryland, no Upper Peninsula Party in Michigan, no Northern California Party in California, no Upstate New York Party in New York, and no Panhandle Party in Florida.

²⁵³ Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

Similarly, we do not see regional parties nominating regional candidates to run for the U.S. Senate.

In the real world, ordinary plurality voting discourages the formation of niche parties. Instead, ordinary plurality voting rewards the formation of broad coalitions in which various groups and interests join together in order to win the most votes (and thereby win office).

The reason that ordinary plurality voting has this effect is that a vote cast for a splinter candidate generally produces the politically counter-productive effect of helping the major-party candidate whose views are diametrically opposite to those of the voter.

For example, votes cast for Green Party candidate Ralph Nader enabled Republican George W. Bush to win Florida and New Hampshire in 2000.²⁵⁴ Votes cast for Libertarian Party candidate Bob Barr enabled Democrat Barack Obama to win North Carolina in 2008.²⁵⁵

Based on historical evidence, regional candidates are far more common under the state-by-state winner-take-all system of electing the President than in elections in which the winner is the candidate who receives the most popular votes.

Under the current state-by-state winner-take-all system of electing the President, regional segregationist candidates such as Strom Thurmond (1948) and George Wallace (1968) won electoral votes in various Southern states. None of these third-party candidates had any reasonable expectation of winning a plurality of the popular votes nationwide. The current state-by-state winner-take-all system encourages regional candidacies because such candidates can win certain states outright or can affect the national outcome by shifting electoral votes from one major party to another. The current system gives regional candidates the hope of being able to throw the presidential election into the U.S. House of Representatives or to bargain with the major party candidates before the meeting of the Electoral College in mid-December.

9.8.3. MYTH: It is the genius of the Electoral College that Grover Cleveland did not win in 1888 because the Electoral College works as a check against regionalism.

QUICK ANSWER:

- The state-by-state winner-take-all system does not protect against regionalism.
- In 1888, the state-by-state winner-take-all system gave the White House to a *regional* candidate who had fewer popular votes nationwide instead of giving it to the *regional* candidate with more popular votes nationwide.

²⁵⁴ In Florida and New Hampshire in 2000, Ralph Nader received considerably more votes than the margin between George W. Bush (the winner of these two states) and Al Gore (the second-place candidate).

²⁵⁵ In North Carolina in 2008, Bob Barr (the Libertarian candidate) received considerably more votes than the margin between Barack Obama (the winner of the state) and John McCain (the second-place candidate).

MORE DETAILED ANSWER:

One of the consequences of the state-by-state winner-take-all rule (i.e., awarding all of a state’s electoral votes to the presidential candidate who receives the most popular votes in each separate state) is that it is possible for a candidate to win the Presidency without winning the most popular votes nationwide.

Of the 57 presidential elections between 1789 and 2012, there have been four elections in which the candidate with the most popular votes nationwide did not win the Presidency (table 1.22).

The election of 1888 between Democrat Grover Cleveland and Republican Benjamin Harrison was one of four such elections.

Trent England (a lobbyist opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington) has written:

“Because of the Electoral College, Cleveland’s intense regional popularity—even when it gave him a raw total majority—was not enough to win the presidency.

“Successful presidential campaigns must assemble broad, national coalitions.

“It is the genius of the Electoral College that Grover Cleveland did not win in 1888. **The Electoral College works as a check against regionalism and radicalism.**

“American politics are more inclusive, moderate, stable, and nationally unified because of the Electoral College.”²⁵⁶ [Emphasis added]

Figure 9.2 shows the distribution of electoral votes in the 1888 presidential election. Democrat Grover Cleveland’s states are shown in black, and Republican Benjamin Harrison’s states are thatched. The white parts of the map represent territories that were not states in 1888.

It is certainly true that figure 9.2 shows that the states (in black) carried by the candidate who received the most popular votes nationwide (Grover Cleveland) were concentrated regionally.

However, as the same figure shows, it is equally true that the states (thatched) carried by the second-place candidate (Benjamin Harrison) were regionally concentrated.

How is “the genius of the Electoral College” illustrated by elevating the *regional* second-place candidate (Benjamin Harrison) to the White House, instead of the *regional* first-place candidate (Grover Cleveland)?

Moreover, given that Grover Cleveland was a conservative (as evidenced by his record as President starting in 1885 and again in 1893), one wonders how the “wrong

²⁵⁶ England, Trent. What Grover learned at (the) Electoral College: American politics are more inclusive, moderate, stable, and nationally unified because of the Electoral College. December 15, 2009. <http://www.saveourstates.com/2009/what-grover-learned-at-the-electoral-college/>.

winner” outcome of the 1888 election supports Trent England’s claim that “the Electoral College works as a check against . . . radicalism?”

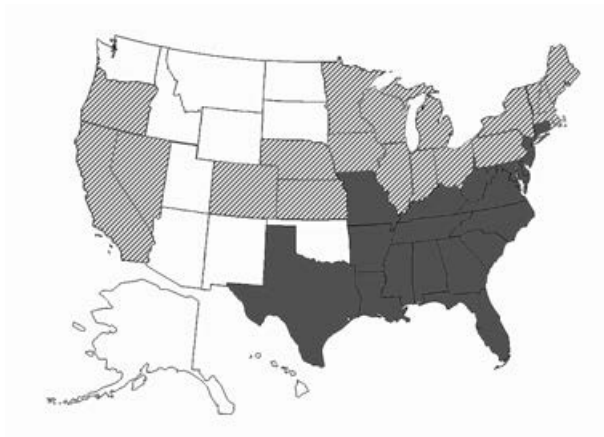


Figure 9.2 Results of 1888 election

As shown in figure 9.3, the regional pattern of the 1880 election was almost identical to that of the Cleveland–Harrison election. In figure 9.3, 1880 Democratic nominee Winfield Hancock’s states are shown in black, and Republican nominee James Garfield’s states are thatched. Indeed, most of the post-Civil-War elections evidenced a regional pattern similar to that of figures 9.2 and 9.3.

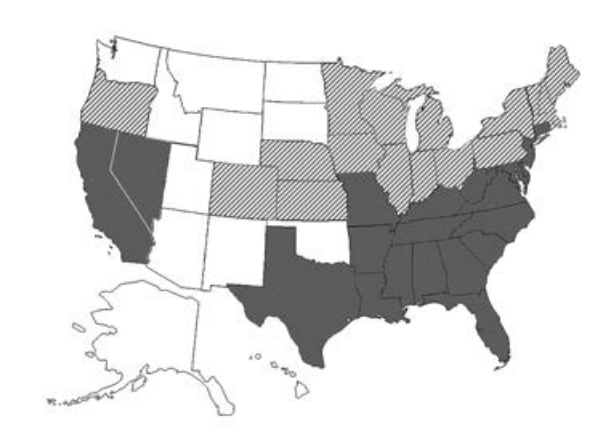


Figure 9.3 Results of 1880 election

How is Trent England’s claim that “the Electoral College works as a check against regionalism” illustrated by the election in 1880 of James Garfield, a manifestly regional candidate?

Figure 9.4 shows the results of the 2012 presidential election. Democrat Barack Obama’s states are shown in black, and Republican Mitt Romney’s states are thatched.

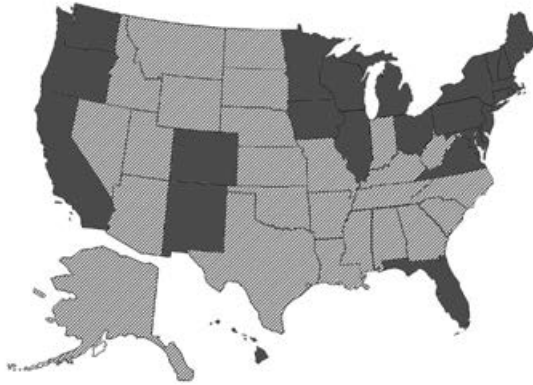


Figure 9.4 Results of 2012 election

A comparison of figure 9.4, figure 9.3, and figure 9.2 shows that regionalism was still quite prominent in the nation’s 57th presidential election in 2012—just as it was in 1880 and 1888. After 57 presidential elections, when can we expect Trent England’s claim that “the Electoral College works as a check against regionalism” to finally become true?

9.9. MYTHS ABOUT LOGISTICAL NIGHTMARES ARISING FROM DIFFERENCES IN STATE LAWS

9.9.1. MYTH: Logistical nightmares would plague a national popular vote because of differences among the states concerning ballot-access requirements, ex-felon eligibility requirements, poll-closing times, and so forth.

QUICK ANSWER:

- Adding up the number of popular votes that are cast in each state to obtain the nationwide popular vote total for each presidential candidate is not a difficult task, much less a “logistical nightmare.”
- There is nothing incompatible between state control over elections and a national popular vote for President.
- Differences in election laws are inherent and inevitable in our federalist system, which gives the states control over elections.
- The National Popular Vote plan is based on the federal constitutional system that exists in the United States and on the political reality that there is widespread public and legislative support for federalism and state control of elections.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote compact, predicts that the compact would create:

“logistical nightmares [that] could haunt the country.”²⁵⁷

Ross also notes:

“There are . . . inconsistencies among states’ ballots that would skew the election results. . . . States differ in their requirements for ballot qualification.”²⁵⁸

Adding up the popular votes that are cast in each state to obtain the nationwide popular vote total for each presidential candidate is not a difficult task, much less a “logistical nightmare.”

Differences in election laws are inherent in our federalist system, which gives the states control over elections.

The Founders gave the states exclusive control over the manner of electing the President so as to provide a check on a sitting President who might try to manipulate the rules for his own re-election in conjunction with a possibly compliant Congress.

There is nothing incompatible between the concept of a national popular vote for President and the inevitable differences in election laws resulting from state control over elections. This was certainly the mainstream view when the U.S. House of Representatives passed a constitutional amendment in 1969 for a national popular vote by a 338–70 margin. That amendment was endorsed by Richard Nixon at the time. That amendment was also endorsed by Gerald Ford, Jimmy Carter, and members of Congress who later became vice-presidential and presidential candidates such as Congressman George H.W. Bush (R–Texas), and Senator Bob Dole (R–Kansas).

The proposed 1969 constitutional amendment provided that the certified popular-vote tallies from each state would be added together to obtain the nationwide total for each candidate. See section 3.4 for more information.

Similarly, the National Popular Vote compact uses the very same process of adding up the popular-vote count from each state.

It is certainly true that some state election laws vary in many ways, including voter-registration policies, poll-closing time, amount of early voting, requirements for absentee voting, ex-felon voting, and so forth.

However, once a vote is cast in accordance with whatever policies are in effect in each state, there is no practical problem in adding up the votes from the 50 states and the District of Columbia.

There is certainly no “logistical nightmare” created by simply adding up the certified popular-vote totals for each candidate from each state just because one state happens to close its polls at a different time than another.

²⁵⁷ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

²⁵⁸ *Id.*

Indeed, *under the current system*, the *electoral-vote* counts from all 50 states are comingled and added together—despite the fact that each of these electoral-vote counts has been significantly impacted by differing state election laws (including laws governing ballot access, poll-closing times, voter registration, ex-felon voting, the extent and nature of early voting, and voter identification requirements).

It is incorrect to argue that the election laws of one state do not matter to citizens of other states.

Under both the *current* system and the National Popular Vote compact, *all* of the people of the United States are impacted by the election practices of *every* state. Everyone in the United States is affected by how electoral votes are awarded by every state. The procedures governing presidential elections in a closely divided battleground state (e.g., Florida and Ohio) can affect—and indeed have affected—the ultimate outcome of national elections.

For example, the 2000 Certificate of Ascertainment (required by federal law) from the state of Florida reported 2,912,790 popular votes for George W. Bush and 2,912,253 popular votes for Al Gore. It also reported 25 electoral votes for George W. Bush and 0 electoral votes for Al Gore. The 25–0 division of the electoral votes from Florida in 2000 was comingled and added together with the count of electoral votes from all the other states. The 25–0 division of the electoral votes from Florida determined the outcome of the national election. In the same manner, a particular division of the popular vote from a particular state might, when added to the popular vote count from other states, decisively affect the national outcome in some future election under the National Popular Vote compact.

Concerning the differences in ballot-access requirements among the states, it is true that it is easier to get on the ballot in some states than others. Nonetheless, serious third-party candidates for President manage to get on the ballot in virtually every state. For example, Ross Perot (who received 19% of the national popular vote in 1992) was on the ballot in all 50 states in 1992 and 1996. John Anderson (who received 7% of the national popular vote in 1980) was on the ballot in all 50 states. The Libertarian Party got its presidential nominee on the ballot in all 50 states in 1980, 1992, and 1996. Lenora Fulani, the nominee of the New Alliance Party, was on the ballot in all 50 states in 1988. Ralph Nader (who received 2.7% of the vote in 2000) got onto the ballot in 48 jurisdictions. In 2012, Gary Johnson (the nominee of the Libertarian Party) was on the ballot in 48 states.²⁵⁹

However, even if a particular third-party candidate is not on the ballot in all 50 states, no “logistical nightmare” is created.

The consequence to a candidate of not being on the ballot in a particular state is identical under *both* the current system and the National Popular Vote plan, namely that the candidate is unlikely to receive any substantial number of popular votes from

²⁵⁹ *Ballot Access News*. October 2012.

that particular state (barring the remote possibility of a successful write-in campaign in that state).

In terms of election administration, the absence from the ballot of a particular candidate in a particular state does not create any problem because election officials in each state simply report whatever votes are cast in their state for whichever candidates actually receive votes in their state. Today, each state reports the vote total for each presidential candidate on its Certificate of Ascertainment (required by section 6 of Title 3 of the United States Code).²⁶⁰

If a particular candidate does not receive any votes in a particular state, there is no vote total reported for that candidate from the state. If a candidate wins votes in a state where he is on the ballot, his absence from the ballot in another state does not cause him to forfeit his votes from the first state, much less create a “logistical nightmare.” All of the votes that the candidate actually receives are added together to arrive at his nationwide total.

In 1860, Abraham Lincoln was the nominee of the newly created Republican Party (which first nominated a candidate for President in 1856). The Republican Party was not on the ballot in 1860 in nine states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Texas). Consequently, Lincoln received no popular votes from those states (and, of course, no electoral votes). No problem of election administration was created by Lincoln’s absence from the ballot in nine states. His absence from the ballot in nine states did not cause him to forfeit the votes that he received from other states; it did not prevent him from winning the largest number of popular votes nationwide (39%); it did not prevent him from winning a majority in the Electoral College; it did not prevent him from becoming President; and it did not create a “logistical nightmare” in terms of election administration.

Similarly, Strom Thurmond (1948), George Wallace (1968), and Theodore Roosevelt (1912) were not on the ballot in every state; however, their absence from the ballot in numerous states did not prevent them from receiving the electoral votes from the states that they carried. No “logistical nightmare” was created because of their absence from the ballot in other states.

The National Popular Vote compact provides that the results from each state (and D.C.) would be added together—the very same process of adding up 51 sets of numbers that would have occurred under the constitutional amendment that was approved by the U.S. House of Representatives in 1969.

Tara Ross never specifically says how the adding up of 51 sets of numbers would create a “logistical nightmare”—much less how it “would skew the election results.”

It is true that some state election laws vary in many ways.

For example, some states have early poll-closing times (e.g., 6:00 P.M. in Kentucky

²⁶⁰ Figure 9.5 shows North Dakota’s 2008 Certificate of Ascertainment.

and Indiana), whereas the polls stay open until 9:00 P.M. in other states. In addition, polls close at different times due to the nation’s numerous time zones. Differences in poll-closing times would be handled under the National Popular Vote in the same way they are handled now—that is, the polls would open and close in each state in accordance with prevailing law.²⁶¹

Tara Ross cites the differences among the states concerning the eligibility of ex-felons to vote. Under the National Popular Vote plan, each state would conduct the election under its own laws—the same thing that would have occurred under the constitutional amendment that was approved by the U.S. House of Representatives in 1969. The certified popular vote totals from each state for each candidate would be added up to produce nationwide totals—the same thing that would have occurred under the constitutional amendment that was approved by the U.S. House of Representatives in 1969.

Tara Ross further observes:

“Inevitably, [a state] would have to abide by national election results derived from policies with which it disagrees.”²⁶²

This is precisely what happens now under the current U.S. Constitution because the Constitution empowers the states to control elections. All of the people of the United States are impacted by the election policies of every other state. No one can dispute that the procedures governing presidential elections in battleground states (e.g., Florida and Ohio) have affected the outcome of national elections and significantly impacted the entire country.

The fact that Oregon conducts its elections 100% by mail and that Minnesota permits voter registration on Election Day arguably contributed to the defeat of two sitting Republican U.S. Senators in November 2008, thereby affecting the course of national legislation because it gave the Democrats 60 votes in the U.S. Senate in 2009. A change in the Massachusetts vacancy-filling law enabled Republican Scott Brown to win the U.S. Senate seat previously occupied by the late Ted Kennedy in 2010 and significantly impacted the course of national legislation (e.g., the Affordable Care Act).

The genius of the federalist approach set forth in the U.S. Constitution is that no single political party is ever in a position to impose politically advantageous voting procedures on the entire country and thereby lock in a self-perpetuating advantage on the national level.

The real question for opponents of state control over elections is whether they would have been comfortable under *all* of the following scenarios:

²⁶¹ Clause 4 of section 1 of Article II of the U.S. Constitution provides, “The Congress may determine the Time of chusing the Electors.” Under existing federal law, Congress has chosen a uniform national day for choosing electors (namely, the Tuesday after the first Monday in November). However, Congress could specify the time of day as well.

²⁶² Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

- Suppose that in 2003 (just prior to the 2004 presidential election), the then-Republican-controlled Congress and a then-sitting Republican President enacted uniform national voting procedures, including photo identification; vigorous purging of the voter rolls of those who did not vote in the immediately preceding election; and closing the polls at 6:00 P.M. in every state.
- Suppose that in 2009, the then-Democratic-controlled Congress and the then-sitting Democratic President enacted uniform national voting procedures, including automatic permanent voter registration based on the census; advance voting several weeks before Election Day in every state; and no-excuse absentee voting in every state.
- Suppose that at some future time, one political party controls both houses of Congress and the White House.

There are advantages to uniformity in election laws, and there are advantages to preventing a single political party from adopting uniform national laws that allow it to perpetuate itself in office.

The Founders resolved this dilemma by choosing a federalist approach that gives the states control over elections. Differences in state election laws resulting from our federalist system are not “logistical nightmares [that] could haunt the country” but a strength of our nation’s Constitution.

As then-Congressman George H.W. Bush (R-Texas) said on September 18, 1969, in support of direct popular election of the President:

“This legislation has a great deal to commend it. It will correct the wrongs of the present mechanism . . . by calling for direct election of the President and Vice President. . . . Yet, in spite of these drastic reforms, the bill is **not . . . detrimental to our federal system or one that will change the departmentalized and local nature of voting in this country.**

“In electing the President and Vice President, the Constitution establishes the principle that votes are cast by States. This legislation does not tamper with that principle. It only changes the manner in which the States vote. Instead of voting by intermediaries, the States will certify their popular vote count to the Congress. **The states will maintain primary responsibility for the ballot and for the qualifications of voters.** In other words, they will still designate the time, place, and manner in which elections will be held. Thus, there is a very good argument to be made that **the basic nature of our federal system has not been disturbed.**”²⁶³ [Emphasis added]

Of course, if a national consensus emerges in favor of uniform federal control of elections at some time in the future, the U.S. Constitution can be so amended to eliminate state control over elections at that time.

²⁶³ *Congressional Record*. September 18, 1969. Pages 25,990–25,991.

Meanwhile, the National Popular Vote plan is based on the constitutional system that actually exists in the United States and on the reality that there is widespread public and legislative support for state control of elections.

9.9.2. MYTH: A state’s electoral votes could be awarded to a candidate not on a state’s own ballot.

QUICK ANSWER:

- This hypothesized scenario is politically implausible because a presidential candidate winning the most popular votes throughout the entire United States would, almost certainly, have been on the ballot in all 50 states.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote compact, has raised the possibility in written testimony to the Delaware Senate that a presidential candidate from Texas (say, Congressman Ron Paul) might not be on the ballot in Delaware but nonetheless could win the national popular vote. She then raises the possibility that:

“Delaware could be required to cast its electoral votes for a candidate who did not qualify for the ballot in Delaware.”²⁶⁴

It is most unlikely that a serious candidate for President would run without qualifying for the ballot in all 50 states. Serious candidates for President generally qualify for the ballot in all 50 states.

- Ross Perot was on the ballot in all 50 states in both 1992 and 1996.
- John Anderson was on the ballot in all 50 states in 1980.
- Lenora Fulani, the nominee of the New Alliance Party, was on ballot in all 50 states in 1988.
- The Libertarian Party got its presidential nominee on the ballot in all 50 states in 1980, 1992, and 1996.
- Ralph Nader (who received only 2.7% of the national popular vote in 2000) was on the ballot in 48 jurisdictions.

It would be especially unlikely that Tara Ross’ hypothetical Texas regional candidate would have been unable to qualify in Delaware, because a new political party can qualify for the ballot in Delaware with only 650 signatures.

In any event, it would be very unlikely that Ross’ hypothesized candidate from Texas would have received the most popular votes in all 50 states and the District of Columbia without being on the ballot in every state (or virtually every state).

But even if Ross’ politically implausible scenario were to occur, the National Popular Vote compact would deliver precisely its promised result, namely the election of

²⁶⁴ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

Tara Ross further hypothesized that the presidential candidate from Texas might win the national popular vote and then appoint Texans to represent Delaware in the Electoral College.

“Delaware probably did not nominate a slate of electors for Paul because he was not on its ballot. NPV’s compact offers a solution, but it is doubtful that voters in Delaware will like it. Paul would be entitled to personally appoint the three electors who will represent Delaware in the Electoral College vote. In all likelihood, he would select Texans to represent Delaware in the presidential election. . . .”²⁶⁵

First, under the National Popular Vote compact, nominees for the position of presidential elector would be chosen in exactly the same way as they currently are (that is, by local political parties in accordance with existing state law). The provision of the National Popular Vote compact cited in Ross’ hypothetical scenario applies *only if* a local political party in a state fails to nominate the exact number of candidates for the position of presidential elector to which the state is entitled. In this unlikely contingency, the compact permits the winning presidential candidate to decisively and quickly untangle any problem that might prevent him or her from receiving the full number of electoral votes to which he or she is entitled. This back-up procedure is designed to ensure that the compact guarantees the election of the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. Clause 7 of Article III of the compact states:

“If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner **is less than or greater than that state’s number of electoral votes**, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state’s presidential elector certifying official shall certify the appointment of such nominees.” [Emphasis added]

Second, there is historical evidence about how real-world politicians would behave in this situation. Under existing law in Pennsylvania, *every* presidential candidate, in *every* election, directly chooses *every* presidential elector in Pennsylvania. Needless to say, no presidential candidate has ever chosen a Texan or any other out-of-state person for the position of presidential elector in Pennsylvania. Indeed, it would be politically preposterous for a presidential candidate to insult Pennsylvania gratuitously by selecting out-of-staters to the ceremonial position of presidential elector. It

²⁶⁵ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

would be even more preposterous for someone who had just won the national popular vote (and was about to become President and face the task of unifying the country) to insult a state gratuitously.

Third, it would be extraordinary that Ron Paul (whom Ross hypothesizes just won the most popular votes across the entire United States) would not have three supporters in Delaware.

Fourth, in case any state believes that Ross' hypothetical scenario is politically plausible and potentially harmful, every state has the power, under the U.S. Constitution, to adopt residency qualifications for the position of presidential elector. Indeed, Delaware is an example of a state that has already enacted additional qualifications for the position of presidential elector (albeit not to disqualify non-resident presidential electors).

9.10. MYTHS ABOUT FAITHLESS ELECTORS

9.10.1. MYTH: Faithless presidential electors would be a problem under the National Popular Vote compact.

QUICK ANSWER:

- There is no practical problem with faithless presidential electors. There have been only 17 deviant votes for President out of the 22,991 electoral votes cast in the nation's 57 presidential elections between 1789 and 2012, and only one of them, in 1796, was a true faithless elector.
- To the extent that anyone believes that there is a problem, the states have ample constitutional authority to remedy it, and effective solutions are available (such as the proposed Uniform Faithful Presidential Electors Act).
- One of the collateral benefits of the National Popular Vote plan is that it would virtually eliminate the possibility of faithless electors actually affecting the outcome of a presidential election because it would typically generate an exaggerated margin of victory in the Electoral College of about 75% for the national popular vote winner (namely, an absolute majority of the electoral votes from the compacting states plus about half of the remaining electoral votes of the non-compacting states).

MORE DETAILED ANSWER:

The myth about faithless electors is yet another example of a potential problem that the National Popular Vote plan handles in a manner that is equal to, and arguably superior to, the current system.

The Founding Fathers envisioned that the presidential electors would be outstanding citizens who would meet and debate and exercise independent judgment in choosing the best person to become President. However, that expectation was dashed

with the emergence of political parties in the nation's first competitive presidential election in 1796.

Since 1796, presidential electors have been committed party activists who are nominated by their political party to cast their vote in the Electoral College for their party's nominee. That is, presidential electors have simply been willing "rubber-stamps" for their party's nominee for President.

Faithless presidential electors are not a practical problem in the first place. Of the 22,991 electoral votes cast for President in the nation's 57 presidential elections between 1789 and 2012, only 17 were cast in a deviant way.²⁶⁶ Moreover, among these 17 cases, the unexpected vote of Samuel Miles for Thomas Jefferson in 1796 was the only instance of a true faithless elector (where the elector might have thought, at the time he voted, that his vote might affect the national outcome).

Fifteen of the 17 cases were post-election grand-standing votes cast by publicity-seeking electors who knew, at the time they voted, that their vote would not affect the outcome in the Electoral College.

One electoral vote was accidentally and unintentionally cast by an unidentified Democratic presidential elector in Minnesota who absentmindedly voted for the party's vice-presidential candidate for both President and Vice President.²⁶⁷

Nonetheless, the possibility of faithless electors exists under both the current system and the National Popular Vote plan.

For example, in September 2012, three Republican electors (who had favored Ron Paul during the nomination process) publicly raised doubt as to their loyalty to Mitt Romney, the eventual Republican presidential nominee.²⁶⁸ Defection by multiple presidential electors could potentially throw a close presidential election into the U.S. House of Representatives.²⁶⁹

Second, if anyone perceives faithless presidential electors to be a real problem, the states already have ample constitutional authority to remedy the situation by state law.

In most states, each political party nominates candidates for the position of presidential elector (typically at a combination of party conventions at the congressional district level and state level).

²⁶⁶ See section 2.12.

²⁶⁷ The accidental vote was cast in Minnesota in 2004. After the ballots were counted, all 10 electors said that they intended to vote for John Kerry for President and John Edwards for Vice President. However, one of the 10 accidentally voted for John Edwards for both President and Vice President.

²⁶⁸ Baker, Mike. Three Electoral College members may pass on GOP ticket. *Associated Press*. September 12, 2012.

²⁶⁹ As discussed in section 2.12, in 1836, 23 Democratic presidential electors from Virginia did not vote for the Democratic Party's vice-presidential nominee (Richard M. Johnson). The Virginia Democratic Party had announced their vigorous opposition to Johnson at the party's national convention (both before and after Johnson's nomination). Johnson failed to receive an absolute majority of the electoral votes and the vice-presidential election was therefore thrown into the U.S. Senate. The Democratic Party was in control of the Senate, and Johnson won by an overwhelming 33–16 vote.

About half of the states currently have laws involving pledges, penalties, or other procedures to ensure that presidential electors vote for their party’s nominees.

In upholding the constitutionality of a pledge guaranteeing faithful voting by presidential electors, U.S. Supreme Court Justice Robert H. Jackson wrote in the 1952 case of *Ray v. Blair*:

“No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices. . . .

“This arrangement miscarried. **Electors**, although often personally eminent, independent, and respectable, **officially become voluntary party lackeys and intellectual nonentities** to whose memory we might justly paraphrase a tuneful satire:

‘They always voted at their party’s call
‘And never thought of thinking for themselves at all’²⁷⁰ [Emphasis added]

Existing Pennsylvania law is noteworthy in that it empowers each party’s presidential candidate to nominate all elector candidates directly. The presidential nominee is, after all, the person whose name actually appears on the ballot on Election Day and who has the greatest immediate interest in faithful voting by presidential electors.

Existing North Carolina law declares vacant the position of any contrary-voting elector, voids that elector’s vote, and empowers the state’s remaining electors to replace the contrary-voting elector immediately with an elector loyal to the party’s nominee.

At its 119th annual meeting in 2010, the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) approved a “Uniform Faithful Presidential Electors Act” and submitted this model legislation to the state legislatures for their consideration. The Conference, formed in 1892, is a non-governmental body that has produced more than 200 recommended uniform state laws. The Conference is most widely known for its work on the Uniform Commercial Code.

The Uniform Faithful Presidential Electors Act has many of the features of North Carolina’s existing law. The proposed uniform law calls for the election of both electors and alternate electors. The Act has a state-administered pledge of faithfulness. Any attempt by a presidential elector to cast a vote in violation of that pledge effectively constitutes resignation from the office of elector. The Act provides a mechanism for immediately filling a vacancy created for that reason (or any other reason). The National Popular Vote organization has endorsed this proposed uniform law.

Third, in case anyone views faithless presidential electors to be a real problem, the

²⁷⁰ *Ray v. Blair* 343 U.S. 214 at 232. 1952.

National Popular Vote plan is actually superior to the current system in ensuring that a wayward elector would be unlikely to impact the ultimate choice of the President. Under the National Popular Vote compact, the national popular vote winner would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College in any given presidential election. The reason is that the National Popular Vote compact guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would receive at least 270 (of the 538) electoral votes from the states belonging to the compact. Then, beyond that guaranteed bloc of at least 270 electoral votes, the national popular vote winner would receive additional electoral votes from whichever non-compacting states he or she happened to carry (presumably under existing winner-take-all statutes in those states). If the non-compacting states divided approximately equally between the candidates, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College (that is, about 404 out of 538 electoral votes). This cushion would make it highly unlikely that faithless electors could affect the outcome of a presidential election (where 270 electoral votes are required to win the Presidency).

For additional information about faithless electors, see section 2.12.

9.10.2. MYTH: It might be difficult to coerce presidential electors to vote for the national popular vote winner.

QUICK ANSWER:

- No coercion would be required to force presidential electors to vote for the national popular vote winner under the National Popular Vote compact, because the compact (like the current system) would result in the election to the Electoral College of presidential electors who are avid supporters of the national popular vote winner.

MORE DETAILED ANSWER:

No coercion is required to force presidential electors to vote as intended under either the current system or the National Popular Vote system.

Under both systems, each political party nominates opinionated party activists for the ceremonial position of presidential elector under existing state laws. Each party's nominees for the position of presidential elector are selected precisely because they are passionate supporters of their party's candidate and because they can be relied upon to act as willing "rubber-stamps" for their party's nominee.

When voters go to the polls on Election Day in November, they are, in reality, choosing amongst competing slates of presidential electors associated with the Democratic Party, the Republican Party, or some other party. Under the winner-take-all system (currently used in 48 of the 50 states and the District of Columbia), the entire

slate of elector candidates associated with the presidential candidate receiving the most popular votes within each separate state is elected as the state’s presidential electors.²⁷¹

Under the National Popular Vote compact, the state’s presidential electors would be the elector candidates associated with the presidential candidate who won the most popular votes in all 50 states and the District of Columbia. This bloc of 270 (or more) presidential electors would reflect the will of the voters nationwide. All of these 270 or more presidential electors would be loyal and avid supporters of the national popular vote winner. These presidential electors would come from the political party that won the election nationally. Thus, no one in this bloc of 270 (or more) presidential electors would be asked to vote contrary to his or her own political inclinations or conscience. Instead, these electors would vote for their own strongly held personal choice, namely the nominee of their own political party.

Under the National Popular Vote plan, these 270 (or more) presidential electors would operate as willing “rubber-stamps” for the nationwide choice of the voters, just as presidential electors currently act as willing “rubber-stamps” for the statewide choice of the voters (or district-wide choice, in the cases of Maine and Nebraska).

9.10.3. MYTH: Presidential electors might succumb to outside pressure and abandon the national popular vote winner in favor of the winner of the popular vote in their state.

QUICK ANSWER:

- Presidential electors are loyal party activists who are selected precisely because they can be relied upon to act as willing “rubber-stamps” for their party’s nominee.
- The low probability of presidential electors succumbing to outside pressure is illustrated by the fact that none of the 271 Republican presidential electors in 2000 voted for Al Gore despite the fact that Gore received the most popular votes nationwide and despite the fact that the American public overwhelmingly believes that the President should be the candidate who receives the most popular votes in all 50 states and the District of Columbia. Instead, all 271 Republican presidential electors dutifully voted for their party’s nominee in accordance with the virtually universal view of how the system that was legally in effect at the time was supposed to operate.

²⁷¹ In two states (Maine and Nebraska), the elector candidates associated with the presidential candidate who receives the most popular votes in each of the state’s congressional districts are elected (along with the two additional at-large elector candidates associated with the presidential candidate who receives the most popular votes in the state as a whole).

MORE DETAILED ANSWER:

Some have suggested that, under the National Popular Vote compact, presidential electors might, after the people vote in November, succumb to outside pressure and abandon the national popular vote in favor of the winner of the popular vote in their state.

This hypothetical scenario is based on the following incorrect assumptions:

- There is any substantial pool of people who would support the notion of changing the rules after the public has voted on Election Day.
- The public favors the current state-by-state winner-take-all approach for electing the President, and hence there would be a vast pool of people to apply such pressure on presidential electors.
- The supporters of the presidential candidate who just won the national popular vote, under laws that were in place on Election Day, would care about—much less actually succumb to—pressure from people representing the losing party.

The reality is that there would be no substantial pressure in the first place. The public simply does not favor the current system of awarding all of a state's electoral votes to the presidential candidate who receives the most popular votes in each separate state (the winner-take-all-rule). In polls since 1944, at least 70% (usually more) of the American people have said that they favored the idea that the presidential candidate receiving the most votes throughout the United States should win the Presidency. A mere 20% of the public supports the current state-by-state winner-take-all system (with 10% undecided). Far from being attached to the state-by-state winner-take-all system of awarding electoral votes, the public strongly opposes it.

The environment in which this hypothetical scenario would arise has the following five elements:

- (1) About 70% of the voters of any given state believe that the presidential candidate receiving the most votes in all 50 states and the District of Columbia should win the Presidency;
- (2) The state legislature and Governor of the state have responded to the wishes of its own voters and enacted the National Popular Vote law in their state;
- (3) States possessing a majority of the electoral votes (essentially more than half the population of the country) have similarly enacted the National Popular Vote law, and the law has taken effect nationally;
- (4) A nationwide presidential campaign has been conducted, over a period of many months, with the candidates, the media, and everyone else in the United States knowing that the National Popular Vote plan is the law that will govern the presidential election; and
- (5) On Election Day in November, one presidential candidate emerged with the most popular votes in all 50 states and the District of Columbia.

The hypothetical scenario then conjectures that when the time comes for the Electoral College to meet in mid-December, the 270 (or more) presidential electors (who

are avid supporters of their own party’s presidential candidate who just won the national popular vote) would respond to pressure from supporters of the political party that just lost the election.

In fact, there would be little inclination for party activists to vote against their own strongly held personal preferences, against their own party’s presidential nominee, against their own state’s law, and against the desires of an overwhelming majority of their state’s voters (who favor a national popular vote for President).

The country has actual experience that relates to the hypothesized scenario. In 2000, Al Gore won the national popular vote by a margin of over 537,000 votes. However, under the laws in place at the time, there were 271 Republican presidential electors (just one more than the 270 needed to elect a President) who were nominated for that position by their party on the presumption that they would vote for George W. Bush. About 70% of the American people believed (then and now) that the Presidency should go to the candidate who receives the most popular votes in all 50 states and the District of Columbia. Nevertheless, none of the 271 Republican presidential electors succumbed to public pressure and voted in favor of the winner of the national popular vote.

9.11. MYTHS ABOUT POST-ELECTION CHANGES IN THE RULES OF THE GAME, WITHDRAWAL, AND ENFORCEABILITY

9.11.1. MYTH: A politically motivated state legislature could withdraw from the National Popular Vote compact after the people vote in November, but before the Electoral College meets in December.

QUICK ANSWER:

- There are at least six *separate and independent* reasons why there should be no concern about the hypothetical scenario in which a Governor and legislature attempt—for partisan political reasons—to change a state’s method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December.
- The National Popular Vote compact permits a state to withdraw; however, it delays the effective date of a withdrawal until after the inauguration of the new President if the withdrawal occurs during the six-month period between July 20 of a presidential election year and Inauguration Day.
- Any attempt to appoint presidential electors after the people vote in November would be unconstitutional on its face (and subject to summary judgment) because (1) the Constitution gives Congress the power to establish the day for appointing presidential electors, and (2) existing federal law requires that presidential electors be appointed on a *single* specific day in each four-year election cycle (namely, the Tuesday after the first Monday in November). Therefore, no state may appoint presidential electors after the

results of an election become known (under either the current state-by-state winner-take-all system or the National Popular Vote compact).

- Any withdrawal that purports to take effect between July 20 of a presidential year and Inauguration Day would be unconstitutional on its face (and subject to summary judgment) because it would violate the Impairments Clause of the U.S. Constitution which states, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”
- Any attempt to appoint presidential electors after the people vote in November would invalidate the “conclusiveness” of that state’s results under existing federal law specifying that presidential electors must be appointed under “laws enacted *prior*” to the single specific date set by federal law for appointing presidential electors (namely, the Tuesday after the first Monday in November).
- The highly partisan maneuver of attempting to appoint presidential electors after the people vote in November could be executed, in practice, in only about four states because of numerous practical political reasons, including (1) high quorum requirements in some state legislatures, (2) lengthy lay-over requirements before a bill may be considered, (3) the fact that many states have politically divided government at any given time, (4) the fact that state constitutions would delay the effective date of the new state law until after the Electoral College met in mid-December, (5) the numerous time-delaying tactics enabling the minority party to delay action in the short period of time between Election Day and the meeting of the Electoral College, and (6) other factors.
- Any attempt to appoint presidential electors after the people vote in November would be politically preposterous in the real world because (1) there would be overwhelming public sentiment against changing the “rules of the game” after the people had voted, (2) the legislature would have to meet in the state capital on Election Day (because this is the only day in the four-year election cycle when presidential electors may legally be appointed), (3) there would be a high level of public support for a national popular vote, and (4) the action would necessarily have to occur in a state where both houses of the legislature and the Governor had already enacted the National Popular Vote compact.
- Any attempt by one state, or even multiple states, to appoint presidential electors after the people vote in November would probably not matter anyway because the national popular vote winner would typically receive an exaggerated margin of victory in the Electoral College (roughly 75%), thereby producing a cushion of about 135 electoral votes above the 270 needed to win the Presidency.
- If the hypothetical scenario of changing the “rules of the game” were legally

permissible or politically plausible, it would have occurred in the past *under the current system* on the numerous occasions (including 2000) where a particular presidential candidate was not favored by a particular Governor and legislature.

MORE DETAILED ANSWER:

This section discusses the hypothetical scenario in which a Governor and state legislature might try—for partisan political reasons—to change the “rules of the game” for electing the President by repealing (withdrawing from) the National Popular Vote compact after Election Day in November but before the meeting of the Electoral College in mid-December. Under this scenario, the Governor and legislature would presumably implement some politically advantageous alternative method of appointing presidential electors (say, legislative appointment) after Election Day.

John Samples of the Cato Institute says that the National Popular Vote compact:

“cannot offer any certainty that states will not withdraw from the compact when the results of an election become known.”²⁷²

There are six *separate and independent* reasons why Sample’s hypothetical scenario cannot happen (and a seventh reason applicable if the compact were enacted by the citizen-initiative process in a particular state).

All but two of these independent reasons (the second and sixth) apply to *both* the current system and the National Popular Vote compact. Thus, if John Sample’s hypothetical scenario of changing the “rules of the game” were legally permissible or politically plausible, it would have already occurred *under the current system* on the numerous previous occasions when a particular presidential candidate was not favored by a particular Governor and state legislature.

We start with the simplest of the numerous reasons why John Sample’s hypothetical scenario is of no concern.

Any attempt to appoint presidential electors after the people vote in November would be unconstitutional on its face because the Constitution gives Congress the power to establish the day for appointing presidential electors and existing federal law allows presidential electors to be appointed on only one specific day in each four-year period (namely, the Tuesday after the first Monday in November).

John Sample’s hypothetical scenario in which a politically motivated Governor and legislature try to change their state’s law on appointing presidential electors after “the results of an election become known” is legally impossible in the United States.

²⁷² Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1.

The U.S. Constitution (Article II, section 1, clause 4) specifically grants Congress the power to establish the time for appointing presidential electors:

“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” [Spelling as per original] [Emphasis added]

Congress has exercised this power by enacting a federal law (section 1 of Title 3 of the United States Code) that requires presidential electors to be appointed *on one specific day in every four-year period* namely, the Tuesday after the first Monday in November (Election Day).

“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” [Emphasis added]

Thus, no state may appoint its presidential electors after “the results of an election become known.” This existing federal law is applicable to *both* the National Popular Vote compact and the current system.

Note that the U.S. Constitution does not require a state to permit its own voters to vote directly for President or presidential electors. Under the Constitution, state legislatures have always had the power to appoint presidential electors without consulting the voters.²⁷³ However, if a state legislature decides that it is going to appoint presidential electors itself, it must make the appointments on the specific *single* day established by Congress (the Tuesday next after the first Monday in November). In particular, a state legislature cannot appoint presidential electors *after* Election Day (e.g., after seeing the election results in its own state or other states).

Aside from being illegal, John Sample’s hypothetical scenario would be politically implausible. In all but three states, between 50% and 100% of the state legislature is up for re-election on the same day that the President is being elected. That is, on the very day when the legislators are trying to get themselves re-elected, they would have to be sitting in the state capitol attempting to change the “rules of the game” of the ongoing presidential election. In particular, the legislators would not be in their districts campaigning for re-election. Also, in a quarter of the states, the Governor is up for re-election on the same day that the President is being elected.

The role of Article II, section 1, clause 4 of the Constitution in conjunction with

²⁷³The people participated in directly choosing presidential electors in only six states in the nation’s first presidential election in 1789. In 1789, state legislatures appointed presidential electors in a number of states. In New Jersey in 1789, the Governor and his Council appointed the state’s presidential electors. The last time when the people did not directly choose presidential electors was in 1876, when the Colorado legislature appointed the state’s presidential electors.

section 1 of Title 3 of the United States Code in squelching John Sample’s hypothetical scenario was illustrated in the 1960 presidential election.

John F. Kennedy won the nationwide popular vote by 114,673 votes. However, Kennedy’s majority in the Electoral College (only 34 electoral votes in excess of the majority needed for election) depended on the fact that he had carried Illinois by the slender margin of 4,430 popular votes and carried South Carolina by 4,732 votes. Some members of the South Carolina legislature suggested that the legislature repeal South Carolina’s winner-take-all law for awarding the state’s electoral votes and appoint non-Kennedy presidential electors themselves.

Nothing came of this suggestion in South Carolina in 1960, because section 1 of Title 3 of the United States Code specifies that Election Day is the single day in the four-year cycle on which presidential electors may be appointed. Election Day had, of course, passed by the time South Carolina leaders realized that Kennedy’s margin of victory in the Electoral College depended in large part on South Carolina’s electoral votes. If the South Carolina legislature had wanted to appoint presidential electors itself, it could have chosen to do so, but it would have had to have convened in Columbia for this purpose on Election Day (i.e., the Tuesday next after the first Monday in November).²⁷⁴

There is only one exception permitted by Congress to section 1’s requirement of appointing presidential electors on Election Day, and it does not apply to John Sample’s hypothetical scenario. Section 2 of Title 3 of the United States Code provides:

“Whenever any State has held an election for the purpose of choosing electors, **and has failed to make a choice on the day prescribed by law**, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” [Emphasis added]

This “failure to make a choice” exception covers contingencies such as the occurrence of a tie in a state’s popular vote. Accordingly, many states have adopted legislation to deal with ties in a state’s popular vote.

The “failure to make a choice” exception offered by section 2 would not be applicable to John Sample’s hypothetical scenario involving the National Popular Vote compact, because the voters would have already made a choice on Election Day—simply a choice that a particular Governor and legislature did not like.

The exception in section 2 played a (sometimes misunderstood) role in the debate over the disputed presidential election count in Florida in 2000.²⁷⁵ Because of section 1 of the United States Code, everyone recognized that there was no possibility that the

²⁷⁴ As explained in a later part of this section, because of section 5 of Title 3 of the United States Code, South Carolina would also have had to repeal its law providing for popular election of presidential electors *prior* to Election Day.

²⁷⁵ The authors appreciate conversations with former Congressman Tom Feeney, who was Speaker of the Florida House of Representatives in November 2000, for clarifying the nature of the “reaffirming” resolution.

Republican-controlled Florida legislature could meet after Election Day, retroactively decide to ignore the already-cast popular vote, and directly appoint Republican presidential electors favorable to George W. Bush.

However, the argument was advanced that if a recount were ordered by a court, if the court-ordered recount were to vacate the initial count, and if the court-ordered recount were not completed by the “safe harbor” date (i.e., six days prior to the meeting of the Electoral College), then there would have been a “failure to make a choice” in Florida.

Florida could then have been left with no presidential electors by the “safe harbor” day because of its “failure to make a choice.” Note that the Constitution does not require an absolute majority of the electoral votes to become President, but only a

“majority of the whole number of electors **appointed**.”²⁷⁶ [Emphasis added].

If Florida had failed to cast its 25 electoral votes in the Electoral College, Al Gore would have been elected President because he would have had a majority of the electors *appointed*.

To forestall that possibility, the Republican-controlled Florida House of Representatives passed a resolution *reaffirming* the initial *already-certified* vote count (in favor of 25 Republican presidential electors pledged to George W. Bush). Nothing came of this “reaffirming” motion in the Republican-controlled state Senate because of subsequent action in the courts (specifically, the U.S. Supreme Court’s decision in the case of *Bush v. Gore*).

Finally, it should be noted that if John Sample’s hypothetical scenario (of appointing presidential electors after the people voted on Election Day) were legally permissible or politically plausible, it could occur *under the current system*.

The winner-take-all rule is not in the U.S. Constitution. It is simply state law. If post-election changes in the method of appointing presidential electors were legally permissible or politically plausible, it would have been possible for this scenario to have occurred in each of the nation’s 57 presidential elections between 1789 and 2012, including the 2000 election.

Of course, we all know that there were no special sessions of legislatures in late November 2000 in Democratic states that George W. Bush carried (North Carolina, West Virginia, Alabama, and Arkansas).²⁷⁷ None of these four states repealed their

²⁷⁶The 12th Amendment (ratified in 1804) states, “The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors *appointed*.” There have been occasional cases when a state failed to appoint its presidential electors. For example, New York did not in 1789 because the legislature could not agree on how to appoint them. Notably, the Southern states did not appoint presidential electors in 1864.

²⁷⁷The Democrats also controlled the Governor’s office in North Carolina, West Virginia, and Alabama. In Arkansas (where the governor was Republican at the time), a veto can be overridden by a majority vote in the Legislature, so the Democrats had a veto-proof majority in the legislature.

existing winner-take-all laws and appointed presidential electors who would vote for the candidate who received the most popular votes nationwide. Such an action in *any one* of these four states would have given Al Gore a majority of the Electoral College in 2000—even after George W. Bush was awarded all 25 of Florida’s electoral votes.

Similarly, the North Carolina Legislature did not switch, after Election Day in 2000, to an allocation of electoral votes based on congressional districts or a proportional allocation of the state’s electoral votes. Either of those two actions would have given Al Gore a majority in the Electoral College.

Moreover, the Alabama legislature did not switch, after Election Day, to a proportional allocation of electoral votes—an action that would have given Al Gore a majority in the Electoral College.

Note that these Governors and legislatures could easily have fabricated political “spin” to justify their action based on the widespread public support for the concept that the candidate receiving the most popular votes in all 50 states and the District of Columbia should become President.

Indeed, Gallup polls since 1944 have shown that only about 20% of the public have supported the current system of awarding all of a state’s electoral votes to the presidential candidate who receives the most votes in each separate state (with about 70% opposed and about 10% undecided).

The Governors and legislatures of these four states could also have quickly conducted public opinion polls in their own states on the abstract question of whether the winner of the nationwide popular vote should become President. Polls taken later showed that 81% of West Virginia voters, 80% of Arkansas voters, and 74% of North Carolina voters supported the proposition that the winner of the nationwide popular vote should become President.²⁷⁸

Of course, as we all know, no state legislatures took any of the above actions after the November 2000 election because everyone recognized that such action would have been unconstitutional on its face under Article II, section 1, clause 4 of the U.S. Constitution and section 1 of Title 3 of the United States Code.²⁷⁹ If such an action had been attempted, it would have been immediately voided by a state or federal court by summary judgment—with no credence being given to the disingenuous political “spin” offered by the Governor or legislature for their post-election change in the rules of the game.

The American people accepted the ascendancy of the second-place candidate to the White House in 2000 because everyone understood that the election had been conducted under the established “rules of the game” that were known to both candidates,

²⁷⁸ See section 9.35.1 and 7.1 for information about these polls. Detailed reports on these and other polls, including the cross-tabs, are available at the web site of National Popular Vote at <http://www.nationalpopularvote.com/pages/polls.php>.

²⁷⁹ As explained in later parts of this section, this hypothetical scenario would also have to overcome potential problems under section 5 of Title 3 of the United States Code.

namely the state-by-state winner-take-all method. This was the case even though a substantial majority of the public disapproved (then and now) of the state-by-state winner-take-all system and favored (then and now) a national popular vote for President.

In summary, Article II, section 1, clause 4 of the U.S. Constitution and section 1 of Title 3 of the United States Code precludes any state from appointing presidential electors after “the results of an election become known”—under either the National Popular Vote compact or the current system.

Any law repealing the compact that purports to take effect between July 20 of a presidential year and Inauguration Day would be unconstitutional on its face, because it would violate the Impairments Clause of the U.S. Constitution.

An interstate compact is a contract. Withdrawal from any contract may only be made in accordance with the contract’s own terms.

Like most interstate compacts, the National Popular Vote compact permits states to withdraw from the compact (simply by passing a repeal statute).

And, like most other interstate compacts, the National Popular Vote compact delays the effectiveness of any withdrawal for a certain amount of time appropriate to the subject matter of the compact.

The National Popular Vote compact permits any member state to withdraw, subject to the limitation that a withdrawal cannot take effect during a six-month period between July 20 of a presidential election year and January 20 (Inauguration Day) of the following year. Clause 2 of Article IV of the National Popular Vote compact provides:

“Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.”

This six-month “blackout” period includes six important events relating to presidential elections namely, the:

- national nominating conventions,
- fall general election campaign period,
- Election Day on the Tuesday after the first Monday in November,
- meeting of the Electoral College on the first Monday after the second Wednesday in December,
- counting of the electoral votes by Congress on January 6, and
- inauguration of the President and Vice President for the new term on January 20.

The blackout period in the National Popular Vote compact is aimed at preventing a withdrawal in the midst of the presidential election process and, in particular, during the especially sensitive period (approximately 35 days) between Election Day in early November and the meeting of the Electoral College in mid-December.

The Impairments Clause (sometimes called the “Contracts Clause”) of the U.S. Constitution (Article I, section 10, clause 1) provides:

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”

Because of the Impairments Clause, the courts have never allowed *any* state to withdraw from *any* interstate compact without following the procedure for withdrawal specified by the compact.

The U.S. Supreme Court succinctly dismissed the possibility in *Petty v. Tennessee-Missouri Bridge Commission* in 1952:

“A compact, is after all, a contract.”²⁸⁰

On numerous occasions, federal and state courts have implemented the U.S. Supreme Court’s interpretation of the Impairments Clause and rebuffed the occasional (sometimes creative) attempts by states to evade their obligations under interstate compacts.

The U.S. District Court for the District of Maryland in *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* stated in 1976:

“Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; **the compact** governs the relations of the parties with respect to the subject matter of the agreement and **is superior to both prior and subsequent law**. Further, when enacted, **a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered** without the consent of all parties.”²⁸¹
[Emphasis added]

The 1999 case of *Aveline v. Pennsylvania Board of Probation and Parole* was concerned with withdrawal from the Interstate Compact for the Supervision of Parolees and Probationers. Section 7 of that compact provides:

“The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. **Renunciation of this compact shall be by the same authority which executed it, by sending six months’ notice in writing of its intention to withdraw from the compact to the other states party hereto.**”²⁸² [Emphasis added]

In 1999, the Commonwealth Court of Pennsylvania ruled in *Aveline v. Pennsylvania Board of Probation and Parole*:

²⁸⁰ *Petty v. Tennessee-Missouri Bridge Commission*. 359 U.S. 275 at 285. 79 S.Ct. 785 at 792. 1952.

²⁸¹ *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* (414 F.Supp. 408 at 409). 1976.

²⁸² Missouri Revised Statutes. Chapter 217. Section 217.810.

“A compact takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide.”²⁸³
[Emphasis added]

The 1991 case of *McComb v. Wambaugh* was concerned with withdrawal from the Interstate Compact on Placement of Children. The compact permits withdrawal with two-years notice.

“Withdrawal from this compact shall be by the enactment of a statute repealing the same, but **shall not take effect until two years after the effective date of such statute** and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.”
[Emphasis added]

The United States Court of Appeals for the Third Circuit ruled in *McComb v. Wambaugh*:

“Having entered into a contract, a participant state may not unilaterally change its terms. **A Compact also takes precedence over statutory law in member states.**”²⁸⁴ [Emphasis added]

As the Court of Appeal of the State of California said in *The Gillette Company et al. v. Franchise Tax Board* in 2012:

“Interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact. (Broun on Compacts, *supra*, § 1.2.2, p. 17.)”²⁸⁵ [Emphasis added]

The Council of State Governments summarized the nature of interstate compacts as follows:

“Compacts are agreements between two or more states that bind them to the compacts’ provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against

²⁸³ *Aveline v. Pennsylvania Board of Probation and Parole* (729 A.2d. 1254 at 1257, note 10).

²⁸⁴ *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

²⁸⁵ *The Gillette Company et al. v. Franchise Tax Board. Court of Appeal of the State of California*, First Appellate District, Division Four. July 24, 2012. Page 10. Appendix GG contains the full opinion.

laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).

“That means that **compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws.** In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and **they take precedence over conflicting state laws, regardless of when those laws are enacted.**

“However, unlike treaties, compacts are not dependent solely upon the good will of the parties. **Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves.** Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That’s why **compacts are considered the most effective means of ensuring interstate cooperation.**”²⁸⁶
[Emphasis added]

The occasional attempts by states to evade their obligations under interstate compacts are consistently rejected by the courts.

Both state courts and federal courts have the power to enforce the Impairments Clause.

An example of state-level enforcement of the Impairments Clause is found in the 2012 case of *The Gillette Company et al. v. Franchise Tax Board*. In that case, the California Court of Appeal voided a state law attempting to override a provision of the Multistate Tax Compact (from which California had not withdrawn at the time of the court’s decision).²⁸⁷

“Some background on the nature of interstate compacts is in order. **These instruments are legislatively enacted, binding and enforceable agreements between two or more states.**”²⁸⁸

“As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not.”²⁸⁹

²⁸⁶The Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

²⁸⁷After the California court’s decision in *The Gillette Company et al. v. Franchise Tax Board*, the state of California enacted a law (Senate Bill 1015 of 2012) exercising California’s right to withdraw from the Multistate Tax Compact. After the effective date of the statute withdrawing from the compact, the state of California became free to change its formula for taxing multi-state businesses. Senate Bill 1015 took effect as a “budget trailer” on July 27, 2012.

²⁸⁸*The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 8. Appendix GG contains the full opinion.

²⁸⁹*Ibid.* Page 9.

“Where, as here, federal congressional consent was neither given nor required, the Compact must be construed as state law. (*McComb v. Wambaugh* (3d Cir. 1991) 934 F.2d 474, 479.) Moreover, **since interstate compacts are agreements enacted into state law, they have dual functions as enforceable contracts between member states and as statutes with legal standing within each state;** and thus we interpret them as both. (*Aveline v. Bd. of Probation and Parole* (1999) 729 A.2d 1254, 1257; see Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts* (ABA 2006) § 1.2.2, pp. 15-24 (Broun on Compacts); 1A Sutherland, *Statutory Construction* (7th ed. 2009) § 32:5; *In re C.B.* (2010) 188 Cal.App.4th 1024, 1031 [recognizing that Interstate Compact on Placement of Children shares characteristics of both contractual agreements and statutory law].)

“The contractual nature of a compact is demonstrated by its adoption: There is an offer (a proposal to enact virtually verbatim statutes by each member state), an **acceptance** (enactment of the statutes by the member states), and **consideration** (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest.)” (Broun on Compacts, *supra*, § 1.2.2, p. 18.) **As is true of other contracts, the contract clause of the United States Constitution shields compacts from impairment by the states.** (*Aveline v. Bd. of Probation and Parole*, *supra*, 729 A.2d at p. 1257, fn. 10.) Therefore, upon entering a compact, “it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide.” (Ibid.; accord, *Intern. Union v. Del. River Joint Toll Bridge* (3d Cir. 2002) 311 F.3d 273, 281.) **Thus interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact.** (Broun on Compacts, *supra*, § 1.2.2, p. 17.)

“As explained and summarized in *C.T. Hellmuth v. Washington Metro. Area Trans.* (D.Md. 1976) 414 F.Supp. 408, 409 (*Hellmuth*): **‘Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.** It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other sig-

natories.’ Cast a little differently, ‘[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact.’ (*Henderson v. Delaware River Joint Toll Bridge Com’m* (1949) 66 A.2d 843, 849-450.) Nor may states amend a compact by enacting legislation that is substantially similar, unless the compact itself contains language enabling a state or states to modify it through legislation “‘concurred in’” by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, *supra*, 311 F.3d at pp. 276-280.)²⁹⁰ [Emphasis added]

The court also stated:

“Were this simply a matter of statutory construction involving two statutes—sections 25128 and 38006—we would at least entertain the FTB’s argument that section 25128 repealed the section 38006 taxpayer election to apportion under the Compact formula, and now mandates the exclusive use of the double-weighted sales apportionment formula. However, this construct is not sustainable because it completely ignores the dual nature of section 38006. Once one filters in the reality that **section 38006 is not just a statute but is also the codification of the Compact, and that through this enactment California has entered a binding, enforceable agreement with the other signatory states**, the multiple flaws in the FTB’s position become apparent. **First, under established compact law, the Compact supersedes subsequent conflicting state law. Second, the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts.** And finally, the FTB’s construction of the effect of the amended section 25128 runs afoul of the reenactment clause of the California Constitution. . . .

“By its very nature an interstate compact shifts some of a state’s authority to another state or states. Thus signatory states cede a level of sovereignty over matters covered in the Compact in favor of pursuing multilateral action to resolve a dispute or regulate an interstate affair. (*Hess v. Port Authority Trans-Hudson Corporation* (1994) 513 U.S. 30, 42; *Broun on Compacts*, *supra*, § 1.2.2, p. 23.) Because the Compact is both a statute and a binding agreement among sovereign signatory states, having entered into it, California cannot, by subsequent legislation, unilaterally alter or amend its terms. Indeed, as an interstate compact **the Compact is superior to prior and subsequent the statutory law of member states.** (*McComb v. Wambaugh*, *supra*, 934 F.2d at

²⁹⁰ *Ibid.* Pages 9–11.

p. 479; Hellmuth, *supra*, 414 F.Supp. at p. 409.) This means that the Compact trumps section 25128, such that, contrary to the FTB's assertion, section 25128 cannot override the UDITPA election offered to multistate taxpayers in section 38006, article III, subdivision 1. It bears repeating that the Compact requires states to offer this taxpayer option. If a state could unilaterally delete this baseline uniformity provision, it would render the binding nature of the compact illusory and contribute to defeating one of its key purposes, namely to "[p]romote uniformity or compatibility in significant components of tax systems." (§ 38006, art. I, subd. 2.) **Because the Compact takes precedent over subsequent conflicting legislation, these outcomes cannot come to pass.**²⁹¹

The courts have long held that a state belonging to an interstate compact may not unilaterally renounce the agreement. The U.S. Supreme Court addressed this issue in a 1950 case involving the Ohio River Valley Water Sanitation Compact. The parties to this compact included eight states and the federal government. The compact established a commission consisting of representatives from each of the governmental units. It provided that each party state would pay a specified share of the operating expenses of the compact's commission.

"The signatory states agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory states, one half of such amount to be prorated among the several states in proportion of their population within the district at the last preceding federal census, the other half to be prorated in proportion to their land area within the district." [Emphasis added]

There was considerable political division in the West Virginia state government over the desirability of the compact. The state legislature ratified the compact and, in 1949, appropriated \$12,250 as West Virginia's initial contribution to the expenses of the compact's commission.

The state Auditor, however, refused to make the payment from the state treasury. He argued that the legislature's approval of the compact violated the state constitution in two respects. First, the Auditor argued that the compact was unconstitutional because it delegated the state's police power to an interstate agency involving other states and the federal government. Second, the Auditor argued that the compact was invalid because it bound the West Virginia legislature in advance to make appropriations for the state's share of the commission's operating expenses in violation of a general provision of the state constitution concerning the incurring of "debts."

The West Virginia State Water Commission supported the compact and went to

²⁹¹ *Ibid.* Pages 15–16.

court requesting a mandamus order (a judicial writ ordering performance of a specific action) to compel the Auditor to make the payment from the state treasury. The Supreme Court of Appeals of West Virginia invalidated the legislature's ratification of the compact on the grounds that the compact violated the state constitution.

In 1950, the U.S. Supreme Court reversed the state ruling and prevented West Virginia from evading its obligations under the compact. The Court wrote in *West Virginia ex rel. Dyer v. Sims*:

“But a compact is after all a legal document. . . . **It requires no elaborate argument to reject the suggestion that an agreement** solemnly entered into between States by those who alone have political authority to speak for a State **can be unilaterally nullified**, or given final meaning by an organ of one of the contracting States. **A State cannot be its own ultimate judge in a controversy with a sister State.**”²⁹² [Emphasis added]

The Court continued:

“That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved **because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated.** . . . What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. . . . Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. **The Compact involves a reasonable and carefully limited delegation of power to an interstate agency.**”²⁹³ [Emphasis added]

Justice Robert Jackson's concurring opinion set forth an additional justification for the Court's decision. Justice Jackson suggested that the Supreme Court did not need to interpret the West Virginia state constitution in order to conclude that the compact bound West Virginia. Instead, he stated that West Virginia was estopped from changing its position after each of the other governmental entities relied upon, and changed their position because of, the compact.

“**West Virginia assumed a contractual obligation** with equals by permission of another government that is sovereign in its field (the federal government). After Congress and **sister states had been induced to alter**

²⁹² *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 at 28, 1950.

²⁹³ *Id.* at 30–31.

their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she put on the generalities of her Constitution, **she is bound by the Compact.**²⁹⁴ [Emphasis added]

The pre-ratification expectations of states joining a compact are especially important whenever there is a post-ratification dispute among compacting parties concerning voting rights within the compact.

In one case, Nebraska (which was obligated to store radioactive waste under the terms of an interstate compact) sought additional voting power on the compact's commission after the compact had gone into effect. A majority (but not all) of the compact's other members consented to Nebraska's request. Nebraska's request was, however, judicially voided in 1995 in *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*

“because changes in ‘voting power’ substantially alter the original expectations of the majority of states which comprise the compact.”²⁹⁵

Amplifying the principle of *West Virginia ex rel. Dyer v. Sims*, the courts have noted that a single state cannot obstruct the workings of a compact. In *Hess v. Port Authority Trans-Hudson Corp.*, the U.S. Supreme Court held in 1994 that a compact is

“ . . . not subject to the unilateral control of any one of the States ”²⁹⁶

Similarly, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court in 1979 held that a member state may not unilaterally veto the actions of a compact's commission. Instead, the remedy of an aggrieved state consists of withdrawing from the compact in accordance with the compact's terms for withdrawal.²⁹⁷

In *Kansas City Area Transportation Authority v. Missouri*, the Eighth Circuit in 1981 held that a member state may not legislatively burden the other member states unless they concur.²⁹⁸

Moreover, the courts have prevented a compacting state from undermining the workings of that compact. In the 1993 case of *Alcorn v. Wolfe*, the removal of an appointee to a compact commission, initiated by a Governor to inject his political influence into the operations of the commission, was invalidated because it

“clearly frustrate[d] one of the most important objectives of the compact.”²⁹⁹

²⁹⁴ *Id.* at 36.

²⁹⁵ *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 902 F.Supp. 1046, 1049 (D.Neb. 1995).

²⁹⁶ *Hess v. Port Authority Trans-Hudson Corp.* 513 U.S. 30 at 42. 1994.

²⁹⁷ *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*. 440 U.S. 391 at 399 and 402. 1979.

²⁹⁸ *Kansas City Area Transportation Authority v. Missouri*. 640 F.2d 173 at 174 (8th Cir.). 1979.

²⁹⁹ *Alcorn v. Wolfe*. 827 F.Supp. 47, 53 (D.D.C. 1993).

In *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*, Nebraska was estopped in 1993 from seeking equitable relief to prevent a compact, of which it was a member, from pursuing its central mission.³⁰⁰ In *New York v. United States*, the U.S. Supreme Court held that the estoppel doctrine was applicable only to the states that have adopted the interstate compact.³⁰¹

In short, a state may be estopped from withdrawing from a compact in any manner not permitted by the terms of the compact.

Recall that most interstate compacts contain obligations that a member state would never have agreed to unless it could rely on the enforceability of the obligations undertaken by its sister states. Consequently, most interstate compacts impose a delay on withdrawal because each member state must be able to rely on each contracting party to fulfill its obligations and must have time (and sometimes compensation) to adjust if another state desires to withdraw.

The six-month blackout period for withdrawing from the proposed “Agreement Among the States to Elect the President by National Popular Vote” is reasonable and appropriate in order to ensure that a politically motivated member state does not change its position after the candidates, the political parties, the voters, and the other compacting states have proceeded through the presidential campaign and presidential election cycle in reliance on each compacting state fulfilling its obligations under the compact.

The enforceability of interstate compacts under the Impairments Clause is precisely the reason why sovereign states enter into interstate compacts. If a state were willing to merely rely on the goodwill and graciousness of other states to undertake certain actions, it could unilaterally enact its own independent law on the subject matter involved (unconnected with the actions of other states), unilaterally enact a uniform state law (and hope that other states did the same), or unilaterally enact a contingent state law (if permitted by the state constitution). However, if a state wants an agreement that is legally binding on other states, it enters into an interstate compact.

Thus, if a Governor and state legislature were to enact legislation purporting to withdraw from the National Popular Vote compact during the six-month period between July 20 of a presidential election year and Inauguration Day (January 20), that legislation would be unconstitutional on its face because of the Impairments Clause.³⁰²

Professor Norman R. Williams of Willamette University has made the argument that the state legislature’s plenary power to choose the manner of appointing presiden-

³⁰⁰*State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 834 F.Supp. 1205 at 1215 (D.Neb. 1993).

³⁰¹*New York v. United States*. 505 U.S. 144 at 183. 1992.

³⁰²Generic contract law (applicable to parties to *any* contract, whether the parties are state governments or not) provides a separate and independent non-constitutional legal basis for preventing a state from attempting to withdraw from a compact except in the manner specified by the compact.

tial electors is not subject to any specific provisions in the Constitution restricting the exercise of legislative power.

“It is not clear that the NPVC is valid and enforceable against a state that decides to withdraw from it after July 20 in a presidential election year. Article II of the U.S. Constitution entrusts the method of appointment of the presidential electors to the state legislature. For some, that federal constitutional delegation of authority must be read literally, meaning that **the state legislature’s power cannot be circumscribed to any extent or in any manner.**”³⁰³ [Emphasis added]

According to Williams’ “imperial legislature” theory, specific restrictions in the Constitution, such as the Impairments Clause, cannot restrain the exercise of legislative power.

This argument ignores the reality that the vast majority of interstate compacts involve state plenary powers. States voluntarily enter into interstate compacts precisely because compacts, in conjunction with the Impairments Clause, provide a way to create enforceable restrictions on state action. States mutually agree to these restrictions because each participating state believes that the restrictions are mutually beneficial.

Section 1 of Article II of the U.S. Constitution provides:

“Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors. . . .”³⁰⁴ [Emphasis added]

The wording “in such manner as the ___ may direct” is a grant of power permitting each state to exercise a certain power; however, it does not create a power that stands above the rest of the U.S. Constitution or outside the Constitution.

Tellingly, section 1 of Article II does *not* say:

“**Notwithstanding any other provision of this Constitution**, each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .”

Section 1 of Article II is neither more nor less than a delegation of a certain power to a certain body (in this case the state legislature). The exercise of that legislative power is subject to all of the other specific restraints in the U.S. Constitution (and state constitution) that may apply to the exercise of legislative power.

Among the specific restrictions on the power of a state under section 1 of Article II are those contained in the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of ser-

³⁰³ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 219.

³⁰⁴ U.S. Constitution. Article II, section 1, clause 2.

vitude”), the 19th Amendment (woman’s suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

Article I, section 10, clause 1 of the U.S. Constitution provides:

“**No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; **pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts,** or grant any Title of Nobility.” [Emphasis added]

Thus, under section 1 of Article II, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, notwithstanding Professor Williams’ “imperial legislature” theory, a state legislature may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a previous presidential election because the Constitution’s explicit prohibition against *ex post facto* laws operates as a restraint on the delegation of power contained in section 1 of Article II.

Similarly, the Constitution’s explicit prohibition against a “law impairing the obligation of contract” (appearing adjacent to the prohibition against *ex post facto* laws) operates as a restraint on the delegation of power contained in section 1 of Article II.

It is interesting to note that the wording “in such manner as the ___ may direct” appears in a second place in the Constitution in connection with the specific subject of selecting the manner of appointing presidential electors. The 23rd Amendment to the U.S. Constitution (ratified in 1961) provides:

“The District constituting the seat of government of the United States shall appoint **in such manner as the Congress may direct** a number of electors of President and Vice President. . . .”

Surely no one would argue that “in such manner as the ___ may direct” (the exact parallel of the wording of section 1 of Article II) means that Congress is not subject to specific provisions of the Constitution restricting the exercise of its plenary legislative power, and that Congress could therefore, for example, exclude women and African-Americans from voting in the selection of presidential electors in the District of Columbia, notwithstanding the specific requirements of the 19th Amendment (ratified in 1920) and the 15th Amendment (ratified in 1870).

The wording “in such manner as the ___ may direct” also appears in the 17th Amendment (ratified in 1913) in connection with temporary appointments to fill U.S. Senate vacancies

“ . . . until the people fill the vacancies by election **as the legislature may direct.**” [Emphasis added]

Certainly, no one would argue that the “may direct” wording means that a state legislature is not subject to other specific provisions in the Constitution restricting the

exercise of this plenary legislative power such as, say, the 15th Amendment (ratified in 1870) or the Equal Protection clause of the 14th Amendment (ratified in 1868). A state legislature could not, for example, exclude African-American voters in a vacancy-filling election for the U.S. Senate.

In fact, both the U.S. Constitution and state constitutions are replete with plenary powers possessed by their respective legislative bodies. Congress, for example, has plenary power over counterfeiting, the District of Columbia, federal taxation, and numerous other “enumerated” areas, but no one would argue that these plenary powers are not subject to specific provisions of the Constitution restricting the exercise of all legislative power, such as, say, the specific constitutional prohibition against *ex post facto* laws (Article I, section 9, clause 3). For example, Congress may not pass *ex post facto* laws applicable to the District of Columbia under its plenary powers in Article I, section 8, clause 17:

“The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District.”

Similarly, state legislatures have plenary power over innumerable matters, but no one would argue that these plenary powers are not subject to specific restrictive provisions of the U.S. Constitution and their state constitutions.

In short, two centuries of settled law concerning the enforceability of interstate compacts under the Impairments Clause would be available to rebuff any attempt to execute the hypothetical scenario concerning withdrawal.

See section 9.11.3 for a detailed discussion of another of Professor Williams’ claims that interstate compacts are “toothless.”

The Safe Harbor provision of federal law confers conclusiveness only on appointments of presidential electors made under “laws enacted prior to” Election Day.

As already discussed in an earlier part of this section, John Sample’s hypothetical scenario about a state withdrawing from the National Popular Vote compact after “the results of an election become known” is legally impossible because of Article II, section 1, clause 4 of the Constitution and section 1 of Title 3 of the United States Code.

Even if a state legislature were to meet on Election Day to appoint presidential electors, that action would not be sufficient.

The “safe harbor” section of federal law (Title 3, section 5) treats a state’s appointment of presidential electors as “conclusive” only if the appointment is based on

“laws enacted prior to the day fixed for the appointment of the electors.”
[Emphasis added]

The day fixed by law for appointment of presidential electors is the Tuesday after the first Monday in November (i.e., Election Day).

Thus, the state’s pre-existing law specifying the manner of appointing presidential electors (either under the National Popular Vote compact or under the current state-

by-state winner-take-all system) would have to have been repealed *prior* to Election Day before the legislature could meet on Election Day to appoint presidential electors.

The hypothetical scenario could only be executed in about three states because of numerous practical political reasons, including high quorum requirements, the fact that many states have politically divided government at any given time, the significant time delay before a new state law may take effect, the numerous time-delaying tactics enabling the minority party to delay action in the short period of time between Election Day and the meeting of the Electoral College, and other factors.

Even if the Impairments Clause of the U.S. Constitution and sections 1 and 5 of Title 3 of the United States Code did not exist, there are practical reasons that would prevent John Sample’s hypothetical scenario in which a state legislature and Governor might try, for partisan political advantage, to change the “rules of the game” between Election Day in early November and the meeting of the Electoral College in mid-December.

Changing the way a state chooses its presidential electors requires several distinct steps.

- First, the state legislature and Governor would have to enact a statute repealing (withdrawing from) the National Popular Vote compact.
- Second, after passing the legislature and being signed by the Governor, the repeal statute would have to take effect in the state involved.
- Third, the legislature and Governor would have to enact a statute providing a new way to appoint the state’s presidential electors. For example, the legislature and Governor might enact a statute empowering the legislature to appoint the state’s presidential electors.
- Fourth, the statute providing a new way to appoint the state’s presidential electors would have to take effect in the state involved.
- Fifth, the presidential electors would have to be appointed under the newly enacted procedure.

Because most state legislatures are not in session in November and December, it first would be necessary to call the legislature into special session for this purpose. Governors generally have the power to call their state legislatures into special session. In some states, legislators may have an independent power to convene a special session.

All Governors have the power to veto legislative bills. Thus, the Governor’s support would, as a practical matter, be a necessary part of any effort to repeal the compact except in the unusual situation where the legislative leadership possesses the power to convene a special session and controls a veto-proof majority.³⁰⁵

An attempt to change the manner of appointing a state’s presidential electors after

³⁰⁵In most states, a super-majority vote of both houses is necessary to override a governor’s veto. In Alabama, Arkansas, Indiana, Kentucky, North Carolina, Pennsylvania, Tennessee, and West Virginia, a gubernatorial veto can be overridden by a majority vote of both houses of the legislature.

the state's voters cast their votes on Election Day would be a partisan maneuver of the most extreme and extraordinary nature. It would elicit fierce opposition from the to-be-disadvantaged political party.

Thus, John Sample's hypothetical scenario could not even be contemplated in two-thirds of the states because of

- (1) high quorum requirements,
- (2) lengthy lay-over requirements before a bill may be considered,
- (3) the fact that almost half the states generally have politically divided government at any given time,
- (4) the fact that state constitutions in 21 states would delay the effective date of the new state law until after the Electoral College met in mid-December,
- (5) numerous time-delaying tactics enabling the minority party to delay action in the short period of time between Election Day and the meeting of the Electoral College, and
- (6) other factors.

These practical political difficulties can be appreciated by visualizing what would have happened if John Sample's hypothetical scenario had been contemplated immediately after the November 2008 presidential election.

First, the constitutions of four states (Texas, Oregon, Indiana, and Tennessee) specify a two-thirds quorum requirement for a meeting of the legislature. No political party had two-thirds control of both houses of the legislature in any of these states in November of 2008. Thus, it would be futile to even contemplate executing the hypothetical scenario in these states because the minority party would simply have boycotted the legislative session during the short period of time between Election Day and the meeting of the Electoral College in mid-December. The opposition would simply run out the clock.

Second, in California, there is a constitutional lay-over requirement preventing consideration of any bill for 30 days after its introduction (unless waived by a three-quarters vote). Neither political party had a three-quarters super-majority in the California legislature in 2008. Thus, it would be futile to even contemplate executing the hypothetical scenario in California.

Third, at any given time, the Governor's office and the two houses of state legislatures are not controlled by the same political party in many states. Over half the states had divided political control in the 20-year period starting in 1984. In 2004, 30 states had divided political control.^{306, 307} In November of 2008, for example, no politi-

³⁰⁶The number dropped to 13 after the 2012 elections. See Davey, Monica. One-party control opens states to partisan rush. *New York Times*. November 22, 2012. See chart showing partisan control of state government at <http://www.nytimes.com/interactive/2012/11/23/us/state-government-control-since-1938.html?ref=politics>.

³⁰⁷Dubin, Michael J. 2007. *Party Affiliations in the State Legislatures: A Year by Year Summary 1796–2006*. Jefferson, NC: McFarland & Company Inc.

cal party controlled both houses of the legislature plus the Governor's office (or had a veto-proof legislative majority in both houses) in 18 states *in addition to* the five states mentioned above. These 18 additional states were Alabama, Arizona, Connecticut, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia, and Wisconsin.

Fourth, the constitutions of 21 states significantly delay the effective date of *all* newly enacted state laws. Thus, in 10 states (*in addition to* the above 23 states), a new law changing the method of appointing presidential electors could not even take effect prior to the mid-December meeting of the Electoral College. The 10 additional states are Alaska, Illinois, Louisiana, Maine, Maryland, Nebraska, New Mexico, North Dakota, South Dakota, and Utah.

The shortest such delay in this group of 10 additional states is 60 days after the Governor's signature. There are only about 35 days between Election Day in November and the mid-December meeting of the Electoral College. Thus, the presidential electors from these states would have met and cast their votes under the pre-existing state law long before the politically motivated law repealing the National Popular Vote compact could take effect. In fact, in some of these states, the new President would have been inaugurated before the repeal law could take effect.

Table 9.12 shows the earliest date when a new state law can take effect in a given state.

The only exception to the delays imposed by state constitutions is to give a newly enacted law immediate effect by passing it as an "emergency bill." However, emergency bills require super-majorities (three-fifths, two-thirds, three-quarters, or four-fifths, depending on the state). Column 3 of table 9.12 shows the super-majority needed to give a bill immediate effect. In November 2008, no political party had the super-majorities necessary to pass an emergency bill in the additional group of 10 states. Thus, a statute repealing the compact simply could not take effect prior to the mid-December meeting of the Electoral College. Therefore, it would be pointless to even consider trying to execute John Sample's hypothetical scenario in this group of states.

Note that there are *overlapping* reasons why John Sample's hypothetical scenario could not be executed in most states. For example, two states with a two-thirds quorum (Tennessee and Indiana) also had divided government in November 2008. Moreover, bills passed in a special session in California do not take effect until 91 days after a bill is passed (unless the bill is given immediate effect by a two-thirds vote of each house). Neither party in California in November 2008 had the super-majority necessary to give a bill immediate effect. The state constitutions of many of the states with divided government in November 2008 would delay a new bill's effective date well beyond the mid-December meeting of the Electoral College.

Summarizing the above four points, John Sample's hypothetical scenario could not even be contemplated in 33 states (that is, two-thirds of the states).

Table 9.12 EARLIEST POSSIBLE EFFECTIVE DATE FOR NEW STATE LAWS

STATE	DATE WHEN A BILL ORDINARILY TAKES EFFECT	SUPER-MAJORITY NEEDED TO GIVE BILL IMMEDIATE EFFECT
Alabama	Can be immediate	
Alaska	90 days after enactment	Two-thirds
Arizona	90 days after legislature adjourns	Two-thirds (three-quarters if veto was overridden)
Arkansas	90 days after legislature adjourns	Two-thirds
California	January 1 next following a 90-day period from date of enactment. 91 days after special session adjourns	Two-thirds
Colorado	Can be immediate	
Connecticut	Can be immediate	
Delaware	Can be immediate	
Florida	Can be immediate	
Georgia	Can be immediate	
Hawaii	Can be immediate	
Idaho	Can be immediate	
Illinois	June 1 of the following year (if passed after May 31)	Three-fifths
Indiana	Can be immediate	
Iowa	Can be immediate	
Kansas	Can be immediate	
Kentucky	Can be immediate	
Louisiana	Can be immediate	
Maine	90 days after recess	Two-thirds
Maryland	June 1 after adjournment	Three-fifths
Massachusetts	90 days after enactment	Two-thirds
Michigan	90 days after adjournment	Two-thirds
Minnesota	Can be immediate	
Mississippi	Can be immediate	
Missouri	90 days after adjournment	
Montana	Can be immediate	
North Carolina	Can be immediate	
Nebraska	Three months after adjournment	Two-thirds
Nevada	Can be immediate	
New Hampshire	Can be immediate	
New Jersey	Can be immediate	
New Mexico	90 days after adjournment	Two-thirds
New York	20 days after enactment	
North Dakota	August 1	Two-thirds
Ohio	90 days after enactment	Two-thirds
Oklahoma	90 days after adjournment	Two-thirds
Oregon	Can be immediate	
Pennsylvania	Can be immediate	
Rhode Island	Can be immediate	
South Carolina	Can be immediate	
South Dakota	June 1 after adjournment	Two-thirds
Tennessee	Can be immediate	
Texas	90 days after adjournment	Two-thirds
Utah	60 days after adjournment	Two-thirds
Vermont	Can be immediate	
Virginia	July 1st or first day of 4th month after special session	Four-fifths
West Virginia	90 days after passage	Two-thirds
Washington	Can be immediate	
Wisconsin	Can be immediate	
Wyoming	Can be immediate	

That leaves 17 states where the hypothetical scenario would have been theoretically possible in November 2008. Those 17 states are Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Massachusetts, New Hampshire, New Jersey, North Carolina, Rhode Island, South Carolina, West Virginia, Washington state, and Wyoming. These are states lacking high quorums, lacking significant lay-over requirements, lacking significant delays before new laws take effect, and where one political party was in total control of the law-making process in November 2008 (either by controlling both houses of the legislature and the Governor’s office or by enjoying veto-proof majorities in both houses of the legislature).

However, even this small remaining group of 17 states is illusory. This group of 17 states would be immediately winnowed down to about four states because of two independent factors:

(A) A state cannot withdraw from the compact if it is not already a member.

John Sample’s hypothetical scenario would be irrelevant if the state were not a member of the National Popular Vote compact in the first place. If we make the reasonable assumption that about half of the states will be in the compact when it takes effect, this factor would alone eliminate about half of this group of 17 states.

(B) There would be no reason to withdraw from the compact if the political party controlling a given state is pleased with the outcome of the nationwide popular vote. Thus, the hypothetical scenario would be irrelevant in states where the political party in control of a given state had just won the national popular vote. This factor would independently eliminate about half of the states not eliminated by factor (A). That is, there would only be about four states in which Sample’s hypothetical scenario might be possible at any given time.

Even in this winnowed-down group of four states, there are several additional practical reasons why the hypothetical scenario probably could not be executed in the limited amount of time available.

First, a highly motivated minority in most state legislatures can delay the enactment of new legislation for a considerable length of time by invoking various parliamentary tactics. These tactics include offering amendments, filibusters, insisting that no action occur until pending amendments are printed, and, most importantly, “working to rule”—that is, refusing to waive the numerous time-consuming notice, scheduling, and lay-over requirements that are routinely waived in ordinary circumstances. The dilatory tactics available to a legislative minority cannot delay enactment of a particular bill forever; however, in most states, they are more than sufficient to delay a legislative bill in the short time available between Election Day and the mid-November meeting of the Electoral College.

Second, this winnowed-down group of states would probably not possess enough electoral votes to reverse the outcome in the Electoral College. One reason is that the

compact might well be enacted by a sufficiently large number of states so that the compacting states would possess significantly more than 270 electoral votes. Another (even more compelling) reason (discussed in greater detail below) is that, in a typical future presidential election under the National Popular Vote compact, the candidate winning the national popular vote would generally receive an exaggerated margin of victory in the Electoral College (roughly 75%).

Third, in several states in this winnowed-down group of 17 (e.g., Colorado, Washington state, and Wyoming), a protest referendum petition could be circulated to suspend the politically motivated action of the state legislature. The filing of a protest referendum petition automatically and unconditionally suspends the effectiveness of any new state law passed by the legislature until a subsequent statewide election. Protest referendum petitions generally require only a modest number of signatures (far smaller than the number of signatures required, say, to initiate a new state law). The aggrieved political party could, almost certainly, quickly acquire the requisite number of signatures. There would, of course, be no time to hold the referendum in the short five-week period between Election Day in early November and the meeting of the Electoral College in mid-December.

Thus, even if the Impairments Clause of the U.S. Constitution and sections 1 and 5 of Title 3 of the United States Code did not exist to prevent John Sample's hypothetical scenario, parliamentary difficulties would make it unlikely that the hypothetical scenario could be successfully implemented in practice.

The next section discusses an additional reason—indeed, the controlling reason—why John Sample's hypothetical scenario could not be executed in the real world, namely public opinion.

Any attempt to appoint presidential electors after the people vote in November would be politically preposterous in the real world.

There would be virtually no public support for John Sample's hypothetical scenario of changing the "rules of the game" after the people voted in November.

John Sample's hypothetical scenario assumes that the public strongly and enthusiastically supports the state-by-state winner-take-all system and would support a high-handed, last-ditch maneuver to restore it (in a state whose Governor and legislature had already enacted the National Popular Vote compact).

Recall that the political context of the hypothetical scenario would be some future time when the National Popular Vote compact is in effect. At that moment, the political environment would be such that

- a nationwide presidential campaign had already been conducted, over a period of many months, in which the candidates and the voters acted in accordance with the expectation that the national popular vote will determine who will become President;
- more than 70% of the American public favors a nationwide vote for President;

- more than 70% of the public in the state involved favors a nationwide vote for President;
- the legislature and Governor of the state involved have enacted the National Popular Vote bill; and
- the National Popular Vote compact has been enacted by (25 or so) states representing a majority of the people of the United States.

In reality, there is no significant public support for the current system at either the national or state level. Over 70% of the American people support the idea that the candidate who receives the most votes in all 50 states and the District of Columbia should win the Presidency (with 20% opposed and 10% undecided). Virtually identical percentages have been registered in state-level polls in big states, small states, spectator states, battleground states, red states, blue states, border states, and Southern states, as detailed in section 7.1.

Given the citizen nature of most state legislatures, it would require an extraordinary degree of control to whip a party's state legislators into line for such an unprecedented and highly partisan maneuver.

To execute John Sample's proposed partisan maneuver, the Governor and both houses of the state legislature would have to convene on Election Day (i.e., the Tuesday after the first Monday in November) because this is the only day in every four-year period when it is legal to choose presidential electors. This is, of course, the very same day when most state legislators would ordinarily be busy campaigning in their own districts (where, in most states, 50% to 100% of them are up for re-election). In addition, about a quarter of the nation's Governors are elected on Election Day in presidential election years. Thus, on the very same day when the voters would be going to the polls to cast their ballots for President in accordance with pre-existing state law (i.e., the National Popular Vote compact), the Governor and his supporters in the legislature would be hunkered down in the state Capitol Building, telling the voters that they intend to ignore the choice the people were in the process of making on Election Day (while simultaneously urging those same voters to re-elect them).

In short, John Sample's hypothetical partisan and illegal maneuver of attempting to withdraw from the National Popular Vote compact is a parlor game with no connection to the real world.

The hypothetical scenario would probably not matter because the national popular vote winner will typically receive about 75% of the electoral votes in the Electoral College, thereby producing a cushion of about 135 electoral votes above the 270 needed to win the Presidency.

Even if the Impairments Clause of the U.S. Constitution and sections 1 and 5 of Title 3 of the United States Code did not exist, John Sample's hypothetical scenario would probably not matter, because the national popular vote winner would typically receive an exaggerated margin in the Electoral College under the National Popular vote compact.

The reason is that the compact guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will receive at least 270 electoral votes (that is, a majority of the 538 electoral votes) from the states belonging to the compact. Then, in addition to this minimum guaranteed bloc of 270 or more electoral votes from the compacting states, the nationwide winning candidate would receive a certain number of additional electoral votes from whichever non-compacting states he or she happened to win under existing (winner-take-all) laws for awarding electoral votes in those states. If the non-compacting states divided approximately equally between the candidates, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College (that is, about 404 out of 538 electoral votes). Thus, even if it were legally possible to execute John Sample’s hypothesized partisan maneuver in one state (or even several states), the maneuver would almost certainly not affect who became President.

State constitutions provide additional constraints on withdrawal from a compact enacted by the citizen-initiative process.

In the case of a compact enacted by the citizen-initiative process, state constitutions would provide an additional constraint on a withdrawal from the National Popular Vote compact during the 35-day period between Election Day in November and the meeting of the Electoral College in mid-December.

In 11 states, there are state constitutional limitations concerning the repeal or amendment of a statute originally enacted by the voters by means of the citizen-initiative process. In seven of these states, the constraint on the legislature runs for a specific period of time. In four of the 11 states, the constraint is permanent—that is, the voters must be consulted in a subsequent referendum about any proposed repeal or amendment.

Table 9.13 briefly describes these constitutional limitations. Appendix R contains the complete constitutional provisions.

Table 9.13 STATE CONSTITUTIONAL LIMITATIONS ON THE REPEAL OR AMENDMENT OF STATUTES ORIGINALLY ENACTED BY THE VOTERS THROUGH THE CITIZEN-INITIATIVE PROCESS

STATE	LIMITATIONS
Alaska	No repeal within two years; amendment by majority vote anytime
Arizona	Three-quarters vote to amend; amending legislation must “further the purpose” of the measure
Arkansas	Two-thirds vote to amend or repeal
California	No amendment or repeal of an initiative statute by the legislature unless the initiative specifically permits it
Michigan	Three-quarters vote to amend or repeal
Nebraska	Two-thirds vote to amend or repeal
Nevada	No amendment or repeal within three years of enactment
North Dakota	Two-thirds vote to amend or repeal within seven years of effective date
Oregon	Two-thirds vote to amend or repeal within two years of enactment
Washington	Two-thirds vote to amend or repeal within two years of enactment
Wyoming	No repeal within two years of effective date; amendment by majority vote any time

In addition to constitutional limitations, public opinion acts as an especially strong inhibition against legislative repeal of a statute that the voters originally enacted by means of the citizen-initiative process. This political inhibition is particularly forceful in Western states where the citizen-initiative process is frequently used.

9.11.2. MYTH: A Secretary of State might change a state’s method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December.

QUICK ANSWER:

- No Secretary of State has the power to change a state’s method of awarding electoral votes.

MORE DETAILED ANSWER:

The following concern has been raised on an election blog regarding the National Popular Vote bill:

“In 2004 George Bush won a majority of the votes nationwide, but John Kerry came within something like 60,000 votes in Ohio of winning the Electoral College while losing the popular vote. Say Kerry won those 60,000 votes in Ohio, and the NPV program was in place with California a signer. In that entirely plausible scenario, does anyone think California’s (Democratic) Secretary of State, representing a state that Kerry won by a 10% margin (54%–44%), would actually certify George Bush’s slate of electors and personally put George Bush over the top for re-election, as the NPV agreement would have required?”³⁰⁸

Section 1 of Article II of the U.S. Constitution provides:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”³⁰⁹ [Emphasis added]

No state legislature has delegated the power to select the manner of appointing the state’s presidential electors to the Secretary of State. Instead, the method of awarding electoral votes in each state is controlled by the state’s election law—not the personal political preferences of the Secretary of State.

A Secretary of State may not ignore or override the National Popular Vote law any more than he or she may ignore or override the winner-take-all rule that is currently in effect in 48 states.

It does not matter whether the Secretary of State personally thinks that electoral votes should be allocated by congressional district, in a proportional manner, by the

³⁰⁸ In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution.

³⁰⁹ U.S. Constitution. Article II, section 1, clause 2.

winner-take-all rule, or by a national popular vote. The role of the Secretary of State in certifying the winning slate of presidential electors is entirely ministerial. That is, the role of the Secretary of State is to execute existing state law.

In the unlikely and unprecedented event that a Secretary of State were to attempt to certify an election using a method of awarding electoral votes different from the one specified by state law, a state court would immediately prevent the Secretary of State from violating the law's provisions (by injunction) and compel the Secretary of State to execute the provisions of the law (by mandamus).

If this hypothetical scenario were legally permissible or politically plausible, it would have occurred previously *under the current system*.

In 2000, there were 10 states³¹⁰ that George W. Bush carried that had a Democratic Secretary of State (or chief elections official).³¹¹

The electoral votes of *any* of these 10 states would have been sufficient to give Al Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes).³¹² Seventy percent or more of voters in the country supported the proposition that the candidate who receives the most popular votes in all 50 states and the District of Columbia should become President (as discussed in section 7.1).

Nonetheless, it can be safely stated that it did not even occur to any of these 10 Democratic Secretaries of State to attempt to try to override their states' laws by certifying the election of Democratic presidential electors in their states.

Such a post-election change in the rules of the game would not have been supported by the public (even though the public intensely dislikes the winner-take-all system), would immediately have been nullified by a state court, and almost certainly would have led to the subsequent impeachment of any official attempting it.

Moreover, awarding electoral votes proportionally in any of nine states with a Democratic Secretary of State would have been sufficient to give Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes).³¹³ A proportional allocation of electoral votes would have, indisputably, represented the will of the people of each of these nine states more accurately than the state-level winner-take-all rule.

In addition, awarding electoral votes by congressional districts in any of three states with a Democratic Secretary of State,³¹⁴ would have been sufficient to give Al Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes). A district allocation of electoral votes arguably would have

³¹⁰ Al Gore's home state of Tennessee, Alaska, Arkansas, Georgia, Kentucky, Mississippi, Missouri, New Hampshire, North Carolina, and West Virginia.

³¹¹ In Alaska, there is no Secretary of State, and the Lieutenant Governor is the state's chief elections official.

³¹² George W. Bush received 271 electoral votes in 2000 (including Florida's 25 electoral votes), and 270 electoral votes are required for election.

³¹³ All of those previously mentioned except Alaska.

³¹⁴ Georgia, Missouri, and North Carolina.

represented the will of the people of each of these three states more closely than the winner-take-all rule.

There has also been speculation that a Secretary of State might be “vilified” by certifying the election of the national popular vote winner. Under the National Popular Vote legislation, a dilemma has been hypothesized as to

“whether the Secretary of State would really certify the losing panel of electors from the state in question, or find some justification to send the panel actually elected by the voters in the state. That’s a very tough call and near-certain political vilification, either way, for the Secretary of State.”³¹⁵

This is not a “tough call” at all. In fact, there is no call to make. The Secretary of State is a ministerial official whose actions are directed and controlled by state law.

If 70% of the voters in a state prefer that the President be elected by a national popular vote, and if a state legislature enacts the National Popular Vote bill in response to the strong desires of the state’s voters, and if the presidential campaign is then conducted with both voters and candidates knowing that the National Popular Vote compact is going to govern the election in that state, then the voters are not going to complain about a Secretary of State who faithfully executes the state’s law.

Aside from the legal issues, the hypothesized scenario presupposes that the people heavily support the currently prevailing winner-take-all rule. In fact, public support for the current system of electing the President is very low (as discussed in section 7.1).

In short, the hypothesized scenario has no basis in law and certainly no basis in political reality.

9.11.3. MYTH: Interstate compacts that do not receive congressional consent are unenforceable and “toothless.”

QUICK ANSWER:

- Some interstate compacts require congressional consent; however, those that do not challenge federal supremacy do not require congressional consent.
- Far from being “toothless,” all interstate compacts are enforceable contracts (regardless of which combination of political bodies are necessary to approve them).
- In particular, an interstate compact takes precedence over *all* state laws—whether enacted *before* or *after* the state entered the compact. If a state no longer wishes to comply with its obligations under an interstate compact, it must withdraw from the compact in the manner specified by the compact before it adopts a contrary policy.

³¹⁵In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution. November 13, 2007.

MORE DETAILED ANSWER:

Professor Norman R. Williams of Willamette University discusses a variation on John Sample’s hypothetical withdrawal scenario (section 9. 11.1) by saying:

“In every state where the state legislature is controlled by the party of the national popular vote loser, there will be calls by disaffected constituents to withdraw from the NPVC. . . .

“In fairness, the NPVC foresees this problem and attempts to address it by forbidding states from withdrawing from the compact after July 20 in a presidential election year. States that are signatories as of July 20 are mandated by the NPVC to adhere to the compact and its rules for appointing electors. Depending on whether Congress ratifies the NPVC, however, that provision is either **toothless** or fraught with difficulties.”³¹⁶ [Emphasis added]

In support of his claim, Professor Williams has presented the following legally incorrect argument—with some astonishingly inappropriate legal citations—concerning the enforceability of interstate compacts that do not require congressional consent in order to take effect:

“Article I, Section 10 of the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation.
[Williams’ footnote 171 appears here]

“Let’s suppose Congress does not consent to the compact, as its supporters urge is unnecessary despite the seemingly categorical command of the Compact Clause.

“In that case, the compact does not acquire the force of federal law, as congressionally endorsed compacts do, and therefore, **it remains merely the law of the state.**

“Its status as state law, however, makes it no different from any other statute enacted by the state legislature.

“And, **like any other state statute, a subsequent legislature can amend or repeal the NPVC** consistent with the state’s own constitutionally prescribed legislative process. [Williams’ footnote 175 appears here]

“A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally unratified interstate compacts.”³¹⁷ [Williams’ footnote 176 appears here] [Emphasis added]

³¹⁶ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 215–216.

³¹⁷ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

Williams’ statement that “the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation” is supported by his footnote 171 citing the Compacts Clause of the Constitution. However, Williams fails to cite a century and a quarter of settled compact jurisprudence interpreting the Compacts Clause of the Constitution, including rulings of the U.S. Supreme Court such as the 1893 case of *Virginia v. Tennessee*³¹⁸ and the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*³¹⁹ (both quoted at length in section 9.16.5 and contained in full in appendices AA and BB, respectively).

The facts are that numerous interstate compacts that never received congressional consent are in force today based on the U.S. Supreme Court’s rulings in *Virginia v. Tennessee* and *U.S. Steel Corporation v. Multistate Tax Commission*. For example, the Supreme Court ruled that the Multistate Tax Compact—the subject of *U.S. Steel Corporation v. Multistate Tax Commission*—did not require congressional consent in order to go into effect.

Williams’ characterization of the Compacts Clause as a “categorical command” fails to acknowledge that the U.S. Supreme Court specifically ruled in both *U.S. Steel Corporation v. Multistate Tax Commission* and *Virginia v. Tennessee* that the Compact Clause was not categorical. As the Court said:

“Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.

“The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*.³²⁰ His conclusion [was] that the Clause could not be read literally [and this 1893 conclusion has been] approved in subsequent dicta, but this Court did not have occasion expressly to apply it in a holding until our recent decision in *New Hampshire v. Maine*,³²¹ supra.”

“Appellants urge us to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.”³²² [Emphasis added]

See section 9.16.5 for additional discussion of the U.S. Supreme Court’s decisions and criteria for whether a particular interstate compact requires congressional consent.

³¹⁸ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

³¹⁹ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. 1978.

³²⁰ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

³²¹ *New Hampshire v. Maine*, 426 U.S. 363. 1976.

³²² *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. at 459–460. 1978.

Williams' statement that a compact's "status as state law . . . makes it no different from any other statute enacted by the state legislature" is legally incorrect.

The fact that a congressionally approved compact acquires the status of federal law is unrelated to the question of whether a compact has gone into effect and is an enforceable contract.

Compacts go into operation in one of two ways.

- First, if the compact requires congressional consent, the compact goes into effect only after (1) being enacted by the requisite combination of states, and (2) Congress confers its consent. A compact that requires congressional consent, but has not received it, simply never goes into effect.
- If the compact does not require congressional consent, the compact goes into effect after being enacted by the requisite combination of states.

The question of whether a particular compact requires congressional consent in order to take effect is a legal question that is answered by whether or not it satisfies the criteria established by rulings of the U.S. Supreme Court.

In practice, there may be litigation to determine whether a particular new compact requires congressional consent.

When Congress consents to an interstate compact, the compact acquires the status of federal law.

Compacts that do not require congressional consent do not acquire the status of federal law.

Once a compact is in effect, it is an enforceable contractual arrangement among participating states. The Impairments Clause of the U.S. Constitution provides:

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts."³²³

State courts routinely enforce interstate compacts not requiring congressional consent on the basis of the Impairments Clause.

The fact that a compact not requiring congressional consent has not been converted into federal law is unrelated to its enforceability.

A 2012 *state* court ruling involving the Multistate Tax Compact (the same interstate compact that was the subject of the U.S. Supreme Court's decision in *U.S. Steel Corporation v. Multistate Tax Commission*) illustrates this point.

In *The Gillette Company et al. v. Franchise Tax Board*, the California Court of Appeal voided a state law attempting to override a provision of the Multistate Tax Compact (from which California had not withdrawn at the time of the decision).

"In 1972, a group of multistate corporate taxpayers brought an action on behalf of themselves and all other such taxpayers threatened with audits

³²³ U.S. Constitution. Article I, section 10, clause 1.

by the Commission. The complaint challenged the constitutionality of the Compact on several grounds, including that it was invalid under the compact clause of the United States Constitution. (*U.S. Steel*, supra, 434 U.S. at p. 458.)

“The high court acknowledged that the compact clause, taken literally, would require the states to obtain congressional approval before entering into any agreement among themselves, ‘irrespective of form, subject, duration, or interest to the United States.’ (*U.S. Steel*, supra, 434 U.S. at p. 459.) However, it endorsed an interpretation, established by case law, that limited application of the compact clause ‘to agreements that are “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.” . . . This rule states the proper balance between federal and state power with respect to compacts and agreements among States.’” (Id. at p. 471, initial quote from *Virginia v. Tennessee* (1893) 148 U.S. 503, 519.)

“Framing the test as whether the Compact enhances state power with respect to the federal government, the court concluded it did not.”³²⁴

The California court continued:

“Some background on the nature of interstate compacts is in order. **These instruments are legislatively enacted, binding and enforceable agreements between two or more states.**”³²⁵

“As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not.”³²⁶

“Where, as here, federal congressional consent was neither given nor required, the Compact must be construed as state law. (*McComb v. Wambaugh* (3d Cir. 1991) 934 F.2d 474, 479.) Moreover, **since interstate compacts are agreements enacted into state law, they have dual functions as enforceable contracts between member states and as statutes with legal standing within each state;** and thus we interpret

³²⁴ *The Gillette Company et al. v. Franchise Tax Board. Court of Appeal of the State of California*, First Appellate District, Division Four. July 24, 2012. Page 6. Appendix GG contains the full opinion.

³²⁵ *The Gillette Company et al. v. Franchise Tax Board. Court of Appeal of the State of California*, First Appellate District, Division Four. July 24, 2012. Page 8. Appendix GG contains the full opinion.

³²⁶ *The Gillette Company et al. v. Franchise Tax Board. Court of Appeal of the State of California*, First Appellate District, Division Four. July 24, 2012. Page 9. Appendix GG contains the full opinion.

them as both. (*Aveline v. Bd. of Probation and Parole* (1999) 729 A.2d 1254, 1257; see Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts* (ABA 2006) § 1.2.2, pp. 15-24 (Broun on Compacts); 1A Sutherland, *Statutory Construction* (7th ed. 2009) § 32:5; *In re C.B.* (2010) 188 Cal.App.4th 1024, 1031 [recognizing that Interstate Compact on Placement of Children shares characteristics of both contractual agreements and statutory law].)

“The contractual nature of a compact is demonstrated by its adoption: “There is an offer (a proposal to enact virtually verbatim statutes by each member state), an **acceptance** (enactment of the statutes by the member states), and **consideration** (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest.)” (Broun on Compacts, *supra*, § 1.2.2, p. 18.) **As is true of other contracts, the contract clause of the United States Constitution shields compacts from impairment by the states.** (*Aveline v. Bd. of Probation and Parole*, *supra*, 729 A.2d at p. 1257, fn. 10.) Therefore, upon entering a compact, “it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide.” (Ibid.; accord, *Intern. Union v. Del. River Joint Toll Bridge* (3d Cir. 2002) 311 F.3d 273, 281.) **Thus interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact.** (Broun on Compacts, *supra*, § 1.2.2, p. 17.)

“As explained and summarized in *C.T. Hellmuth v. Washington Metro. Area Trans.* (D.Md. 1976) 414 F.Supp. 408, 409 (*Hellmuth*): ‘**Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.** It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.’ Cast a little differently, ‘[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact.’ (*Henderson v. Delaware River Joint Toll Bridge Com’m* (1949) 66 A.2d 843, 849-450.) Nor may states amend a compact by enacting legislation that is substantially

similar, unless the compact itself contains language enabling a state or states to modify it through legislation ‘ “concurrent in” ’ by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, supra, 311 F.3d at pp. 276-280.)³²⁷ [Emphasis added]

The California court thus rejected a California state law overriding the Multistate Tax Compact as unconstitutional.³²⁸

Although state courts are more than capable of enforcing interstate compacts (and, in particular, voiding state legislation that attempts to evade a particular state’s obligations under a compact), interstate compacts may be litigated (and often are litigated) at the U.S. Supreme Court, as explained in *Interstate Disputes: The Supreme Court’s Original Jurisdiction*.³²⁹

The U.S. Constitution states:

“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.”³³⁰

Williams supports his next legally incorrect statement (that a compact for which congressional consent is unnecessary is “merely” a state law and not an enforceable contract) with a totally inapplicable legal authority. Williams says:

“A subsequent legislature can amend or repeal the NPVC consistent with the state’s own constitutionally prescribed legislative process. [Williams’ footnote 175 appears here]”³³¹

Williams’ authority for this legally incorrect statement (that is, his own footnote 175) is the 1951 U.S. Supreme Court decision in *West Virginia ex rel. Dyer v. Sim*.³³² However, this case is not about a state being allowed to evade its obligations under an interstate compact, but about the U.S. Supreme Court ruling that West Virginia could *not* evade its obligations under the compact. What the U.S. Supreme Court said was:

³²⁷ *The Gillette Company et al. v. Franchise Tax Board. Court of Appeal of the State of California*, First Appellate District, Division Four. July 24, 2012. Pages 9–11. Appendix GG contains the full opinion.

³²⁸ After the California court’s decision in *The Gillette Company et al. v. Franchise Tax Board*, the state of California enacted a law (Senate Bill 1015 of 2012) exercising California’s right to withdraw from the Multistate Tax Compact. After the effective date of the statute withdrawing from the compact, the state of California became free to change its formula for taxing multi-state businesses. Senate Bill 1015 took effect as a “budget trailer” on July 27, 2012.

³²⁹ Zimmerman, Joseph F. 2006. *Interstate Disputes: The Supreme Court’s Original Jurisdiction*. Albany, NY: State University of New York Press.

³³⁰ U.S. Constitution. Article III, section 2, clause 2.

³³¹ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

³³² *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33-34 (1951).

“But a compact is after all a legal document. . . . **It requires no elaborate argument to reject the suggestion that an agreement** solemnly entered into between States by those who alone have political authority to speak for a State **can be unilaterally nullified**, or given final meaning by an organ of one of the contracting States. **A State cannot be its own ultimate judge in a controversy with a sister State.**”³³³ [Emphasis added]

Williams’ final legally incorrect statement and inappropriate footnote are even more astonishing.

“A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally unratified interstate compacts. [Williams’ footnote 176 appears here]”³³⁴

Williams cites two authorities for this incorrect statement in his footnote 176:

- the 1996 Nebraska case of *State ex rel. Stenberg v. Moore*,³³⁵ and
- the 1936 Pennsylvania case of *Visor v. Waters*.³³⁶

In fact, neither case supports Williams’ statement, and the ruling in one of them is exactly opposite to what Williams claims.

State ex rel. Stenberg v. Moore was concerned with a 1993 Nebraska state law (Legislative Bill 507) that attempted to require future legislatures to provide certain fiscal estimates and provide appropriations at the time when that future legislature took any action that might increase the number of inmates in the state’s correctional facilities.

Legislative Bill 507 provided:

“(1) **When any legislation is enacted after June 30, 1993**, which is projected in accordance with this section to increase the total adult inmate population or total juvenile population in state correctional facilities, **the Legislature shall include in the legislation an estimate** of the operating costs resulting from such increased population for the first four fiscal years during which the legislation will be in effect. . . .

(3) **The Legislature shall provide by specific itemized appropriation**, for the fiscal year or years for which it can make valid appropriations, **an amount sufficient to meet the cost indicated in the estimate contained in the legislation for such fiscal year or years**. The appropriation shall be enacted in the same legislative session in which the legislation

³³³ *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 at 28, 1950.

³³⁴ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173, November 2011. Page 216.

³³⁵ *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

³³⁶ *Visor v. Waters*, 182 A. 241, 247 (Pa. 1936).

is enacted and shall be contained in a bill which does not contain appropriations for other programs.

“(4) Any legislation enacted after June 30, 1993, which does not include the estimates required by this section and is not accompanied by the required appropriation shall be null and void.” [Emphasis added]

In *State ex rel. Stenberg* in 1996, the Nebraska Supreme Court made the unsurprising ruling that it was unconstitutional for the legislature to attempt to bind succeeding legislatures by means of an ordinary state statute.

Significantly, in its ruling, the Nebraska Supreme Court specifically recognized interstate compacts as one of the rare exceptions to the general principle that one legislature cannot bind a future legislature:

“One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, **except as to valid contracts entered into by it**, and as to rights which have actually vested under its acts, and no action by one branch of the legislature can bind a subsequent session of the same branch.”³³⁷ [Emphasis added]

Thus, the 1996 Nebraska case of *State ex rel. Stenberg v. Moore* cited by Williams is not a legal authority supporting Williams’ statement, but a ruling making it clear that Williams is just plain wrong.

Williams’ citation of the 1936 Pennsylvania case of *Visor v. Waters* also fails to support Williams’ claim. *Visor v. Waters* was concerned with an attempt by one house of the Pennsylvania legislature to nullify a previously enacted state statute by means of a resolution passed only by the one house. *Visor v. Waters* was not even about a state statute (much less an interstate compact). The court’s ruling said:

“It is a settled rule that one Legislature cannot bind another and no action by one House could bind a subsequent session of that same House, but when the constituent bodies are united in a statute, **a single House, by a mere resolution cannot set aside and nullify the positive provisions of a law. . . . A new law can do that, but nothing less than a new law can.**”³³⁸ [Emphasis added]

The fact is that there are no applicable citations in support of Williams’ statements about the unenforceability of interstate compacts because Williams is just plain wrong.

³³⁷ *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

³³⁸ *Visor v. Waters*. 41 *Dauphin County Reports*. Volume 219 at 227. 1935. In 1936, the Pennsylvania Supreme Court upheld the lower court decision by saying, “The judgment in this case is affirmed on the full and comprehensive opinion of the learned President Judge of the lower court, which is printed at length in 41 *Dauphin County Reports* 219. *Visor v. Waters*, 182 A. 241, 247 (Pa. 1936).”

Another example of a compact that did not require congressional consent is the Interstate Compact for the Placement of Children. All 50 States and the District of Columbia are parties to this compact.³³⁹

In the 1991 case of *McComb v. Wambaugh*, the U.S. Court of Appeals for Third Circuit ruled that the compact took precedence over state law.

“The Constitution recognizes compacts in Article I, section 10, clause 3, which reads, ‘No state shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State.’ **Despite the broad wording of the clause Congressional approval is necessary only when a Compact is ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.’** *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468, 98 S.Ct. 799, 810, 54 L.Ed.2d 682 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893)).

“The Interstate Compact on Placement of Children has not received Congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states. *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 852-53, 34 L.Ed. 500 (1890); *Lehman v. Lycoming County Children’s Services Agency*, 648 F.2d 135, 143 (3d Cir. 1981) (en banc), *aff’d*, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). **Congressional consent, therefore, was not necessary for the Compact’s legitimacy.”**

“Because Congressional consent was neither given nor required, the Compact does not express federal law. Cf. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981). **Consequently, this Compact must be construed as state law.** See Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 *Va.L.Rev.* 987, 1017 (1965) (‘[T]he construction of a compact not requiring consent . . . will not present a federal question. . . .’).

³³⁹The Interstate Compact for the Placement of Children was written with the expectation that congressional consent would not be required if its membership were limited to states of the United States, the District of Columbia, and Puerto Rico. However, the compact invites the federal government of Canada and Canadian provincial governments to become members. The compact specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party to the compact by saying, “This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of congress, the government of Canada or any province thereof.” At the present time, no Canadian entity has sought membership in the compact.

“Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states.”³⁴⁰ [Emphasis added]

9.12. MYTHS ABOUT CAMPAIGN SPENDING AND LENGTH

9.12.1. MYTH: Campaign spending would skyrocket if candidates had to campaign in all 50 states.

QUICK ANSWER:

- The total amount of money that is spent on presidential campaigns is controlled by available money—not by the (virtually unlimited) number of opportunities to spend money. The National Popular Vote compact does not increase the amount of money available from political donors.
- Under both the current state-by-state winner-take-all system and nationwide voting for President, candidates allocate the pool of money available to them from donors in the manner that they believe will maximize their chance of winning. Under the current system, virtually all of the money (and campaign events) are concentrated in a handful of closely divided battleground states, while four out of five states and four out of five voters get virtually no attention. Under a national popular vote, every voter in every state would be politically relevant, and money would therefore be spent differently.

MORE DETAILED ANSWER:

The total amount of money that a presidential campaign can spend is determined by the amount of money that it can raise—not by the virtually unlimited opportunities for spending money.

There are two major steps in campaign budgeting.

First, presidential campaigns and their supporters try to raise as much money as possible from all sources available to them. All serious presidential campaigns raise money nationally, even though they concentrate their campaigning to closely divided battleground states. Table 9.2 shows the contributions to the 2008 presidential campaign from residents of each state.

Second, after an organization ascertains how much money it can raise, it engages in a resource-allocation process in order to decide how to spend the money in the most advantageous way. The controlling factor in allocating resources is the state-by-state winner-take-all method of awarding electoral votes.

Under the current state winner-take-all statutes, campaigns concentrate their

³⁴⁰*McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

spending on a handful of closely divided battleground states. They do this because they have nothing to lose, and nothing to gain, by trying to win votes in states where they are comfortably ahead or hopelessly behind.

Under the current system, 99% of the money raised in the 2004 presidential campaign was spent in just 16 states. In 2008, candidates concentrated 98% of their campaign events and ad money in just 15 states.³⁴¹ In 2012, four out of five states were ignored by the presidential campaigns (section 9.2.1).

Under the current system, a rational resource-allocation process for presidential campaigns involves ignoring all but the closely divided battleground states.

The National Popular Vote compact would not increase the total number of dollars available from donors. Candidates and their supporters would continue to raise as much money as they possibly can on a national basis. The mere existence of several dozen additional states that could not be ignored would not, in itself, generate any additional money.

The resource-allocation process would be different under the National Popular Vote plan than under the current system. The reason is that every voter in every state and the District of Columbia would be politically relevant under a national popular vote. Therefore, it would be suicidal for a presidential campaign to ignore 40 of the 50 states. The available amount of money would be reallocated because every voter in every state would be politically relevant.

Under a national popular vote, it would be impossible to operate a campaign in all 50 states at the same per-capita level of intensity as recent campaigns in a battleground state such as Ohio.

Consider Ohio and Illinois. Both states had 20 electoral votes in the 2008 election. Under the current state-by-state winner-take-all system, Illinois was ignored, while Ohio received an enormous amount of attention in the general-election campaign. In 2008, Ohio received 62 of the 300 post-convention campaign events (table 9.1) and about \$17,000,000 in advertising (table 9.2), whereas Illinois received no post-convention campaign events and only \$53,896 in advertising.

Although one cannot predict exactly how a future presidential campaign might unfold under the National Popular Vote plan, it would be suicidal, for example, for a presidential campaign to ignore Illinois. Some of the available pool of money would necessarily be reallocated to Illinois because a vote in Illinois would be just as valuable as a vote in Ohio under the National Popular Vote plan. In all likelihood, Ohio and Illinois would receive approximately equal attention (in both campaign events and spending) because they are approximately equal in population.

The role of unpaid volunteers would change under a national popular vote. Under the current system, there is considerable grassroots campaigning for President in the

³⁴¹ <http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230>.

closely divided battleground states because people in those states are aware that their votes and the votes of their neighbors matter. However, in the spectator states, there is no significant grassroots campaigning for President under the current system (except for raising money, making phone calls into battleground states, and traveling to battleground states to campaign). Under a national popular vote, campaigning would become worthwhile in every state. Increased volunteer activity would partially counter-balance the effect of large donations in political campaigns.

9.12.2. MYTH: The length of presidential campaigns would increase if candidates had to travel to all 50 states.

QUICK ANSWER:

- Critics of a national popular vote for President argue that presidential campaigns would lengthen if presidential candidates had to “travel to 50 states to court voters.”
- The National Popular Vote compact does not change the amount of time between a candidate’s nomination and Election Day.
- There was time to conduct 300 post-convention campaign events in 2008. Under the current state-by-state winner-take-all rule, candidates allocated two-thirds of their time to just six states.
- There was time to conduct 253 post-convention campaign events in 2012. Under the current state-by-state winner-take-all rule, two thirds of the presidential and vice-presidential post-convention campaign events were conducted in just four states (Ohio, Florida, Virginia, and Iowa).
- The effect of the National Popular Vote compact would be that candidates would have to allocate the time available very differently than they do now. Every voter in every state would be politically relevant in every presidential election.
- We view the fact that the National Popular Vote compact would force presidential candidates to “travel to 50 states to court voters” as a highly desirable benefit—not a disadvantage.

MORE DETAILED ANSWER:

In an article entitled “The Electoral College is Brilliant, and We Would Be Insane to Abolish It,” Walter Hickey writes:

“Nobody wants to make the presidential election season any longer . . .

“If you make it so a President has to travel to 50 states to court voters, that’s going to take time. . . .

“Dragging it out more months, jet setting from California to New York on weekends, that would make an already annoying election period into a downright intolerable one.

“The best candidate would be the one with either the most frequent flier miles or the strongest immune system.”³⁴² [Emphasis added]

As Hickey correctly points out, the National Popular Vote compact would force presidential candidates to “travel to 50 states to court voters.” We view that as a highly desirable benefit of a national popular vote for President.

There was time to conduct 300 post-convention campaign events in 2008. Candidates necessarily must allocate the available amount of time to various activities.

Today, the state-by-state winner-take-all rule determines how presidential candidates allocate their time (and other resources).

Under the current state-by-state winner-take-all rule, candidates allocated two-thirds of their time to just six states.

There was time to conduct 253 post-convention campaign events in 2012. Under the current state-by-state winner-take-all rule, two thirds of the presidential and vice-presidential post-convention campaign events were conducted in just four states in 2012 (Ohio, Florida, Virginia, and Iowa).

The National Popular Vote compact cannot, and does not, change the amount of time between a candidate’s nomination and Election Day.

The effect of a national popular vote for President would be that candidates would allocate the time available very differently than they do now. Under a national popular vote, every voter in every state would be politically relevant in every presidential election.

Under the current state-by-state winner-take-all system, New Hampshire received 13 of the 253 campaign events in 2012, while the 12 other smallest states each received none. Under the National Popular Vote plan, it would be inconceivable that presidential candidates would campaign in only one small state, while ignoring the 12 other small states. Most likely, *each* of the 13 smallest states would receive one campaign event under a nationwide vote for President.

Although one cannot predict exactly how a future presidential campaign might unfold under the National Popular Vote plan, a good prediction would be that presidential candidates would probably distribute their limited number of campaign events among the states roughly in proportion to population.

³⁴²Hickey, Walter. 2012. The Electoral College is brilliant, and we would be insane to abolish it. *Business Insider*. October 3, 2012. <http://www.businessinsider.com/the-electoral-college-is-brilliant-2012-10>.

9.13. MYTHS ABOUT ELECTION ADMINISTRATION

9.13.1. MYTH: Local election officials would be burdened by the National Popular Vote compact.

QUICK ANSWER:

- Local and county elections officials would conduct elections exactly as they do now.

MORE DETAILED ANSWER:

Under the National Popular Vote compact, a presidential election would be administered inside each state in the same way that it is now administered. The compact makes no changes in a state’s laws or procedures for preparing ballots, operating polling places, handling absentee ballots or early voting, or counting votes at the precinct, city, town, or county level. Local and county election officials would conduct elections exactly as they do now.

The National Popular Vote compact would make no change in the process of aggregating the vote counts from the local level in order to ascertain the total number of popular votes cast in the state for each presidential slate.

9.13.2. MYTH: The state’s chief elections official would be burdened by the National Popular Vote compact.

QUICK ANSWER:

- The state’s chief election official would not be burdened by the National Popular Vote compact, because the only difference with respect to the current winner-take-all system is that the chief elections official would add up the popular vote totals for each presidential slate in all 50 states and the District of Columbia to determine the national popular vote winner.

MORE DETAILED ANSWER:

The only change introduced by the National Popular Vote compact occurs *after* a state has finished tallying the statewide total number of popular votes cast for each presidential slate.

At that point, the votes cast for each presidential slate in all 50 states and the District of Columbia would be added together to produce a national grand total for each presidential slate (section 6.3.3). This vote total would be, of course, the official version of the same adding process that the media, the political parties, and various watchdog groups already do on Election Night and in the days immediately following each presidential election.

Under the compact, the presidential slate with the largest national grand total from all 50 states and the District of Columbia would be designated as the “national

popular vote winner.” The chief election official of each state belonging to the compact would then certify the election of the entire slate of presidential electors that is affiliated with the “national popular vote winner.” For example, if the Republican slate is the “national popular vote winner,” the state’s chief election official in every state belonging to the compact would certify the election of the entire slate of Republican presidential electors.

The effect of the National Popular Vote compact would be that all the presidential electors of all states belonging to the compact would be affiliated with the presidential slate that received the largest total number of popular votes in all 50 states and the District of Columbia. These presidential electors from the states belonging to the compact would collectively represent the nationwide will of the voters.

Under the compact, the presidential electors would meet in their states, as they do now, in mid-December and cast their electoral votes.

Because the compact would only go into effect when it has been enacted by states possessing a majority of the electoral votes, the presidential slate receiving the most popular votes from all 50 states and the District of Columbia would receive a majority of the electoral votes in the Electoral College.

The fiscal analysts associated with virtually every state legislature that has considered the National Popular Vote bill have concluded that there would be no significant additional administrative burden or financial cost associated with implementing the compact.

9.13.3. MYTH: The National Popular Vote compact would burden the state’s chief election official with the need to judge the election returns of other states.

QUICK ANSWER:

- The National Popular Vote compact would operate in a manner identical to the current system in that no state election official would have the need or power to judge the presidential election returns of any other state.
- Each candidate’s popular vote total in each state would be certified using the same “Certificates of Ascertainment” as are required by existing federal law.

MORE DETAILED ANSWER:

The mechanics for counting and tallying votes at the precinct, city, town, county, and state levels would be the same under the National Popular Vote compact as they are under the current system.

Neither the current system nor the National Popular Vote compact requires—or permits—any state election official to become involved in judging the election returns of other states.

Existing federal law (the “safe harbor” provision in section 5 of Title 3 of the United

States Code) specifies that a state’s “final determination” of its presidential election returns is “conclusive” in the counting of votes by Congress (if done in a timely manner and in accordance with laws that existed prior to Election Day).

The wording of the National Popular Vote compact is patterned directly after the existing federal “safe harbor” provision. It would require each state to treat as “conclusive” every other state’s “final determination” of its vote for President. Clause 5 of Article III of the National Popular Vote compact provides:

“The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.”

Accordingly, assuming each state complies with federal law, no state would have any power to examine or judge the presidential election returns of any other state under the National Popular Vote compact.

9.13.4. MYTH: The National Popular Vote compact would be costly.

QUICK ANSWER:

- The National Popular Vote compact would not impose any fiscal burden on any state because voting in presidential elections would be conducted at the precinct, local, and county levels in the same manner as it is today.
- When the National Popular Vote bill has been considered by state legislatures, state fiscal officials have uniformly concluded that it would have no significant fiscal impact.

MORE DETAILED ANSWER:

Under the National Popular Vote compact, the mechanics for counting votes for President at the precinct, city, town, county, and state levels would be the same as they are today.

The only administrative difference would be that, after counting all the votes in the state, each state’s chief election officer would add up the popular vote totals from all 50 states and the District of Columbia to determine which slate of presidential electors would be called upon to cast the state’s electoral votes.

When the National Popular Vote bill has been introduced in state legislatures, state fiscal officials have uniformly concluded that it has no significant fiscal impact on the state. In most states, this determination has been explicitly stated in the financial analysis that is routinely produced by the legislature’s professional staff prior to the time that the legislature considers the bill.

9.13.5. MYTH: Post-election audits could not be conducted under a national popular vote.

QUICK ANSWER:

- There is nothing in the National Popular Vote plan that prevents a state from auditing its election results.

MORE DETAILED ANSWER:

The arguments in favor of conducting audits apply to all elections, regardless of the office being filled. The statistical procedures for conducting audits are applicable to all elections.

Audits are conducted in some states today, thanks to statutory audit procedures and administratively established audit procedures.

Federal legislation has been proposed to require audits in all federal elections—including presidential elections. For example, the proposed Voter Confidence and Increased Accessibility Act of 2009 (H.R. 2894 of the 111th Congress introduced by New Jersey Congressman Rush Holt and a considerable number of co-sponsors) would require audits for all federal elections, including presidential elections.

One important difference between presidential elections and elections for the U.S. House and U.S. Senate is that the U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election. The existing constitutional provisions (and existing supporting federal statutes) apply equally to elections conducted under both the National Popular Vote plan and the current system.

Specifically, the U.S. Constitution requires that the Electoral College meet on a uniform nationwide day in every state.³⁴³ Congress has specified the Monday after the second Wednesday in December as the date for the meeting of the Electoral College.³⁴⁴

Moreover, the U.S. Supreme Court has made it clear that the states are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” day established by section 5 of Title 3 of the United States Code).³⁴⁵

Thus, under both the current system and the National Popular Vote plan, all counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” by the “safe harbor” day prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

Many of the most important reasons for conducting an audit are lost if insuffi-

³⁴³ U.S. Constitution. Article II, section 1, clause 4.

³⁴⁴ United States Code. Title 3, chapter 1, section 7.

³⁴⁵ For example, in 2008, the election was Tuesday, November 4, and the “safe harbor” day was 33 days later on Monday, December 8. The Electoral College met on the following Monday, December 15 (the Monday after the second Wednesday in December). Congress met to count votes on January 6, 2009. According to the Constitution, the outgoing President’s term ended on January 20, 2009.

cient time remains available to conduct a full recount if the audit discovers a problem. Indeed, in the “Principles and Best Practices for Post-Election Audits” endorsed by numerous organizations involved in election-administration issues (including the Brennan Center for Justice, Common Cause, Verified Voting, and numerous state-level groups), one of the best practices is:

“Post-election audits must be completed prior to finalizing official election results and must either verify the outcome or, through a 100% recount, correct the outcome.”

Thus, in the case of presidential elections, a practical and realistic schedule for audits must allow time for a potential full recount (and also time for potential post-recount litigation) prior to the uniform nationwide day for meeting of the Electoral College. Thus, audits in presidential elections must be conducted in an expeditious and timely manner (soon after Election Day) so as to allow time for a potential full recount and potential post-recount litigation.

Fortunately, audits do not take long. Today, audits are routinely conducted within a couple of days by the states that have statutory audit procedures or administratively established audit procedures. There is thus no reason why audits cannot be conducted for presidential elections under either the current system or the National Popular Vote approach.

Proposed legislation such as H.R. 2894 provides for audits of presidential elections. This (generally excellent) proposal could be improved by amending the formula for determining the intensity of auditing that is required in presidential elections so that the level of intensity of the audit is determined by the apparent margin in the nationwide count (as opposed to the apparent statewide count) in case the appointment of presidential electors is based on the national popular vote. Alternatively, the highest level of intensity already provided for in H.R. 2894 for the audit might be *automatically* applied to presidential counts. Note that this suggested improvement concerning the issue of intensity does not relate to whether an audit will be conducted—but merely to the audit’s level of intensity.

In short, there is nothing in the National Popular Vote plan that would prevent a post-election audit.

9.13.6. MYTH: Provisional ballots would create problems in a nationwide popular vote because voters in all 50 states (instead of just 10 or so states) would matter in determining the winner.

QUICK ANSWER:

- There is a far greater chance that provisional ballots will create problems in a presidential election under the current state-by-state winner-take-all system than under a system in which there is a single national pool of votes

and in which the winner is the candidate receiving the most popular votes nationwide.

- There should be no concern about the delay caused by counting provisional ballots, because the U.S. Constitution establishes a strict overall national schedule for finalizing the results of presidential elections. All counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December. States are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date). The nation knows, from experience in 2000, that the outcome of the presidential election must be resolved (one way or the other) in accordance with the schedule specified by the U.S. Constitution.
- We do not view the proper counting of all legitimate votes as an evil. Electing the right person to office is more important than a slight delay in ascertaining the outcome.

MORE DETAILED ANSWER:

The Help America Vote Act of 2002 (HAVA) permits a voter to cast a “provisional ballot” under certain circumstances, including (but not limited to) situations in which:

- the voter does not have the type of identification (if any) that may be required by state law;
- the voter is not listed on the election roll for a particular precinct (perhaps because the voter went to the wrong polling location or because the voter recently moved); and
- the voter arrives at the polling place on Election Day but previously requested an absentee ballot (thus raising the question of whether the voter has already voted).

A provisional ballot is typically inserted into a large envelope whose exterior contains an explanation as to why the ballot was cast on a provisional basis. The outside of the envelope contains the voter’s signature and often contains additional identifying information beyond the voter’s address (e.g., a driver’s license number).

Provisional ballots are usually counted within six to 10 days after the election (depending on state law).

Processing provisional ballots is a tedious administrative process. The specific processing required depends on the reason why the provisional ballot was cast in the first place. For example, if a ballot was cast provisionally because of lack of certain required identification documents, the signature on the outside of the envelope may be compared visually with registration records before the provisional ballot is approved. If a driver’s license number is used as part of the identification process, the number provided by the voter on the outside of the envelope may be compared with the state’s database of driver’s licenses. According to a *Miami Herald* story:

“Each provisional ballot takes about 30 minutes to review and inspect, said Ron Labasky, counsel for the state association of election supervisors.”³⁴⁶

According to the U.S. Election Assistance Commission (a body established by the Help America Vote Act of 2002), about two-thirds of all provisional ballots are found to have been cast by legitimate voters and, therefore, eventually counted.³⁴⁷

Hans von Spakovsky has stated that a nationwide election of the President

“would . . . lead to . . . contentious fights over provisional ballots.”³⁴⁸

Hans von Spakovsky has also stated:

“Every additional vote found anywhere in the country could make the difference to the losing candidate.”³⁴⁹ [Emphasis added]

We agree with von Spakovsky that any vote “anywhere in the country could make the difference” in a nationwide vote for President. Indeed, the most important reason to adopt the National Popular Vote plan is to make *every* vote in *every* state politically relevant in *every* presidential election. We do not view the fact that every vote “could make the difference” as an evil.

Von Spakovsky continues:

“Provisional ballots may not affect the outcome of the majority vote within a state under the current system because the number of provisional ballots is less than the margin of victory. However, **if the total number of provisional ballots issued in all of the states is greater than the margin of victory**, a national battle over provisional ballots could ensue.

“Losing candidates would then have the incentive to hire lawyers to monitor (and litigate) the decision process of local election officials. . . .

“Lawyers contesting the legitimacy of the decisions made by local election officials on provisional ballots nationwide could significantly delay the outcome of a national election.”³⁵⁰ [Emphasis added]

³⁴⁶ Van Sickler, Michael. Provisional ballots spike, but Florida elections supervisors say they’re not needed. *Miami Herald*. December 17, 2012. <http://www.miamiherald.com/2012/12/17/3145753/provisional-ballots-spike-but.html>.

³⁴⁷ Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

³⁴⁸ Von Spakovsky, Hans. Popular vote scheme. *The Foundry*. October 18, 2011.

³⁴⁹ Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

³⁵⁰ Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

Our view is that ballots cast by legitimate voters should be counted. We also believe that a candidate who is slightly behind in a close election has every right to “monitor” the handling of provisional ballots and, if necessary, “litigate” the question of whether a particular voter is legally entitled to have his or her vote counted. A losing candidate is certainly entitled to present his or her case to the courts “if the total number of provisional ballots . . . is greater than the margin of victory” based on the non-provisional ballots.

We do not view the proper counting of all legitimate votes as an evil; however, if anyone entertains this viewpoint, provisional ballots are far more likely to create a problem under the current state-by-state winner-take-all system than under a nationwide vote.

Under the current state-by-state winner-take-all system, the outcome of the national election frequently depends on the outcome of one or more closely divided battleground states. The number of provisional ballots in closely divided states is typically larger than the initial margin of victory based on the non-provisional ballots. Thus, even when there is a clear winner of the national popular vote, the possibility exists, of a dispute involving provisional ballots in a closely divided battleground state that could, under the current system, determine the outcome of the national election.

For example, in 2004, George W. Bush had a nationwide lead of 3,012,171 popular votes—far greater than the number of provisional ballots nationwide. There has been an exceptionally high amount of provisional voting in Ohio in recent elections, including 2004. In 2004, there were more than 150,000 provisional ballots in Ohio, and Bush’s margin was 118,601 in Ohio in 2004.³⁵¹ The outcome of the 2004 election would have been reversed with a switch of 59,393 votes out of a total of 5,627,903 votes in Ohio. On the Wednesday after Election Day, Senator John Kerry decided that the provisional ballots were unlikely to reverse the apparent outcome in Ohio. If the number of provisional ballots had been somewhat higher or if Bush’s margin among the already counted regular ballots had been somewhat lower, the provisional ballots in Ohio would have decided the Presidency in 2004 (despite Bush’s already known nationwide lead of three million votes).

There has been about one such “near miss” election each decade under the state-by-state winner-take-all system. Table 1.23 shows there have been six presidential elections since World War II in which a shift of a relatively small number of votes in one or two states would have elected (and, of course, in 2000, did elect) a presidential candidate who lost the popular vote nationwide.

In 1976, for example, Jimmy Carter led Gerald Ford by 1,682,970 votes nationwide; however, a shift of 3,687 votes in Hawaii and 5,559 votes in Ohio would have elected Ford.

³⁵¹ Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

In 1968, a shift of 10,245 in Missouri and 67,481 in Illinois would have elected Hubert Humphrey as President despite Richard Nixon’s nationwide lead of 510,645.

The 2000 presidential election was decided by 537 votes out of a total of 5,963,110 votes in Florida—far greater than the number of provisional ballots that are currently cast in Florida.

Although the 2008 presidential election was not as close as 2000 or 2004, a relatively small number of votes determined the outcome in several states in which the number of provisional ballots exceeded the leading candidate’s margin in that state, including Missouri (McCain’s 3,903-vote margin out of 2,925,205 votes), North Carolina (Obama’s 14,177-vote margin out of 4,310,789 votes), and Indiana (Obama’s 28,391-vote margin out of 2,751,054).

There were nine closely divided battleground states in the 2012 election (section 1.3). Thus, there were nine states where provisional ballots could potentially have played a decisive role under the current state-by-state winner-take-all system.

Provisional ballots can be expected to produce disputes in future presidential elections because of the recent enactment of voter-identification laws in some closely divided battleground states. For example, although the voter-identification law enacted in Pennsylvania in 2012 did not take effect in time for the 2012 presidential election, it is expected to take effect in 2013.

The likelihood that provisional ballots might trigger a dispute in a presidential election is higher under the current state-by-state winner-take-all system than under a system in which there is a single national pool of votes.

A November 6, 2012, article in *National Journal* entitled “The Ohio Vote Count Could Be a Mess” stated:

“The Buckeye State has supplanted its Southern cousin Florida as the marquee battleground of the 2012 presidential election—the state most likely to tip the race to either President Obama or Mitt Romney. . . .

“Ohio also bears another, more ominous similarity to the 2000 Florida: If a close race demands a recount, conditions are ripe for a repeat of the delays, confusion, and chaos that racked the Sunshine State. And just like 12 years ago, the state’s ultimate winner could very well determine who is the next president. . . .

“The most obvious flash point involves provisional ballots, those cast if a voter’s eligibility is in question. Election officials don’t count provisional or absentee ballots until 10 days after Election Day. In case of a narrow margin and with hundreds of thousands of such votes still to be counted, neither candidate could claim victory. (Ohio recorded 200,000 provisional ballots in 2008, a number expected to rise this time.”³⁵² [Emphasis added]

³⁵² Roarty, Alex. The Ohio vote count could be a mess. *National Journal*. November 6, 2012.

A similar issue arises in connection with military and overseas absentee ballots. Under the Military and Overseas Voter Empowerment Act (MOVE), each state determines its deadline for receiving absentee ballots from military and overseas voters.

Although the process of properly counting all the legitimate votes may take some time, there should be no concern about the delay. Electing the right person to office is more important than a slight delay in ascertaining the outcome. As discussed in detail in section 9.15.3, the U.S. Constitution establishes a strict overall national schedule for finalizing the results of presidential elections. These existing provisions apply equally to elections conducted under the current state-by-state winner-take-all system as well as elections conducted under the National Popular Vote plan. All counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December. The U.S. Supreme Court has made it clear that the states are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date established by section 5 of Title 3 of the United States Code). The nation knows, from experience in 2000, that the outcome of a presidential election must be resolved (one way or the other) in accordance with the schedule specified by the U.S. Constitution.

The possibility of disputes over provisional ballots is an example of a potential problem that is more likely to occur, and more likely to matter, under the current state-by-state winner-take-all system than the National Popular Vote plan.

9.13.7. MYTH: Knowledge of the winner would be delayed under a national popular vote because the votes of all 50 states (instead of just 10 or so battleground states) would matter.

QUICK ANSWER:

- Because of the current state-by-state winner-take-all rule, knowledge about the winner of the Electoral College in 2000 was delayed until 34 days after Election Day despite the fact that the winner of the national popular vote was apparent.
- There is a far greater chance that knowledge of the winner of a presidential election will be delayed under the current state-by-state winner-take-all system than under a system in which there is a single national pool of votes and in which the winner is the candidate receiving the most popular votes nationwide.
- There should be no concern about the delay caused by counting provisional ballots because the U.S. Constitution establishes a strict overall national schedule for finalizing the results of presidential elections. All counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December. States are expected to make their “final

determination” six days before the Electoral College meets (the so-called “safe harbor” date). The nation knows, from experience in 2000, that the outcome of the presidential election must be resolved (one way or the other) in accordance with the schedule specified by the U.S. Constitution.

- Knowing the winner of the presidential election rapidly is not as important as conducting the election for President in the best way.

MORE DETAILED ANSWER:

At about 11:15 PM eastern time on Election Night in 2012 (shortly after the polls closed in California and other western states), the television networks called the 2012 presidential election in favor of President Barack Obama. Shortly thereafter, Governor Mitt Romney addressed the nation to concede that he had not won the election and congratulate the winner.

How is it possible for television networks to “call” elections and why do candidates concede on Election Night when there are:

- millions of votes cast on Election Day that are yet to be counted;
- millions of uncounted mail-in, absentee, and military ballots (which, in some states, need not even arrive at vote-counting centers until several days after the Election Day); and
- millions of uncounted provisional ballots (for which voters, in many cases, are not even required to step forward and provide evidence in support of their right to vote for 6–10 days)?

Both candidates and television networks routinely and confidently make decisions about the ultimate outcome of an election based on a combination of information sources, including:

- exit polls conducted outside polling places on Election Day,
- telephone and other types of polling indicating the likely breakdown of absentee, mail-in, provisional, and military ballots,
- estimates (obtained from both election officials and polling) of the number of uncounted absentee, mail-in, provisional, military, and regular ballots, and
- actual election returns (obtained from elections officials on Election Night).

Using these techniques, knowledge of the winner of the national popular vote for President has *always* been evident on Election Night.

In contrast, knowledge of the winner of the electoral vote has not always been evident on Election Night.

For example, because of the current state-by-state winner-take-all system, knowledge about the winner of the Presidency in 2000 was delayed until 34 days after Election Day (and six days before the meeting of the Electoral College on December 18, 2000). In contrast, the winner of the national popular vote in 2000 was evident shortly after the polls closed.

The 34-day delay in learning the identity of the President was an artificial crisis

created by the current state-by-state winner-take-all system. The eventual deciding factor in the 2000 election was George W. Bush's lead of 537 popular votes in Florida rather than Gore's nationwide lead of 537,179 popular votes (1,000 times larger than the disputed 537-vote margin in Florida).

Notwithstanding these facts and history, it has been claimed that if the President were elected by a nationwide popular vote, knowledge of the winner would be delayed because votes from all 50 states (instead of just 10 or so battleground states) would matter in determining the winner.

On November 27, 2012 (three weeks after Election Day), the following complaint concerning the *official* count was posted on an election blog:

“Apparently only 17 states have completed their count of all ballots. . . .I think the implications for National Popular Vote are pretty obvious—had this been a closer election (say, Bush–Gore or Kennedy–Nixon close) **we’d still not know who the president was.** . . . The Electoral College seems to have provided conclusive clarity rather quickly.”³⁵³ [Emphasis added]

Of course, in *the very* election that was “Bush–Gore close”—namely the Bush–Gore election in 2000—knowledge about the winner of the Presidency was delayed for 34 days because of the current state-by-state winner-take-all system.

In 2004, knowledge about the winner of the Electoral College was delayed until Wednesday morning even though it was clear on Election Night that President George W. Bush had won the national popular vote by about three million popular votes. If 59,393 Bush voters in Ohio had shifted to Kerry in 2004, Kerry would have ended up with 272 electoral votes (two more than the 270 necessary for election). The 59,393 voters in Ohio were decisive, whereas Bush's nationwide lead of more than three million votes was irrelevant.³⁵⁴

Despite the complaint on the election blog concerning the 2012 election, the 2012 election was not close in terms of the national popular vote. President Obama's multi-million-vote nationwide lead was evident on Election Night. However, the closeness of the race in numerous battleground states (e.g., Ohio, Virginia, Florida, Colorado, Nevada, Iowa, New Hampshire) suggests that if President Obama's nationwide lead had been smaller than his actual nationwide lead of 4,966,945 votes (as discussed in section 9.31.9), knowledge of the winner of the 2012 election would likely have been significantly delayed because of the state-by-state winner-take-all system.

³⁵³ November 27, 2012. In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution.

³⁵⁴ Ohio was not the only key state in the Electoral College in 2004. A shift of 6,743 votes in Iowa (with 7 electoral votes), 4,295 in New Mexico (with 5 electoral votes), and 10,784 in Nevada (with 5 electoral votes) would have given George W. Bush and John Kerry each 269 electoral votes. If this shift of 21,822 popular votes had occurred, the presidential election would have been thrown into the House of Representatives (with each state casting one vote, and states with an equal division casting no vote), and the vice-presidential election would have been thrown into the Senate (with each Senator having one vote).

The complaint on this blog fails to distinguish between the two levels of “knowing” the outcome of an election.

The first level of “knowing” typically occurs on Election Night even though there are millions of uncounted ballots—regular, absentee, mail-in, provisional, and military. Nonetheless, sufficient information is available to enable television networks to reliably “call” the election and, more importantly, to compel losing candidates to concede defeat.

The second level of “knowing” the outcome of a presidential election comes later—namely the official count.

The *official* winner of the 10 closely divided battleground states was not known on Election Night. In fact, the official counts from eight of the 10 battleground states did not come in until *after* November 29—the day when the blogger complained that we might not “know who the president was” if the President were elected by a nationwide popular vote.

After Election Day in 2012, David Wasserman of the *Cook Political Report* monitored the official vote counts from each state and immediately posted each new result on the web.³⁵⁵ Although procedures vary from state to state, the official count typically is certified by the Secretary of State or a board (e.g., Board of Canvassers, Board of Elections). Wasserman announced the completion of the official statewide count for almost all states with a Tweet.

Table 9.14 shows the approximate dates on which the 50 states and District of Columbia announced their official results of the presidential election (based on David Wasserman’s Tweets in most cases). The dates for five states are labeled “before”—indicating that the table contains the date on the state’s Certificate of Ascertainment. The Certificate of Ascertainment is typically created and signed (by the Governor) several days *after* the completion of certification of the official statewide count. Column 1 of the table indicates the order in which each state completed its official count. Column 5 flags the 10 states that many considered to be battleground states in 2012 (New Hampshire, Florida, Wisconsin, Nevada, Iowa, Ohio, Colorado, North Carolina, Virginia, and Pennsylvania).

As can be seen in table 9.14, eight of the 10 battleground states completed their official presidential count *after* November 29—the day when the blogger complained that we might not “know who the president was” if the President were elected by a nationwide popular vote. These eight states were:

- Wisconsin,
- Nevada,
- Iowa,
- Ohio,
- Colorado,
- North Carolina,
- Virginia, and
- Pennsylvania.

³⁵⁵ Wasserman’s counts are at https://docs.google.com/spreadsheets/iv?key=0AjYj9mXEIO_QdHpla01oWE1jOFZRbnhJZkZpVFNKeVE&toomany=true.

Table 9.14 APPROXIMATE DATES WHEN STATES COMPLETED THEIR PRESIDENTIAL VOTE COUNTS IN 2012

	STATE	ELECTORAL VOTES	DATE	BATTLEGROUND STATUS
1	New Hampshire	4	November 13, 2012	Battleground
2	Vermont	3	November 13, 2012	
3	South Dakota	3	Before November 13, 2012	
4	Delaware	3	November 14, 2012	
6	Georgia	16	November 14, 2012	
7	Wyoming	3	November 15, 2012	
8	Louisiana	8	November 16, 2012	
9	North Dakota	3	November 16, 2012	
10	Florida	29	November 19, 2012	Battleground
11	South Carolina	9	November 20, 2012	
12	Oklahoma	7	November 21, 2012	
13	Arkansas	6	November 21, 2012	
14	Idaho	4	November 21, 2012	
15	Michigan	16	November 26, 2012	
16	Hawaii	4	Before November 26, 2012	
17	Maryland	10	November 27, 2012	
18	Rhode Island	4	November 28, 2012	
19	Alaska	3	November 28, 2012	
20	Kentucky	8	November 28, 2012	
20	Connecticut	7	November 28, 2012	
21	D.C.	3	November 29, 2012	
22	Maine	4	November 29, 2012	
23	Wisconsin	10	November 29, 2012	Battleground
24	Kansas	6	November 30, 2012	
25	Indiana	11	November 30, 2012	
26	Massachusetts	11	November 30, 2012	
27	Nevada	6	December 1, 2012	Battleground
28	Utah	6	December 2, 2012	
29	Montana	3	December 2, 2012	
30	Illinois	20	December 3, 2012	
31	Iowa	6	December 3, 2012	Battleground
32	Alabama	9	December 3, 2012	
33	Arizona	11	December 3, 2012	
34	Mississippi	6	December 4, 2012	
35	Minnesota	10	December 4, 2012	
36	Oregon	7	December 5, 2012	
37	Missouri	10	December 5, 2012	
38	Ohio	18	December 5, 2012	Battleground
39	Washington	12	December 6, 2012	
40	Texas	38	December 6, 2012	
41	Colorado	9	December 6, 2012	Battleground
42	North Carolina	15	December 7, 2012	Battleground
43	New Jersey	14	December 7, 2012	
44	Nebraska	5	December 10, 2012	
45	Virginia	13	December 10, 2012	Battleground
46	New Mexico	5	December 10, 2012	
47	New York	29	Before December 10, 2012	
48	Tennessee	11	December 11, 2012	
49	Pennsylvania	20	December 12, 2012	Battleground
50	West Virginia	5	Before December 14, 2012	
51	California	55	Before December 15, 2012	

The blogger's reference to the Kennedy–Nixon election in 1960 was also incorrect. Kennedy was identified as the clear winner of national popular vote early in the morning after Election Day.

The *New York Times*' front-page headline article on the day after the election (Wednesday, November 9, 1960) was “Kennedy is the Apparent Victor.”³⁵⁶

On Thursday November 10, 1960, the headline of the *New York Times* was “Kennedy's Victory Won by Close Margin.”

“Fifty-two additional electoral votes, including California's thirty-two, were still in doubt last night. But the popular vote was a different story. . . . Senator Kennedy's lead last night was little more than 300,000 in a total tabulated vote of about 66,000,000 cast in 165,826 precincts.”³⁵⁷ [Emphasis added]

On Friday November 11, 1960, the headline of the *New York Times* was “Kennedy's Margin Is Under 300,000.”

Nonetheless, uncertainty about the electoral-vote continued. A front-page article in the *New York Times* on Saturday November 12, 1960, reported:

“The Republican National Chairman, Senator Thruston B. Morton . . . **asked party officials in eleven states today to begin legal action to get recounts.** The states were Delaware, Illinois, Michigan, Minnesota, Missouri, Nevada, New Mexico, New Jersey, Pennsylvania, South Carolina and Texas.”³⁵⁸ [Emphasis added]

The electoral vote count remained unclear until Thursday November 17, 1960. The headline of a *New York Times* article on that day's front page announced that “California Is Put in Nixon's Column by Absentee Vote.”

“Senator Kennedy led in the tally of regular ballots with a majority of 34,568, but the absentee returns changed the picture. Mr. Nixon's lead rose to 13,160 with about 20,000 absentee ballots still to be counted. Most of these are in Republican areas.

“The absentee returns gave Mr. Nixon 132,168 to Mr. Kennedy's 84,458. State-wide, absentee and resident, the count was: Mr. Nixon, 3,219,211; Mr. Kennedy, 3,206,051. An official canvass, due by Nov. 28, will give the final result.”³⁵⁹

³⁵⁶ Kennedy is the apparent victor. *New York Times*. November 9, 1960. Page 1.

³⁵⁷ Kennedy's victory won by close margin. *New York Times*. November 10, 1960. Page 1.

³⁵⁸ Nixon shuns move for vote recount. *New York Times*. November 12, 1960. Page 1.

³⁵⁹ California is put in Nixon's column by absentee vote. *New York Times*. November 17, 1960. Page 1.

The final official count in California in 1960 was 3,259,722 for Nixon and 3,224,099 for Kennedy—a difference of 35,623 out of 6.5 million votes.

Under the current state-by-state winner-take-all system, the outcome of the national election frequently depends on the outcome of one or more closely divided battleground states.

For example, in 2004, George W. Bush had a nationwide lead of 3,012,171 popular votes. There has been an exceptionally high amount of provisional voting in Ohio in recent elections, including 2004. In 2004, there were more than 150,000 provisional ballots in Ohio, while Bush's margin was 118,601 votes.³⁶⁰ The outcome of the 2004 election would have been reversed with a switch of 59,393 votes out of a total of 5,627,903 votes in Ohio. On the Wednesday after Election Day, Senator John Kerry decided that the provisional ballots were unlikely to reverse the apparent outcome in Ohio. If the number of provisional ballots had been somewhat higher or if Bush's margin among the already counted regular ballots had been somewhat lower, knowledge of the winner of the election in 2004 would have been delayed until the provisional ballots were counted (despite Bush's already known nationwide lead of three million votes).

There is a far greater chance that knowledge of the winner of a presidential election will be delayed under the current state-by-state winner-take-all rule than under a system in which there is a single national pool of votes and in which the winner is the candidate receiving the most popular votes nationwide.

In any event, there should be no concern about the delay introduced by the official counting of ballots, because the U.S. Constitution establishes a strict overall national schedule for finalizing the results of presidential elections. All counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December. States are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date). The nation knows, from experience in 2000, that the outcome of the presidential election must be resolved (one way or the other) in accordance with the schedule specified by the U.S. Constitution.

An unusual situation developed in 2012 when Hurricane Sandy disrupted many parts of New York state a week before Election Day. On the day before Election Day, Governor Andrew Cuomo issued Executive Order No. 62, allowing any voter in the federally-declared disaster areas to cast a provisional ballot at *any* polling place in the state. The affected areas consisted of the five counties of New York City (Bronx, Kings, New York, Queens, and Richmond) and the counties of Nassau, Rockland, Suffolk, and Westchester. The Executive Order required every county in the state to transmit the resulting provisional ballots to the Board of Election in the county where the voter was registered.

³⁶⁰ Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

The Executive Order resulted in 400,629 provisional ballots on November 6, 2012—about four times the number of provisional ballots handled in New York in 2008.

Counting provisional ballots is a time-consuming and labor-intensive task even under normal circumstances (see section 9.13.6). One reason that counting the provisional ballots resulting from the Governor’s Executive Order was unusually time-consuming is that a provisional ballot given to a voter *outside* his or her normal precinct would, almost always, contain some offices for which the voter was not entitled to vote. The detailed instructions accompanying the Executive Order illustrate the complexity of the situation:

“For example, a voter staying with family in Orange County who was displaced from Westchester, would be entitled to vote for statewide contests and Supreme Court (because those 2 counties share a judicial district) and possibly a congressional, state senate, or state assembly contest. A voter who sought refuge further upstate might only be eligible to vote in the statewide contests, as they would share no other offices/contests.”

Thus, when the provisional ballots resulting from the Executive Order arrived at each voter’s own local Board of Election, the receiving county had to determine whether that particular voter was entitled to vote for *each separate office or contest* that appeared on the sending county’s provisional ballot. A voter who was temporarily displaced to an adjacent county might, for example, still be in his or her own congressional district and state Senate district, but not his own Assembly district.

Obviously, if New York had been in the position of determining the national outcome of the presidential election (as Florida was in 2000 and as Ohio was in 2004), all of these provisional ballots would have been counted expeditiously—regardless of the cost of the overtime needed to complete the task.

In actual practice, the New York State Board of Elections certified a statewide count for President before the “safe harbor” day without considering the unexpected volume of provisional ballots. The state’s first certified count showed that the Obama-Biden slate had received 4,159,441 votes and that the Romney-Ryan slate had received 2,401,799 votes—a margin of 1,757,642 votes.³⁶¹

Then, on December 31, 2012, the Board of Elections certified an amended statewide count showing that the Obama-Biden slate had received 4,471,871 votes and that the Romney-Ryan slate had received 2,485,432 votes—a margin of 1,986,439.

New York was not a closely divided battleground state in 2012, and therefore it was evident that its 400,629 provisional ballots could not have affected the nationwide outcome. Similarly, if the National Popular Vote compact had been in effect in 2012, it would have been evident that New York’s 400,629 provisional ballots could not have

³⁶¹ New York’s December 10, 2012, Certificate of Ascertainment showing that the Obama-Biden slate received 4,159,441 votes and that the Romney-Ryan slate had received 2,401,799 votes can be viewed at <http://www.archives.gov/federal-register/electoral-college/2012-certificates/pdfs/ascertainment-new-york.pdf>.

affected the nationwide outcome. Douglas A. Kellner, Co-Chair of the New York State Board of Elections has stated:

“If the final New York count had been required to determine the identity of the President, the New York State Board of Elections would have accelerated its official count—regardless of whether the outcome of the election was being determined by the state-level winner-take-all rule or the national popular vote.”

9.13.8. MYTH: Elections are so trustworthy in the current battleground states that the country should not risk an election in which other states might affect the outcome of a presidential election.

QUICK ANSWER:

- The trustworthiness of elections is not higher in the closely divided battleground states than the rest of the country. In fact, the trustworthiness of elections is questionable in numerous battleground states, including Ohio, Florida, Colorado, and Pennsylvania.

MORE DETAILED ANSWER:

It is sometimes argued that the quality and trustworthiness of elections is so high in closely divided battleground states that the country should not risk an election in which the 40 or so non-battleground states might affect the outcome of a presidential election.

A small number of questionable votes in a single state is unlikely to change the outcome of a presidential election conducted on the basis of the national popular vote. It is, however, a historical fact that a small number of votes may affect the nationwide outcome of a presidential election under the current state-by-state winner-take-all system. For example, the 2000 presidential election was decided by 537 votes out of a total of 5,963,110 votes in Florida—one of the numerous battleground states that used direct-recording electronic voting machines in 2012.

The trustworthiness of elections has been questioned in numerous closely divided battleground states, including in Ohio, Florida, Colorado, and Pennsylvania.

In each of the states mentioned, proponents of various controversial measures argued that elections were insecure and unreliable.³⁶² In citing these examples, our purpose is not to agree or disagree with the rationale or propriety of these new measures, but to dispute the claim that elections in today’s closely divided battleground states are inherently more trustworthy than the rest of the country.

In Florida, for example, Governor Rick Scott (R) signed into law a controversial

³⁶² Opponents of the proposed controversial measures, in turn, argued that the proposed measures would disenfranchise legitimate voters and discourage voter participation.

measure in 2011 that imposed more than 75 restrictions to combat voter fraud. The changes limited early voting, purged voter rolls of non-citizens, and made it more difficult for third-party organizations to register voters.³⁶³ The article “The Battle over Election Reform in the Swing State of Florida” reviews numerous additional controversies concerning election law in Florida.³⁶⁴

In Colorado, Secretary of State Scott Gessler (R) launched efforts to remove certain ineligible registered voters from the voter rolls.³⁶⁵

In Pennsylvania, stringent voter identification legislation was enacted. *Politics PA* reported on June 25, 2012:

“House Majority Leader Mike Turzai (R-Allegheny) suggested that the House’s end game in passing the Voter ID law was to benefit the GOP politically.

“We are focused on making sure that we meet our obligations that we’ve talked about for years,’ said Turzai in a speech to [Republican State Committee] committee members Saturday. He mentioned the law among a laundry list of accomplishments made by the GOP-run legislature.

“Pro-Second Amendment? The Castle Doctrine, it’s done. First pro-life legislation—abortion facility regulations—in 22 years, done. **Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done.**”³⁶⁶ [Emphasis added]

Ohio was the key battleground state in both the 2004 election and the 2012 election. In 2012, for example, it accounted for 73 of the 253 post-convention campaign events in the 2012 election (table 9.3).

In Ohio, Secretary of State John Husted attempted to eliminate early voting during the weekend before Election Day; however, this change was rejected by federal courts.

A November 6, 2012, article in *National Journal* entitled “The Ohio Vote Count Could Be a Mess” stated:

“The Buckeye State has supplanted its Southern cousin Florida as the marquee battleground of the 2012 presidential election—the state most likely to tip the race to either President Obama or Mitt Romney. . . .

“Ohio also bears another, more ominous similarity to the 2000 Florida: If a close race demands a recount, conditions are ripe for a repeat of the de-

³⁶³ Florida election laws threaten the vote in a key swing state. *Washington Post*. August 26, 2012.

³⁶⁴ MacManus, Susan A. The battle over election reform in the swing state of Florida. *New England Journal of Political Science*. Volume VI. Number 2. Pages 237–292.

³⁶⁵ Election official could be pivotal in battleground Colorado. July 27, 2012. http://nbcpolitics.msnbc.msn.com/_news/2012/07/27/12991424-election-official-could-be-pivotal-in-battleground-colorado#.UBK3Tifzldo.twitter.

³⁶⁶ Cernetich, Kelly. Turzai: Voter ID Law Means Romney Can Win PA. *PoliticsPA*. June 25, 2012. Video available on YouTube at <http://www.youtube.com/watch?v=EuOT1bRYdK8>.

lays, confusion, and chaos that racked the Sunshine State. And just like 12 years ago, the state’s ultimate winner could very well determine who is the next president. Part of the reason is that swing states such as Ohio haven’t adopted some of the reforms that Florida enacted after its infamous recount. . . .

“The most obvious flash point involves provisional ballots, those cast if a voter’s eligibility is in question. Election officials don’t count provisional or absentee ballots until 10 days after Election Day. In case of a narrow margin and with hundreds of thousands of such votes still to be counted, neither candidate could claim victory. (Ohio recorded 200,000 provisional ballots in 2008, a number expected to rise this time.) . . .

“The possibility of an outright recount further clouds Ohio’s outcome. The state will conduct an automatic recount if the difference between Obama’s and Romney’s tallies is less than one-quarter of 1 percentage point. But officials won’t begin that process until the election results are certified, which might not happen until early December. Each county has 21 days to certify its results before submitting them to the secretary of state.”³⁶⁷

We are not aware of any evidence that the trustworthiness of elections in closely divided battleground states is better than the rest of the country.

9.14. MYTHS ABOUT LACK OF AN OFFICIAL NATIONAL COUNT FOR PRESIDENTIAL ELECTIONS AND SECRET ELECTIONS

9.14.1. MYTH: There is no official count of the national popular vote.

QUICK ANSWER:

- Current federal law provides for an official count of the popular vote for President from each state in the form of a public “Certificate of Ascertainment.”

MORE DETAILED ANSWER:

It is sometimes asserted that there is no official national count of the national popular vote for President and, therefore, the National Popular Vote compact would be impossible to implement.

In his testimony on February 19, 2010, to the Alaska Senate Judiciary Committee, Professor Robert Hardaway of the University of Denver Sturm College of Law said:

“Under the Koza scheme, who would be the national official **who would decide what the popular vote is?**” [Emphasis added]

³⁶⁷ Roarty, Alex. The Ohio vote count could be a mess. *National Journal*. November 6, 2012.

The answer is the same under both the current system and under the National Popular Vote compact.

Existing federal law (section 6 of Title 3 of the United States Code) requires that an official count of the *popular vote* for President from each state be certified and sent to various federal officials in the form of a “Certificate of Ascertainment.”

“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment** of the electors appointed, setting forth the names of such electors and **the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast. . . .**”
[Emphasis added]

Figure 9.5 shows the Certificate of Ascertainment from Oregon for the 2012 presidential election.

Appendices E, F, G, H, and I show the 2004 Certificate of Ascertainments for Minnesota, Maine, Nebraska, New York, and Mississippi, respectively.

The certificates of ascertainment from all 50 states and the District of Columbia are available on-line for the 2000, 2004, 2008, and 2012 presidential elections.³⁶⁸

The national popular vote total for each presidential candidate can be obtained by adding together the popular vote counts from the Certificates of Ascertainment from all 50 states and the District of Columbia.

In fact, the results of this arithmetic process of adding up 51 numbers for each candidate may be viewed on the National Archives and Records Administration’s web page entitled “2012 Presidential Election—Popular Vote Totals.”³⁶⁹

Tara Ross says that supporters of the National Popular Vote

“**pretend** it is possible to come up with one national vote total.” [Emphasis added]

Why does Ross think that the National Archives and Records Administration is “pretending” when it presents a spreadsheet showing the number of popular votes cast for each presidential candidate as certified by each state’s Certificate of Ascertainment?

³⁶⁸ For the 2012 presidential election, see http://www.archives.gov/federal-register/electoral-college/2012/certificates_of_ascertainment.html. The web address is the similar for 2000, 2004, and 2008.

³⁶⁹ For the 2012 presidential election, see <http://www.archives.gov/federal-register/electoral-college/2012/popular-vote.html>. The web address is the similar for 2000, 2004, and 2008.

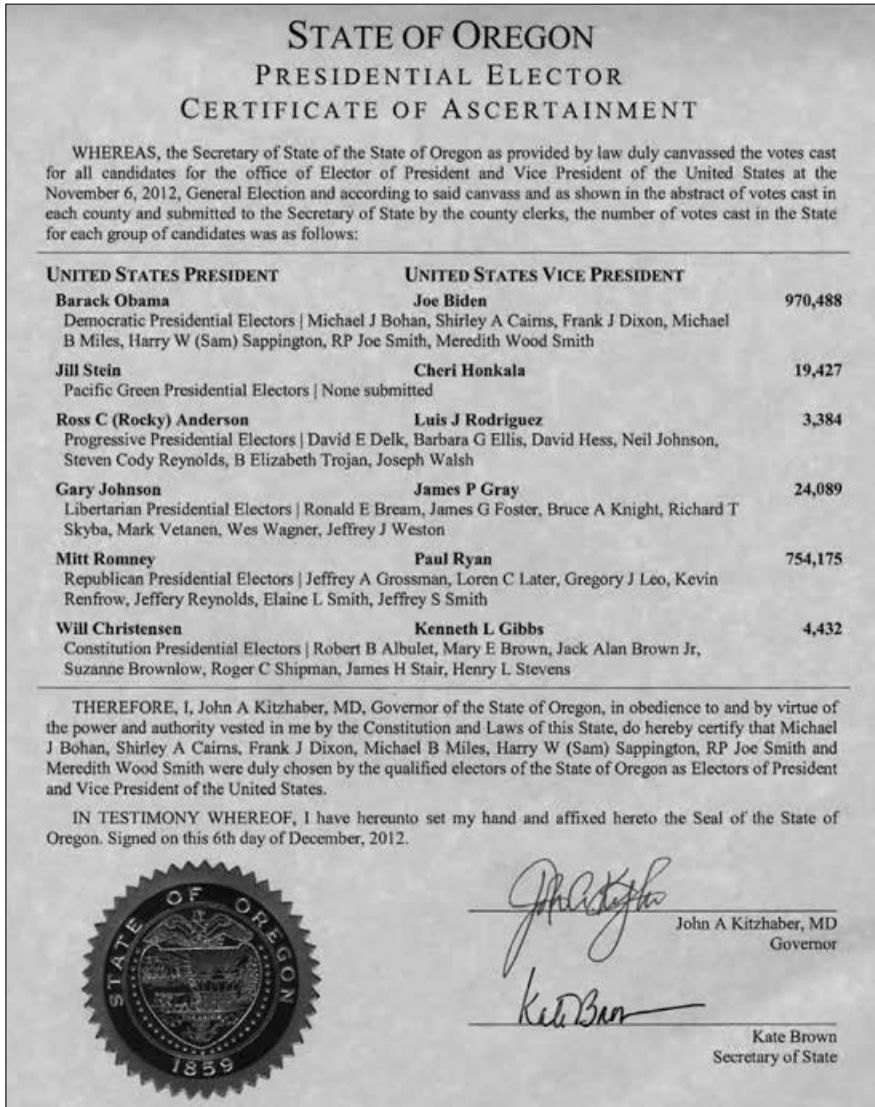


Figure 9.5 Oregon's 2012 Certificate of Ascertainment

In an article entitled “Lawmakers Seek to Change Presidential Elections to Make Them More Risky, Reduce Confidence,” Luther Weeks of Connecticut says:

“There is no official national popular vote number compiled and certified nationally that can be used to officially and accurately determine the winner in any reasonably close election.”³⁷⁰ [Emphasis added]

³⁷⁰ Weeks, Luther. Lawmakers seek to change presidential elections to make them more risky, reduce confidence. February 3, 2011. <http://ctvoterscount.org/lawmakers-seek-to-change-presidential-elections-to-make-them-more-risky-reduce-confidence/>.

Of course, the vote counts recorded on the states' Certificates of Ascertainment are used *under the current system* to award electoral votes. Moreover, these vote counts are considered “official” enough and “accurate” enough to elect the President of the United States under the current system.

In particular, the 537-vote lead (out of 5,963,110 votes) recorded on Florida's Certificate of Ascertainment in 2000 was considered “official” enough and “accurate” enough to elect a President. One wonders why Weeks thinks that these state-produced Certificates of Ascertainment (and the legal process behind the “final determinations” reported in these certificates) would suddenly become “more risky” if used to elect a President under the National Popular Vote compact. Why would they suddenly “reduce confidence?”

9.14.2. MYTH: A single state could frustrate the National Popular Vote compact by keeping its election returns secret.

QUICK ANSWER:

- Current federal law provides for an official public count of the popular vote for President in each state.

MORE DETAILED ANSWER:

It has been suggested on an elections blog that a state might pass a law making its election returns secret at the precinct, local, county, and state levels:

“Couldn't [a state] decide to turn its popular vote totals into a state secret, thereby ruining the pact? What's to stop a state from choosing to count votes behind closed doors?”³⁷¹

Existing federal law (section 6 of Title 3 of the United States Code) requires each state to certify the number of popular votes cast for each presidential elector in a public document, called a “Certificate of Ascertainment,” prior to the mid-December meeting of the Electoral College.

“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment** of the electors appointed, setting forth the names of such electors and **the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast;** and it

³⁷¹ In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution.

shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a **part of the public records of his office and shall be open to public inspection**; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.” [Emphasis added]

Figure 9.5 shows Oregon’s 2012 Certificate of Ascertainment. Appendices E, F, G, H, and I show the Certificates of Ascertainment from Minnesota, Maine, Nebraska, New York, and Mississippi. Figure 6.1 shows Vermont’s 2008 Certificate of Ascertainment. The Certificates of Ascertainment from all 50 states and the District of Columbia are available on-line for the 2000, 2004, and 2008 elections.³⁷²

Professor Norman R. Williams of Willamette University dismisses the federal law by suggesting that presidential elections could nonetheless be conducted in secret.

“States could comply with that requirement without making their actual vote totals public, such as by **releasing the vote totals only to the candidates on the condition that the totals are kept confidential** until after the Electoral College meets. Such **selective release would allow the losing candidate to pursue a judicial election contest, which itself could be kept closed to the public to ensure the vote total’s confidentiality**, but it would frustrate the NPVC by keeping other states from knowing the official vote tally.”³⁷³ [Emphasis added]

Professor Williams’ proposal for secret elections, secret judicial hearings, and non-disclosure agreements assumes that there is a state in which the voters have such a strong attachment to the current winner-take-all rule that they would be willing to abandon the long-standing tradition of having elections closely monitored by the

³⁷² http://www.archives.gov/federal-register/electoral-college/2004/certificates_of_ascertainment.html.

³⁷³ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 213.

media, civic groups, and challengers and observers representing the parties, candidates, and ballot propositions that happen to be on the ballot at the same time as the presidential election.³⁷⁴

Professor Williams' proposal for conducting secret elections is a parlor game devoid of any connection to real-world political reality.

9.14.3. MYTH: Absentee ballots are not counted in California when the number of absentee ballots is significantly less than the amount by which the Democratic presidential candidate is leading.

QUICK ANSWER:

- It is simply an urban legend that absentee ballots are not counted in California (or any other state) when the number of absentee ballots is significantly less than the amount by which the Democratic presidential candidate is leading.
- A typical ballot in California contains votes for between 50 and 100 individual candidates and ballot propositions. Regardless of whether there is any doubt as to which presidential candidate received the most popular votes in California, 100% of the ballots must be counted in order to determine the outcome of the numerous other offices and propositions on the ballot.

MORE DETAILED ANSWER:

A posting on *Real Clear Politics* stated:

“One thing worth noting is that **the true popular vote is rarely even tallied**. For example, I remember hearing several times that **California did not count absentee ballots because the number of absentee ballots was significantly less than the amount by which the Democratic candidate was leading**. Since absentee ballots typically include military votes, the gap might have narrowed, even if wasn't even mathematically possible for the ballots to flip the state. In that case, it's possible that, as an example, Al Gore may not have won the actual popular vote. **I believe there were roughly million absentee ballots not counted in California**, and Gore was leading by about 500,000 votes. While that was nowhere near enough to flip the state, it might have changed the popular vote total.”³⁷⁵ [Emphasis added]

³⁷⁴ As for public attachment to the winner-take-all rule, the political reality is that the public is not attached to the winner-take-all rule. Public opinion surveys show high levels of public support for a national popular vote for President in every state for which state-level polls are available, including battleground states, small states, Southern states, border states, and other states (as itemized in section 9.24.1). Numerous polls are available on National Popular Vote's web site at <http://www.nationalpopularvote.com/pages/polls>.

³⁷⁵ Blog posting by Southerner01. *Real Clear Politics*. October 12, 2012. http://www.realclearpolitics.com/articles/2012/10/12/how_likely_is_an_electoral_vote_popular_vote_split_115749-comments.html.

Depending on a voter's location, a typical ballot in California contains votes for between 50 and 100 individual candidates and ballot propositions, including:

- members of Congress,
- members of the state legislature,
- county offices,
- judges,
- statewide ballot propositions,
- city offices,
- school boards,
- community college boards,
- public hospital boards, and
- local ballot propositions.

There were 10,965,856 votes cast in California in the November 2000 election.

Although no group of 1,000,000 absentee ballots could have eliminated Al Gore's 1,293,774-vote lead over George W. Bush in the presidential race in California, these same 1,000,000 ballots determined the outcome of numerous other races on the ballot in November 2000.

Regardless of whether there is any doubt as to which presidential candidate received the most popular votes in California, 100% of the ballots must be counted in order to determine the outcome of the numerous other offices and propositions on the ballot.

This urban legend is absurd on its face.

9.15. MYTHS ABOUT RECOUNTS

9.15.1. MYTH: The current system typically produces undisputed outcomes, whereas recounts would be frequent under a national popular vote.

QUICK ANSWER:

- The current state-by-state winner-take-all system of electing the President has repeatedly produced unnecessary artificial crises that would not have arisen if there had been a single large national pool of votes and if the winner had been the candidate who received the most popular votes nationwide.
- There have been five litigated state counts in the nation's 57 presidential elections under the current system. This high frequency contrasts with the mere 22 recounts among the 4,072 statewide general elections in the 13-year period between 2000 and 2012—that is, a probability of 1-in-185. In other words, the probability of a disputed presidential election conducted using the current state-by-state winner-take-all system is dramatically higher than the probability of a recount in an election in which there is a single pool of

votes and in which the winner is the candidate who receives the most popular votes.

- The current state-by-state winner-take-all system repeatedly creates artificial crises because every presidential election generates 51 separate opportunities for a dispute because of an outcome-altering statewide margin. The nation's 57 presidential elections have really been 2,237 separate state-level elections.
- Recounts would be far less likely under the National Popular Vote bill than under the current system because there would be a single large national pool of votes instead of 51 separate pools. Given the 1-in-185 chance of a recount and given that there is a presidential election every four years, one would expect a recount about once in 740 years under a National Popular Vote system. In fact, the probability of a close national election would be even less than 1-in-185 because the 1-in-185 statistic is based on statewide recounts, and recounts become less likely with larger pools of votes. Thus, the probability of a national recount would be even less than 1-in-185 (and even less frequent than once in 740 years).
- Many people do not realize how rare recounts are in actual practice, how few votes are changed by recounts, and how few recounts ever change the outcome of an election.
- The average change in the margin of victory as a result of a statewide recount is a mere 294 votes.
- Only one in seven recounts reverses the original outcome.
- Recounts appear to be becoming rarer. There were no recounts among the 419 statewide elections in November 2012.
- Improved technology can be expected to further reduce the occurrence of recounts in coming years.

MORE DETAILED ANSWER:

Criticism of the National Popular Vote plan in connection with recounts is an example of a criticism that actually applies more to the current state-by-state winner-take-all system than to the National Popular Vote plan. As explained below, recounts in presidential elections would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all system.

Indeed, the question of recounts comes to mind in connection with presidential elections only because the current system so frequently creates artificial crises and unnecessary disputes. If we were debating the question of whether to elect state Governors by a popular vote, the issue of recounts would never even come to mind, because everyone knows that recounts rarely occur in elections in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

Tara Ross, an opponent of the National Popular Vote plan, has stated:

“The Electoral College **typically produces** quick and **undisputed outcomes**.”³⁷⁶ [Emphasis added]

Ross has also said:

“The Electoral College encourages stability and certainty in our political system. **Events such as those that occurred in 2000 are rare**.”³⁷⁷ [Emphasis added]

In testimony before the Alaska Senate, Ross stated:

“A direct election system . . . would result in . . . **constant recounts**.”³⁷⁸ [Emphasis added]

Nothing could be further from the truth.

In fact, it is the current state-by-state winner-take-all system (i.e., awarding of all a state’s electoral votes to the candidate who receives the most popular votes in the state) that regularly produces artificial crises in the form of unnecessary recounts and disputes.

There have been five litigated state counts in the nation’s 57 presidential elections between 1789 and 2012 under the current state-by-state winner-take-all system. This rate is dramatically higher the 1-in-185 chance (documented below) of a recount in which there is a single statewide pool of votes and in which the winner is the candidate who receives the most popular votes.

The current state-by-state winner-take-all system repeatedly creates artificial crises because every presidential election provides 51 separate opportunities for a dispute. This fact is illustrated by examining the five litigated state counts in the nation’s 57 presidential elections between 1789 and 2012. All five were artificial crises that would not have arisen if there had been a single large national pool of votes and if the winner had been the candidate who receives the most popular votes.

The 2000 presidential election was an artificial crisis created because of George W. Bush’s lead of 537 popular votes in the state of Florida. Gore’s nationwide lead was 537,179 popular votes—1,000 times larger than the disputed 537-vote margin in Florida. Given the miniscule number of votes that are changed by the typical statewide recount (about 294 votes), no one would have requested a recount or disputed the results in 2000 if the nationwide margin of 537,179 had controlled the outcome. In the absence of

³⁷⁶ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

³⁷⁷ Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

³⁷⁸ Oral and written testimony presented by Tara Ross at the hearing of the Alaska Senate State Affairs Committee in February 2011.

the state-level winner-take-all rule, no one (except perhaps almanac writers and trivia buffs) would have noticed that one particular candidate happened to have a 537-vote margin in one particular state.

In 1960, there was a recount and a court case that reversed the original outcome of the presidential race in Hawaii. Kennedy ended up with a 115-vote margin in Hawaii in an election in which his nationwide margin was 118,574.

Samuel Tilden's 3% nationwide lead in 1876 was a solid victory in terms of the national popular vote (equal, for example, to George W. Bush's nationwide percentage lead in the 2004 election). However, an artificial crisis was created because of the razor-thin margins of 889 votes in South Carolina, 922 in Florida, and 4,807 in Louisiana.³⁷⁹ Few would have cared who received more popular votes in these three closely divided states if the President had been elected by a nationwide popular vote (which Tilden won by 254,694 votes). Again, the state-by-state winner-take-all system created an unnecessary artificial crisis.

Let us start with the facts about how rare recounts are in actual practice, how few votes are actually changed by recounts, and how few recounts actually change the outcome of an election.

FairVote has collected data on every statewide general election in the 13-year period from 2000 to 2012.³⁸⁰

There were 22 recounts in 4,072 statewide general elections between 2000 and 2012—that is, one recount for every 185 elections.

Table 9.15 shows, by year, the number of statewide general elections and recounts in the 13-year period from 2000 to 2012.

Table 9.16 shows a breakdown according to the particular elective office or ballot proposition involved in the 4,072 statewide general elections and 22 recounts in the 13-year period between 2000 and 2012.

Table 9.17 provides details about the 22 recounts of statewide general elections in the 13-year period between 2000 and 2012. The recounts in the table are arranged according to the absolute value of number of votes changed by the recount (shown in column 1). Columns 2, 3, and 4 identify the recount. Column 5 shows whether the original count was upheld or reversed. Column 6 shows the original margin, and column 7 shows the margin after the recount. Column 8 shows whether the recount was

³⁷⁹ Although the 1876 dispute focused primarily on the statewide vote counts in Louisiana, South Carolina, and Florida, the vote count was also close in other states, including California (where the margin was 2,798), Oregon (where the margin was 1,050 votes), and Nevada (where the margin was 1,075 votes).

³⁸⁰ Rob Richie and Mollie Hailey of FairVote updated FairVote's 2010 report covering the 10-year period between 2000 and 2009 by adding data for the three-year period between 2010 and 2012. See Richie, Rob; Talukdar, Monideepa; and Hellman, Emily. 2010. *A Survey and Analysis of Statewide Election Recounts, 2000–2009*. FairVote.

**Table 9.15 THE 4,072 STATEWIDE GENERAL ELECTIONS
2000–2012 BY YEAR**

YEAR	NUMBER OF ELECTIONS	NUMBER OF RECOUNTS
2000	538	5
2001	52	-
2002	554	-
2003	79	-
2004	448	6
2005	59	1
2006	598	3
2007	70	-
2008	449	2
2009	37	1
2010	708	3
2011	61	-
2012	419	0
Total	4,072	22

**Table 9.16 THE 4,072 STATEWIDE GENERAL ELECTIONS
2000–2012 BY TYPE OF ELECTION**

OFFICE	NUMBER OF STATEWIDE ELECTIONS	NUMBER OF RECOUNTS
President	200	1
U.S. Senator	240	3
U.S. Representative	49	-
Governor	169	2
Lieutenant Governor	92	-
Secretary of State	116	1
Attorney General	142	1
Treasurer	113	-
Auditor	81	1
Comptroller	27	-
Public Service Commissioner	24	-
Agriculture or Industries Commissioner	38	-
Labor Commissioner	11	-
Insurance Commissioner	33	-
Public Lands Commissioner	17	-
Tax Commissioner	4	-
Corporation Commissioner	20	-
Railroad Commissioner	9	-
Public Utilities Commissioner	7	-
Mine Commissioner	3	-
Supt. of Public Instruction or Education	43	1
Board of Education or Governors	16	1
University Regent	10	-
Trustee	7	-
Judicial positions and retention	941	5
Ballot questions	1,645	6
Other	15	-
Total	4,072	22

Table 9.17 THE 22 RECOUNTS OF STATEWIDE GENERAL ELECTIONS 2000–2012

CHANGE IN VOTE MARGIN	STATE	YEAR	OFFICE OR PROPOSITION	RECOUNT RESULT	ORIGINAL VOTE MARGIN	VOTE MARGIN AFTER RECOUNT	TYPE OF RECOUNT
3	MT	2000	Public Instruction	Upheld	64	61	Requested
4	AL	2004	Amendment 2	Upheld	1,850	1,846	Automatic
-15	GA	2004	Court of Appeals	Upheld	348	363	Automatic
-37	VA	2005	Attorney General	Upheld	323	360	Requested
-50	WY	2004	Amendment C	Upheld	1,282	1,232	Automatic
-50	NC	2006	Court of Appeals	Upheld	3,416	3,466	Requested
-55	WY	2004	Amendment A	Upheld	858	803	Automatic
-66	AZ	2010	Proposition 112	Upheld	128	194	Automatic
86	MN	2010	Governor	Upheld	8,856	8,770	Automatic
-131	OR	2008	Measure 53	Upheld	550	681	Automatic
219	AK	2004	U.S. Senator	Upheld	9,568	9,349	Requested
239	VT	2006	Auditor	Reversed	137	-102	Requested
267	WA	2000	Secretary of State	Upheld	10,489	1,0222	Automatic
-276	WA	2000	U.S. Senator	Upheld	1,953	2,229	Automatic
-281	PA	2009	Superior Court	Upheld	83,693	83,974	Requested
312	WI	2011	Supreme Court	Upheld	7,316	7,004	Requested
390	WA	2004	Governor	Reversed	261	-129	Automatic
440	MN	2008	U.S. Senator	Reversed	215	-225	Automatic
-508	AL	2006	Amendment	Upheld	2,642	3,150	Automatic
-667	NC	2010	Court of Appeals	Upheld	5,988	6,655	Requested
1,121	CO	2000	Education Board	Upheld	1,211	90	Automatic
1,247	FL	2000	President	Upheld	1,784	537	Automatic
294	Average						

a candidate-requested or an automatic recount (explained below). Details concerning Wyoming’s constitutional amendments A and C of 2004 are explained in a footnote.³⁸¹

The average change in the margin of victory as a result of a statewide recount was a mere 294 votes. This number is obtained by averaging the *absolute* value of the “change in vote” numbers found in column 1 of table 9.17.

As can be seen, the number of votes changed by a statewide recount between 2000 and 2012 ranges from 3 to 1,274.

³⁸¹ In Wyoming, a constitutional amendment must be approved by a majority of the total number of votes cast on Election Day (rather than a majority of those voting on the amendment). On Election Day in Wyoming in November 2004, 245,789 votes were cast, so the required majority to pass an amendment was 122,896. Thus, the outcome was determined by the difference between the number of “yes” votes and 122,896 (rather than the difference between the number of “yes” and “no” votes). In other words, failure to vote on an amendment counts as a “no” vote. Amendment A received 122,038 “yes” votes (and 96,792 “no” votes) in the initial count and was thus only 858 votes short of the 122,896 votes required for passage. This shortfall (0.3491% of 245,789) triggered an automatic recount of Amendment A. The recount of Amendment A changed 55 votes (0.0223% of 245,789). Amendment C received 124,178 “yes” votes (and 110,169 “no” votes) in the initial count and was thus only 1,282 over the 122,896 votes required for passage. This overage (0.5216% of 245,789) triggered an automatic recount of Amendment C. The recount of Amendment C changed 50 votes (0.0203% of the 245,789).

All but two of the 22 recounts resulted in only a three-digit change in the original count, and the largest change was a change of 1,247 votes.³⁸²

As one would expect, half (11 of the 22) of recounts increased the apparent winner's margin, and half decreased it.

The original outcome was reversed in only three of the 22 recounts—that is, about 1-in-7 recounts.

All of the recounts in which the original outcome was reversed had one thing in common, namely a *low-three-digit original margin* (specifically 137, 215, or 261 votes).

The three recounts that reversed the original outcome were:

- the 2004 Governor's race in Washington state (where the original 261-vote lead became a 129-vote loss),
- the 2006 state auditor's race in Vermont (where the original 137-vote lead became a 102-vote loss), and
- the 2008 U.S. Senate election in Minnesota (where the original 215-vote lead became a 225-vote loss).

The probability of a national recount can be estimated from the known probability of statewide recounts.

Using the 1-in-185 chance of a recount, and given that there is one presidential election every four years, one would expect a national recount about once every 740 years under a national popular vote (that is, four times 185).

In fact, the probability of a presidential recount under a national popular vote system would be even less than 1-in-185 (that is, even rarer than once in 740 years) because a close result is less likely to occur as the size of the voting pool increases.

This 1-in-185 frequency of problematic elections is dramatically lower than the five litigated state counts in 57 presidential elections up to 2012 that we have experienced under the current state-by-state winner-take-all system.

The reason there have been so many disputes in the mere 57 presidential elections is that there are 51 separate opportunities for recounts in every presidential election under the current state-by-state winner-take-all system. Our nation's 57 presidential elections between 1789 and 2012 have really been 2,237 separate state-level elections. Thus, the current system repeatedly creates artificial crises in which the vote is extremely close in certain states, but not at all close on a nationwide basis.

One good way to visualize the difference between the two systems is to think of the chance of a recount as being a game of Russian Roulette in which there is one bullet in a 185-chamber gun. Under a national popular vote, the trigger is pulled once every four years. Based on history, we can reasonably expect the gun to fire once every 740 years (185 times 4). In contrast, under the current state-by-state winner-

³⁸²Note that the recount of the presidential vote in Florida in 2000 was the automatic recount that was required by Florida law and that was held shortly after Election Day. This recount did not involve a hand inspection of each ballot. It reduced Bush's initial 1,784-vote lead to a 537-vote lead. The hand recount that was begun later was halted by the U.S. Supreme Court, thus leaving the 537-vote margin as Bush's final margin in Florida.

take-all system, the trigger is pulled 51 times every four years. Thus, we should not be surprised to have had so many litigated state counts in 57 presidential elections between 1789 and 2012. The trigger was pulled 2,237 separate times in 57 presidential elections under the current state-by-state winner-take-all system.

As previously mentioned, one would expect a national recount of a presidential election about once every 740 years under a national popular vote (based on the 1-in-185 chance of a recount and given that there is one presidential election every four years). When that exceedingly rare event occurs, it will also almost certainly be true that the results in one state (and probably several) would also be closely divided. Thus, if the nationwide count were extremely close, the current state-by-state winner-take-all system would very likely also produce a disputed count in one or more closely divided states.

Despite the fact that the average number of votes changed in a recount is very small (a mere 294 votes), it is common on Election Night for disappointed candidates who have lost by thousands of votes to bombastically announce that they are going to demand a recount. However, in the cool light of day, these candidates almost always realize that they have no realistic chance of reversing the outcome.

For example, in a race in North Carolina with a vote gap of 6,658 (0.15% of the 4,368,598 votes cast):

“The trailing Democratic Party candidate for [North Carolina] lieutenant governor said Monday **she won’t seek a statewide recount, admitting that a new tally was unlikely to make up the nearly 6,900 votes she needs. . . .**

“**We face the reality that an extended battle would not alter the outcome of this race,**’ Linda Coleman said at a news conference after conceding the outcome to Republican Dan Forest. ‘It was a hard-fought, spirited campaign and we have stark differences. But in the end, in a tight race, North Carolinians have chosen Mr. Forest as their next lieutenant governor.’

“Coleman had until Tuesday to demand a recount because her margin with Forest was less than 10,000 votes out of almost 4.4 million cast. . . .

“I don’t think the money factor was an issue with her in making this decision,’ [Coleman spokesman] Beasley spoke said. **‘We just were faced with the reality of the numbers and that it’s hard to flip 6,000 votes in an extended recount battle.** She [Coleman] doesn’t want to put the people of North Carolina and the state board of election employees through that.’”³⁸³
[Emphasis added]

³⁸³Dalesio, Emery P. Democrat concedes in N.C. lieutenant gov. race. Associated Press article in *Pilot OnLine*. November 19, 2012. Dalesio, Emery P. Democrat concedes in N.C. lieutenant gov. race. *Pilot OnLine*. November 19, 2012 <http://hamptonroads.com/2012/11/democrat-concedes-nc-lieutenant-gov-race>.

Similarly, Sandy Welsh decided not to pursue a recount in 2012 of her 2,231-vote loss in her race for Montana Superintendent of Public Instruction (a difference of 0.48% of the 468,563 votes cast).³⁸⁴

Not all recounts are conducted because the apparent losing candidate believes that he or she has any realistic probability of changing the result of the initial count. Nineteen states provide for “automatic” recounts of elections that are triggered because the original difference between the candidates is less than some pre-specified statutory percentage or numerical trigger. One reason that states conduct automatic recounts is to maximize public confidence in elections. Another reason is that recounts provide state officials and the public with the periodic opportunities to audit and evaluate the operation of the state’s election process. The government pays for automatic recounts. The percentage or numerical trigger for an automatic recount varies considerably among the 19 states. In many of the 19 states, an automatic recount will be conducted if the difference in the initial count between the first-place and second-place candidate (or ballot alternative, in the case of ballot propositions) is less than 0.5% of the votes cast.³⁸⁵ Several states mandate automatic recounts with even larger differences. In many automatic recounts, no one (including the apparent losing candidate) realistically expects the outcome to change.

About two-thirds of the 22 recounts (14 of 22) in table 9.17 (column 8) were “automatic” recounts (as opposed to candidate-requested recounts).

Table 9.18 presents the percentage change in votes (column 1) that resulted from the 22 recounts of statewide general elections between 2000 and 2012 (table 9.17). Column 6 of the table here shows the total votes cast for the office or ballot proposition. Column 7 shows the percentage lead of the winner of the initial count (that is, the numerical lead shown in column 6 of table 9.17 divided by the total number of votes cast as shown in column 6 of this table). Many of the 19 states that conduct automatic recounts use this percentage as the criterion for deciding whether to conduct an automatic recount. Column 1 shows the percentage change resulting from the recount (that is, the number of votes changed in the recount as shown in column 1 of table 9.17 divided by the total number of votes cast as shown in column 6 of this table). The recounts in this table are arranged according to percentage in column 1.

As can be seen from column 1 of table 9.18, the percentage change that resulted from recounts is very small. Only one of the 22 recounts changed more than 0.1% of the original vote. The percentage change that resulted from 22 recounts ranged between:

- 0.0003%—that is, 3 votes in 1,380,750 (in Alabama) and
- 0.1073%—that is, 137 votes in 222,835 (in Vermont).

Recounts appear to be becoming rarer in recent years.

³⁸⁴ Associated Press. Welch drops recount after coming up short on \$115K. *Independent Record*. Helena, Montana. December 11, 2012. http://helenair.com/news/state-and-regional/welch-drops-recount-after-coming-up-short-on-k/article_8d5e1d2a-efe9-5f59-ba5c-ef91a31e960d.html?comment_form=true.

³⁸⁵ The National Conference of State Legislatures has summarized the characteristics of the 19 state-level automatic recount laws at <http://www.ncsl.org/legislatures-elections/elections/conducting-recounts.aspx>.

Table 9.18 PERCENTAGE DIFFERENCES AND CHANGES RESULTING FROM THE 22 RECOUNTS 2000–2012

PERCENT CHANGE DUE TO RECOUNT	STATE	YEAR	OFFICE OR PROPOSITION	RECOUNT RESULT	TOTAL VOTES IN ORIGINAL COUNT	PERCENT LEAD OF APPARENT WINNER	TYPE OF RECOUNT
0.0003%	AL	2004	Amendment 2	Upheld	1,380,750	0.1340%	Automatic
0.0019%	VA	2005	Attorney General	Upheld	1,941,449	0.0170%	Requested
0.0032%	NC	2006	Court of Appeals	Upheld	1,539,190	0.2220%	Requested
0.0036%	GA	2004	Court of Appeals	Upheld	414,484	0.0840%	Automatic
0.0042%	AZ	2010	Proposition 112	Upheld	1,585,522	0.0080%	Automatic
0.0047%	MN	2010	Governor	Upheld	1,829,620	0.4840%	Automatic
0.0048%	MT	2000	Public Instruction	Upheld	63,080	0.1010%	Requested
0.0115%	WA	2000	U.S. Senator	Upheld	2,396,567	0.0810%	Automatic
0.0125%	WA	2000	Secretary of State	Upheld	2,137,677	0.4910%	Automatic
0.0134%	OR	2008	Measure 53	Upheld	978,634	0.0560%	Automatic
0.0142%	WA	2004	Governor	Reversed	2,742,567	0.0100%	Automatic
0.0154%	PA	2009	Superior Court	Upheld	1,821,869	4.5940%	Requested
0.0182%	MN	2008	U.S. Senator	Reversed	2,422,965	0.0090%	Automatic
0.0203%	WY	2004	Amendment C	Upheld	245,789	0.5216%	Automatic
0.0208%	WI	2011	Supreme Court	Upheld	1,497,330	0.4890%	Requested
0.0214%	FL	2000	President	Upheld	5,816,486	0.0310%	Automatic
0.0223%	WY	2004	Amendment A	Upheld	245,789	0.3491%	Automatic
0.0620%	NC	2010	Court of Appeals	Upheld	1,079,980	0.5540%	Requested
0.0622%	AL	2006	Amendment	Upheld	816,102	0.3240%	Automatic
0.0730%	CO	2000	Education Board	Upheld	1,536,619	0.0790%	Automatic
0.0757%	AK	2004	U.S. Senator	Upheld	289,324	3.3070%	Requested
0.1073%	VT	2006	Auditor	Reversed	222,835	0.0610%	Requested

There were *no* recounts at all among the 419 statewide elections in November 2012.

The frequency of recounts has dropped by about half in recent years. As can be seen in table 9.15, there were twice as many recounts (15 of the 22) between 2000 and 2006 (the top half of the table) than in the six-year period represented by the bottom half of the table (7 of the 22). This apparent decline may be the result of the nationwide efforts made since 2000 to improve election administration and equipment, including enactment of the Help America Vote Act (HAVA) in 2002. One major improvement in election equipment is the drastic reduction since 2000 in the use of punched-card voting (with their hanging chads).

Improved technology can be expected to further reduce the need for recounts in coming years.

For decades, bank tellers, credit-card processors, and state lotteries have routinely and accurately handled and accounted for far more transactions than the mere 130 million votes cast in a presidential election on Election Day. *Every day*, approximately 145 million lottery bets,³⁸⁶ 300 million bank-teller transactions, and 60 million

³⁸⁶ National Conference of State Legislatures. *Lottery Payouts and State Revenue*. <http://www.ncsl.org/issues-research/econ/lottery-payouts-and-state-revenue.aspx>.

credit card transactions³⁸⁷ are accurately handled and accounted for in the United States. In particular, bets in state-administrated Lotto games resemble voting in that they require the accurate recording of the player's selection of six (or so) numbers (typically on a paper slip). Unfortunately, the technology for administering elections and handling ballots in the United States is several decades behind that of the banks, credit-card processors, and state lotteries. No doubt, the technology for more accurately handling and accounting for large numbers of votes will catch up with that of these other industries during the next decade or so (and certainly sometime in the next 740 years) so that worries about recounts become a thing of the past.

9.15.2. MYTH: The current state-by-state winner-take-all system acts as a firewall that helpfully isolates recounts to particular states.

QUICK ANSWER:

- Far from acting as a firewall that helpfully isolates recounts to particular states, the current state-by-state winner-take-all system is, instead, the repeated cause of unnecessary fires.
- The current system repeatedly creates artificial crises because every presidential election presents 51 separate opportunities for a dispute.
- There have been five litigated state counts in the nation's 57 presidential elections between 1789 and 2012 under the current state-by-state winner-take-all system. This rate is dramatically higher than the historical 1-in-185 rate for disputed elections in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

MORE DETAILED ANSWER:

Brendan Loomer Loy claims that the current state-by-state winner-take-all system acts as a helpful firewall that

“isolate[es] post-election disputes to individual close states.”³⁸⁸

Far from acting as a firewall that helpfully isolates recounts to particular states, the current state-by-state winner-take-all system is, instead, the repeated cause of unnecessary fires.

Under the current system, there are 51 separate statewide vote pools in every presidential election. Thus, our nation's 57 presidential elections between 1789 and 2012 have really been 2,237 separate state-level elections. These 51 separate pools

³⁸⁷ Federal Reserve System. *The 2010 Federal Reserve Payment Study: Noncash Payment Trends in the United States: 2006-2009*. April 5, 2011. Page 54.

³⁸⁸ Loy, Brendan Loomer, “Count Every Vote—All 538 of Them” *Social Science Research Network*. September 12, 2007. Available at <http://ssrn.com/abstract=1014431>.

regularly generate 51 separate opportunities for artificial crises in elections in which the vote is not at all close on a nationwide basis (but close in particular states). This is why there have been five litigated state counts in the nation's 57 presidential elections between 1789 and 2012. This rate is dramatically higher than the historical 1-in-185 rate for elections in which there is a single statewide pool of votes and in which the winner is the candidate who receives the most popular votes.

If anyone is genuinely concerned about minimizing the possibility of recounts, then a single national pool of votes provides the way to drastically reduce the likelihood of recounts and eliminate the artificial crises that are regularly produced by the current state-level winner-take-all system.

Trent England (a lobbyist opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington) has written:

“Containing elections within state lines also means containing election problems. The Electoral College turns the states into the equivalent of the watertight compartments on an ocean liner. Fraud or process failures can be isolated in the state where they occur and need not become national crises.”³⁸⁹ [Emphasis added]

The current system does not contain and isolate problems but instead creates artificial crises.

9.15.3. MYTH: Resolution of a presidential election could be prolonged beyond the inauguration date because of recounts.

QUICK ANSWER:

- The U.S. Constitution establishes a strict overall national schedule for finalizing the results of presidential elections. These existing provisions apply equally to elections conducted under the current system as well as to elections conducted under the National Popular Vote plan.
- Under both the current system and the National Popular Vote plan, all counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

MORE DETAILED ANSWER:

Brendan Loomer Loy warns that if we were to have a nationwide popular vote for President:

“Post-election uncertainty could stretch well into January, raising doubt about whether we would have a clear winner by inauguration day. . . .”

³⁸⁹ England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

“With two centuries of legal precedent tossed aside, courts would have a very difficult time managing it all.”³⁹⁰

Loy’s scenario of a prolonged and unsettled election is based on the incorrect assumption that the existing U.S. Constitution, existing federal statutes, and existing state statutes would somehow be “tossed aside” under the National Popular Vote compact. In fact, the National Popular Vote compact was specifically drafted so as to operate within existing constitutional and statutory provisions in the same way that the current system does.

Finality of presidential elections would be ensured under the National Popular Vote compact by the same machinery that applies to the current system, namely the existing U.S. Constitution, existing federal statutes, and existing state statutes.

The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election. These existing provisions would apply to elections conducted under the proposed National Popular Vote legislation in the same way that they apply to elections conducted under the current system. No prolonging of a U.S. presidential election until January is possible, thanks to these existing constitutional provisions and existing federal and state statutory provisions.

The U.S. Constitution provides:

“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”³⁹¹ [Spelling as per original] [Emphasis added]

Congress has exercised this constitutional power to set the uniform nationwide date for the meeting of the Electoral College by enacting the following statute:

“The electors of President and Vice President of each State shall meet and give their votes on the **first Monday after the second Wednesday in December** next following their appointment at such place in each State as the legislature of such State shall direct.”³⁹² [Emphasis added]

Under both the current system and the National Popular Vote approach, all counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

The U.S. Supreme Court has made it clear that the states are expected to make

³⁹⁰ Loy, Brendan Loomer. 2007. “Count Every Vote—All 538 of Them. *Social Science Research Network*. September 12, 2007. Available at <http://ssrn.com/abstract=1014431>.

³⁹¹ U.S. Constitution. Article II, section 1, clause 4.

³⁹² United States Code. Title 3, chapter 1, section 7.

their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date established by section 5 of Title 3 of the United States Code).³⁹³

In addition, in most states, state statutes already impose independent earlier deadlines for finalizing the count for a presidential election. The U.S. Supreme Court has ruled that state election officials and the state judiciary must conduct counts and recounts in presidential elections within the confines of existing state election laws.

Note that the laws governing the finalization of the count (and completion of any recount) for a presidential election are entirely different from those governing, say, a disputed race for one of the 100 seats in the U.S. Senate (e.g., the 2008 Senate race in Minnesota).

It may be argued that the schedule established by the U.S. Constitution, existing federal statutes, and existing state statutes may sometimes rush the count, prevent recounts, and possibly even create injustice. However, there can be no argument that this schedule exists in the U.S. Constitution, federal statutes, and state statutes or that this existing schedule guarantees “finality” prior to the meeting of the Electoral College in mid-December. The existing constitutional and statutory schedule would govern the National Popular Vote compact in exactly the same way that it governs elections under the current system.

9.15.4. MYTH: Conducting a recount would be a logistical impossibility under a national popular vote.

QUICK ANSWER:

- As a matter of routine and prudent planning, state election officials have contingency plans to conduct a recount for every election.
- The personnel and resources necessary to conduct a recount are indigenous to each state. Thus, a state’s ability to conduct a recount inside its own borders is unrelated to whether a recount is being conducted in another state.
- The potential task of recounting the votes cast for President is not a logistical impossibility, as evidenced by the fact that the *original* count is not a logistical impossibility.

MORE DETAILED ANSWER:

A recount is not a logistical impossibility or an unimaginable horror.

The task of recounting the votes cast for President in the nation’s 186,000 precincts is not a logistical impossibility, as evidenced by the fact that the *original* count is not a logistical impossibility.

³⁹³ For example, in 2008, the election was Tuesday, November 4, and the “safe harbor” date was 33 days later on Monday, December 8. The Electoral College met on the following Monday, December 15 (the Monday after the second Wednesday in December). Congress met to count the votes on January 6, 2009. According to the Constitution, the outgoing President’s term ended on January 20, 2009.

A recount is a recognized ever-present contingency whenever a statewide election is conducted. There are about 400 statewide elective offices and statewide propositions on the ballot in a typical November general election in an even-numbered year. There is a probability of about 1-in-185 of a statewide recount (as discussed in section 9.15.1). As a matter of prudent planning, state election officials stand ready with contingency plans to carry out their duty to conduct a recount if one is required.

No state needs the assistance of any personnel or resources from any other state in order to conduct its recount. The personnel and resources necessary to conduct a recount are indigenous to each state. Thus, a state's ability to handle the logistics of a recount within its own borders is unrelated to whether a recount is being conducted in any other state or *all other* states.

Under both the current system and the National Popular Vote approach, all counting, recounting, and judicial proceedings must be conducted so as to reach a "final determination" prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

The U.S. Supreme Court has made it clear that the states are expected to make their "final determination" six days before the Electoral College meets (the so-called "safe harbor" date established by section 5 of Title 3 of the United States Code).

Because all states must finalize their count (or finish their recount) by the "safe harbor" date in early December, and because the only remaining step required by the National Popular Vote bill is to add up the vote totals from all 50 states and the District of Columbia, the final national vote totals would be available before the Electoral College meets.

Even with a single pool of almost 130,000,000 votes, it is possible that the nationwide popular vote could be extremely close in some future presidential election (say, a few hundred votes or perhaps a few thousand votes). In that event, the initial vote count and the recount would be handled in the same way as they are currently handled—that is, under generally serviceable laws that govern all elections.

Any extremely close election will almost certainly engender controversy, and the eventual loser will often go away unhappy.

The guiding principle in such circumstances should be that all votes should be counted fairly and expeditiously.

Of course, if the popular vote count were extremely close on a nationwide basis, it would be very likely that the vote count would also be close in a number of states.

As U.S. Senator David Durenberger (R–Minnesota) said in the Senate in 1979:

"There is no reason to doubt the ability of the States and localities to manage a recount, and nothing to suggest that a candidate would frivolously incur the expense of requesting one. And even if this were not the case, the potential danger in selecting a President rejected by a majority of

the voters far outweighs the potential inconvenience in administering a recount.”³⁹⁴

9.15.5. MYTH: States would be put in the uncomfortable position of judging election returns from other states under a national popular vote.

QUICK ANSWER:

- No state government has any obligation or power to judge the presidential election returns of any other state under either the current system or the National Popular Vote compact.

MORE DETAILED ANSWER:

No state government has any obligation or power to judge the presidential election returns of any other state under either the current system or the National Popular Vote compact.

Existing federal law specifies that each state’s own “final determination” of its presidential election returns is “conclusive” (if done in a timely manner and in accordance with laws in existence prior to Election Day). The existing federal law was originally enacted in substantially the same form that it exists today shortly after the disputed Tilden–Hayes election of 1876.

In particular, the “safe harbor” provision of existing federal law specifies the conditions under which a state’s “final determination” is considered “conclusive.”

“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”³⁹⁵ [Emphasis added]

The nation’s long-standing policy of deferring to the states is echoed in the National Popular Vote compact. In particular, the compact’s wording is directly patterned after existing federal law. The compact requires each state to treat as “conclu-

³⁹⁴ *Congressional Record*. July 10, 1979. Pages 17706–17707.

³⁹⁵ United States Code. Section 5 of Title 3, chapter 1.

sive” each other state’s “final determination” of its presidential vote. The fifth clause of Article III of the National Popular Vote compact provides:

“The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.”

Thus, no state government has any obligation or power to judge the presidential election returns of any other state under either the current system or the National Popular Vote compact.

9.15.6. MYTH: A recount might be warranted, but unobtainable, under the National Popular Vote compact.

QUICK ANSWER:

- The reality today, under current laws, is that a timely recount in a presidential race might be warranted, but impossible to obtain in practice in many states (as illustrated by what actually happened in Florida in 2000 and in Hawaii in 1960).
- A recount would be less likely to be needed under the National Popular Vote plan than under the current state-by-state winner-take-all system. There have been five litigated state counts in the nation’s 57 presidential elections between 1789 and 2012 under the current state-by-state winner-take-all system. This rate is dramatically higher than the historical 1-in-185 rate for elections in which there is a single statewide pool of votes and in which the winner is the candidate who receives the most popular votes. Given that a recount has occurred only about once in 185 statewide elections and that presidential elections occur once every four years, one would expect a national recount about once every 740 years under the National Popular Vote plan.
- Enactment of the National Popular Vote compact would provide impetus for states to review their imperfect existing laws regarding timely recounts in presidential elections.
- Given that Congress currently has the authority over the count and schedule for presidential elections, federal legislation would be the most expeditious solution to the problem of guaranteeing a timely recount in a presidential election under both the current system and the National Popular Vote plan. Such legislation is, in fact, needed now under the current system because the state-by-state winner-take-all system has resulted in such a high frequency of disputes in presidential elections (five litigated state counts in a mere

57 presidential elections between 1789 and 2012) and because the nation has been in an era of non-landslide presidential elections since 1988. Such a federal law would also be beneficial under the national popular vote approach, even though recounts would be less likely because there would be a single large national pool of votes (instead of 51 separate pools).

MORE DETAILED ANSWER:

Tara Ross criticizes the National Popular Vote plan by saying:

“States have different criteria for what does (or does not) trigger recounts within their borders. These differences could cause a whole host of problems. What if the national total is close—**close enough to warrant a recount—but a recount can’t be conducted** because the margins in individual states were not close?”³⁹⁶ [Emphasis added]

Of course, the ability to obtain a recount in situations “close enough to warrant a recount” is hardly ensured under the current state-by-state winner-take-all system, as demonstrated by the nation’s experience with Florida in 2000.

Moreover, there is no ability under the current system to obtain a recount in situations “close enough to warrant a recount” in the states that do not have recount laws (e.g., Mississippi). If, for the sake of argument, the 537-popular-vote margin that determined the 2000 presidential election had occurred in Mississippi (instead of Florida), there would have been no possibility of a recount. The initial count in Mississippi would have been the first, only, and final count.

In criticizing the National Popular Vote plan, Ross creates an additional misimpression by mentioning only automatic recounts (that is, recounts triggered merely because the original difference between the candidates is less than some fixed legislatively specified threshold). However, automatic recounts are not the only way to obtain a recount (or even the most usual way). In fact, only 19 states have such automatic recount laws.³⁹⁷ In most states, there are numerous avenues available for obtaining a recount (with some state statutes providing as many as six ways). For example, 42 states allow candidates to petition for a recount. One of the most common forms of state recount laws is to permit a recount if the disgruntled candidate pays for all of the recount’s administrative costs in advance (with the candidate typically being reimbursed if he or she is vindicated).

Obtaining a recount under a national popular vote would not be as difficult as Ross suggests (even under the questionable assumption that no changes would be made to existing laws in response to enactment of the National Popular Vote compact).

As will be seen below:

³⁹⁶ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

³⁹⁷ Richie, Rob; Talukdar, Monideepa; and Hellman, Emily. 2010. *A Survey and Analysis of Statewide Election Recounts, 2000–2009*. FairVote.

- Under the current system, a timely recount in a presidential race may be warranted, but impossible to obtain in practice.
- A recount would be less likely to be needed under the National Popular Vote plan than under the current state-by-state winner-take-all system.
- Enactment of the National Popular Vote compact would provide impetus for the states to review and modify their existing laws to ensure timely recounts in presidential elections.
- Federal legislation would be an expeditious solution to the problem of guaranteeing a timely recount in a presidential election under the current system and any future system.

The reality today is that a timely recount in a presidential race under the current system may be warranted, but impossible to obtain in practice, in many states.

Presidential elections must be conducted within the constraints of the strict overall national schedule for finalizing the results of a presidential election established by the U.S. Constitution.

In particular, all counting, recounting, and judicial proceedings concerning presidential elections must be conducted so as to reach a “final determination” six days prior to the uniform nationwide date for the meeting of the Electoral College in mid-December. This principle applies equally to both the current state-by-state winner-take-all system of electing the President and the National Popular Vote compact.

The U.S. Constitution (Article II, section 1, clause 4) provides:

“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” [Spelling as per original] [Emphasis added]

Congress has exercised its constitutional power to set the uniform nationwide date for the meeting of the Electoral College. Title 3, chapter 1, section 7 of the United States Code states:

“The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.” [Emphasis added]

This statute was enacted in 1934, just after ratification of the 20th Amendment in 1933. Prior to the 20th Amendment, the President was inaugurated on March 4. The amendment advanced the inauguration to January 20.

Moreover, the U.S. Supreme Court has made it clear that the states are expected to make their “final determination” six days before the Electoral College meets (the

so-called “safe harbor” date established by section 5, chapter 1 of Title 3 of the United States Code).

The important point is that there is not much time between Election Day in early November and the “safe harbor” date. For example, in 2008, Election Day was Tuesday, November 4, and the “safe harbor” date was 33 days later on Monday, December 8. In 2008, the Electoral College met on the following Monday, December 15 (the Monday after the second Wednesday in December). Congress met to count votes on January 6, 2009. The outgoing President’s term ended on January 20, 2009.

The schedule imposed by the “safe harbor” date was one of the major factors preventing a hand recount of presidential ballots in Florida in 2000.

In 1960, Hawaii conducted a recount under judicial supervision (which reversed Nixon’s original lead). However, the recount and judicial proceedings were not completed until after the Electoral College had met. As it happened, Hawaii’s three electoral votes did not affect the outcome of the presidential election in 1960. Congress met in joint session in January 1961 to count the electoral votes. The losing presidential candidate, Vice President Richard M. Nixon, presided over the joint session and graciously permitted Hawaii’s electoral votes to be counted for John F. Kennedy (while ruling that this action would not constitute a precedent). The reality, however, was that the recount was not timely.

In summary, no full ballot-by-ballot recount has ever been completed in a timely fashion for any U.S. presidential election.

The actual work of a recount does not itself consume a lot of time.

One of the major obstacles to obtaining a timely recount in a presidential race is that there cannot be a recount until there is a count.

Unofficial numbers are, of course, generally available from virtually every precinct and various units of local government on Election Night (or very soon thereafter). Although a candidate may know whether a recount is warranted in a particular election, a candidate’s request for a recount under existing laws is generally not legally “ripe” until after the official initial statewide count is complete.

The official initial statewide count typically takes several weeks. The reason for the delay is that official documents certifying the count from each county (or other unit of local government) must be sent to the state’s chief election official or state canvassing board. Then, the vote counts contained in these documents are added together to yield the official initial statewide count. The results are often not official until some board meets.

In Ohio in 2004, there were over 200,000 provisional ballots, and Bush’s final margin in the state was 118,601.³⁹⁸ Senator John Kerry decided that the number of

³⁹⁸ Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

provisional ballots in relation to Bush's statewide margin on Election Night (before counting the provisional ballots) did not warrant disputing the results and therefore conceded on the Wednesday after the election. However, had the margins been closer, a recount might have been warranted. A request for a recount is not ripe until the initial count is completed. However, the initial count was not certified in Ohio until the "safe harbor" day! Thus, a recount would have been impossible in the decisive state of the 2004 presidential election had a recount been warranted.

In 2012, eight of the 10 closely divided battleground states did not complete their initial count until November 29; five of the 10 did not complete their initial count until December 5; and two did not complete their initial count until just before the "safe harbor" date.³⁹⁹

In many other states, the initial count of a presidential election is generally not completed until a week or so before the "safe harbor" date (six days before the Electoral College meets).

The facts are that, under the *current* system, the possibility of conducting a timely recount of a presidential election is largely an illusion.

In most states, there is no deadline for completing the initial official count in sufficient time to permit the conducting of a recount (and likely post-recount litigation) that is consistent with the federal "safe harbor" date and uniform nationwide date for the meeting of the Electoral College.

Moreover, many state chief election officers can effectively preclude a recount merely by "slow-walking" the initial count so that it is not completed until just before the "safe harbor" date—thus preventing a candidate's request for a recount from being legally "ripe" until it is too late to conduct the recount.

With the rising volume of absentee and mail-in voting in many states, provisional ballots, and military ballots, thousands of ballots are not counted until after Election Day, thereby further delaying completion of the initial count.

Thus, at the present time, a timely recount is impossible to obtain, in practice, under the current system in many states.

A recount would be less likely to be needed under the National Popular Vote plan than under the current state-by-state winner-take-all system.

There have been five litigated state counts in our nation's 57 presidential elections between 1789 and 2012. All five of these disputed state counts were the result of the state-by-state winner-take-all rule in elections where there was a clear nationwide popular vote winner. Far from serving as a firewall that helpfully isolates problems to particular states, the current state-by-state winner-take-all system repeatedly creates artificial crises in situations where no problem existed in the first place.

Five litigated state counts in a mere 57 presidential elections between 1789 and

³⁹⁹ See section 9.13.7 and, in particular, table 9.14.

2012 is a dramatically higher rate than the historical 1-in-185 rate for recounts in state-wide elections in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

Given that a recount has occurred only about once in 185 elections and that presidential elections occur once every four years, one could expect a recount about once in 740 years under the National Popular Vote plan.

The reason why there have been so many disputes in a mere 57 presidential elections between 1789 and 2012 is that each presidential election is really 51 separate state-level elections—with 51 separate opportunities for close results warranting a recount. Our 57 presidential elections between 1789 and 2012 have really been 2,237 separate state-level elections. The current state-by-state winner-take-all system has repeatedly created artificial crises in elections in which the vote was extremely close in certain states—but not close nationwide. This can be seen by reviewing the five litigated state counts in our nation’s 57 presidential elections between 1789 and 2012.

The 2000 presidential election was an artificial crisis created because George W. Bush’s total of 2,912,790 popular votes in Florida was a mere 537 more than Gore’s 2,912,353 votes. Under the statewide winner-take-all rule used in Florida, the 537-vote lead entitled Bush to all 25 of Florida’s electoral votes. There was, however, nothing particularly close about the 2000 presidential election on a nationwide basis. Al Gore’s nationwide lead was 537,179 popular votes (1,000 times larger) than the 537-vote margin that decided the 2000 presidential election. Given the miniscule number of votes that are changed by a typical recount (averaging only 294 votes), no one would even have considered a recount in 2000 if the nationwide popular vote had controlled the outcome. No one would have cared whether Bush did, or did not, carry Florida by 537 popular votes. There would not have been a dispute in an election where one candidate had a nationwide margin of over a half million votes.

A recount, court case, and reversal of the original outcome occurred in Hawaii in 1960. John F. Kennedy ended up with a 115-vote margin over Richard Nixon in Hawaii in an election in which his nationwide margin was 118,574. There would have been no recount in Hawaii in 1960 if the President had been elected by a nationwide popular vote.

In 1876, Democrat Samuel J. Tilden received 4,288,191 popular votes—254,694 more than the 4,033,497 popular votes received by Republican Rutherford B. Hayes. Tilden’s percentage lead of 3.05% was greater than George W. Bush’s 2004 lead of 2.8%—a margin generally regarded as “solid.” The 1876 election is remembered as having been close because Hayes had extremely narrow popular-vote margins in several states, namely:

- 889 votes in South Carolina,
- 922 votes in Florida,
- 4,807 in Louisiana,
- 1,075 votes in Nevada,

- 1,050 votes in Oregon,⁴⁰⁰ and
- 2,798 votes in California.^{401,402,403}

The closeness of the 1876 presidential election in the Electoral College was an artificial crisis created by the state-by-state winner-take-all system. The candidate who received more popular votes in these closely divided states would have been a mere footnote if the President had been elected by a nationwide popular vote (where Tilden had a 254,694-vote margin).

No presidential election since the 19th century has been won with a nationwide margin of fewer than 118,574 votes (Kennedy's margin in 1960).

The closest presidential election since the 19th century (when the number of popular votes cast nationwide never exceeded 14,000,000) was the 1960 election in which John F. Kennedy led Richard M. Nixon by 118,574 popular votes (out of 68,838,219 votes cast nationwide). A margin of 118,574 popular votes is not particularly close on a nationwide basis. A six-digit nationwide margin would be unlikely to be challenged and even less likely to be reversed in a recount.

The 1960 presidential election is remembered as being close because a switch by 4,430 voters in Illinois and a switch by 4,782 voters in South Carolina would have given Nixon a majority of the electoral votes. If Nixon had just barely carried both Illinois and South Carolina, Kennedy still would have been ahead nationwide by almost 110,000 popular votes, but Nixon would have won the Presidency. In any case, the perceived closeness of the 1960 election was an illusion manufactured by the winner-take-all system used in Illinois and South Carolina—not because the nationwide margin of 118,574 was ever likely to be overturned by any recount. Indeed, the average change in the margin of victory as a result of a statewide recount was a mere 294 votes in a 13-year study of 4,072 statewide elections (section 9.15.1).

Table 9.19 shows the popular vote count for the Democratic and Republican presidential candidates in each presidential election between 1900 and 2008. In this two-party table, Theodore Roosevelt's vote is shown in the Republican column for the 1912 election because he polled more votes as the nominee of the Progressive (Bull Moose) Party than did the Republican nominee, William Howard Taft. Column 5 shows the difference between the first- and second-place candidates. None of these elections was particularly close in terms of the nationwide popular vote. The closest election during

⁴⁰⁰There was a dispute concerning the 1876 returns from Oregon; however, that dispute did not involve Hayes' relatively small margin in the state (which both parties accepted), but around whether a Republican or Democrat would replace a clearly ineligible Republican presidential elector (a federal appointee). Rehnquist, William H. 2004. *Centennial Crisis: The Disputed Election of 1876*. New York, NY: Alfred A. Knopf. Pages 109–112.

⁴⁰¹Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 125.

⁴⁰²Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

⁴⁰³Robinson, Lloyd. 1996. *The Stolen Election: Hayes versus Tilden—1876*. New York, NY: Tom Doherty Associates Books.

Table 9.19 WINNING MARGINS IN PRESIDENTIAL ELECTIONS 1900–2008

YEAR	TOTAL VOTE	DEMOCRAT	REPUBLICAN	DIFFERENCE
1900	13,576,891	6,357,698	7,219,193	861,495
1904	12,709,100	5,083,501	7,625,599	2,542,098
1908	14,083,472	6,406,874	7,676,598	1,269,724
1912	10,414,533	6,294,326	4,120,207	2,174,119
1916	17,673,102	9,126,063	8,547,039	579,024
1920	25,285,990	9,134,074	16,151,916	7,017,842
1924	24,110,842	8,386,532	15,724,310	7,337,778
1928	36,437,159	15,004,336	21,432,823	6,428,487
1932	38,579,166	22,818,740	15,760,426	7,058,314
1936	44,430,549	27,750,866	16,679,683	11,071,183
1940	49,678,158	27,343,218	22,334,940	5,008,278
1944	47,633,663	25,612,610	22,021,053	3,591,557
1948	46,075,874	24,105,810	21,970,064	2,135,746
1952	61,092,937	27,314,992	33,777,945	6,462,953
1956	61,613,224	26,022,752	35,590,472	9,567,720
1960	68,334,888	34,226,731	34,108,157	118,574
1964	70,307,754	43,129,566	27,178,188	15,951,378
1968	63,060,646	31,275,166	31,785,480	510,314
1972	76,340,294	29,170,383	47,169,911	17,999,528
1976	79,978,556	40,830,763	39,147,793	1,682,970
1980	79,388,036	35,483,883	43,904,153	8,420,270
1984	92,032,260	37,577,185	54,455,075	16,877,890
1988	90,695,171	41,809,074	48,886,097	7,077,023
1992	84,013,208	44,909,326	39,103,882	5,805,444
1996	86,601,112	47,402,357	39,198,755	8,203,602
2000	101,447,491	50,992,335	50,455,156	537,179
2004	121,068,721	59,028,111	62,040,610	3,012,499
2008	129,446,839	69,498,516	59,948,323	9,550,193

this period was in 1960 when the popular-vote difference was 118,574.⁴⁰⁴ This is true even though the number of votes cast nationwide in the first few elections of the 20th century was only about 10% of present-day turnouts.

In short, recounts would be far less likely under the National Popular Vote approach than under the current state-by-state winner-take-all system.

Enactment of the National Popular Vote compact would provide impetus for the states to review and modify their laws regarding timely recounts in presidential elections.

The observation that existing state recount laws are not based on national popular vote totals is something of a straw man in that it suggests that existing state recount laws are permanent and unchangeable.

When the U.S. House of Representatives passed a constitutional amendment in

⁴⁰⁴The 1960 difference of 118,574 reflects the most commonly used method of accounting for the votes from Alabama as discussed in section 2.11.

1969 to establish a national popular vote for President, by a 338–70 margin, there were no detailed procedures for recounts in the amendment. The House did not pass accompanying recount legislation at the time it passed the amendment. Of course, it was generally understood that implementing legislation would have been enacted if the amendment had been ratified. The ratification of the amendment would have provided the impetus to update existing laws.

Similarly, the enactment of the National Popular Vote compact would provide impetus for the states to review their laws regarding timely recounts in presidential elections.

As Tara Ross says:

“To be fair, if NPV were implemented, then many state legislatures would probably work to make their recount statutes more lenient. Even if these states otherwise disagree with NPV, they would not want to be caught in a situation where they could not participate in a national recount. Moreover, as alluded to previously, many states already provide ‘optional recount’ statutes that allow recounts to be requested by candidates or voters even without a close margin.”⁴⁰⁵

Given that Congress has authority over the count and schedule for presidential elections, federal legislation is another way to solve the problem of guaranteeing a timely recount in a presidential election under the current system or the National Popular Vote plan.

Another way to remedy the existing practical difficulties of obtaining a timely recount in a presidential election would be for Congress to use its existing authority over the count and schedule for presidential elections to augment state elections with national recount legislation. This approach is discussed in section 9.15.7.

9.15.7. MYTH: There is no mechanism for conducting a national recount.

QUICK ANSWER:

- Congress has authority over the count in presidential elections as well as authority over the schedule of presidential elections.
- Congress should use this authority to enact a federal recount law that would give presidential candidates a right to obtain a recount that would be completed prior to the uniform national date for the meeting of the Electoral College.
- The federal recount law proposed in this section would require states to accelerate their initial count and conduct a full recount upon the request of

⁴⁰⁵ Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition. Page 159.

any presidential candidate willing to pay the state, in advance, for the cost of such requests.

- A federal recount law would be highly beneficial to the operation of the current state-by-state winner-take-all method for awarding electoral votes because of the high frequency of disputes in presidential elections under the current system (five litigated state counts in a mere 57 presidential elections). Such a law would also be potentially beneficial under the national popular vote approach, even though the probability of recounts (about 1-in-185) would be much lower under a national popular vote because there would be a single large national pool of votes.

MORE DETAILED ANSWER:

Although Congress does not control the manner of awarding a state’s electoral votes, Congress has constitutional authority over both the schedule of presidential elections and the counting of votes in presidential elections under Article II and the 12th Amendment.

One example of the exercise of Congress’ authority over the count in presidential elections is the current federal law requiring each state to produce (prior to the meeting of the Electoral College in mid-December) a “Certificate of Ascertainment” containing the state’s “final determination” of the number of popular votes cast in the state for each individual presidential candidate. This procedure was first adopted after the disputed 1876 Tilden-Hays election and is now contained in section 6, chapter 1 of Title 3 of the United States Code.

Each state’s Certificate of Ascertainment provides the supporting evidence for the state’s “Certificate of Election” containing the names of the presidential electors who will cast the state’s votes in the Electoral College. In the case of a state using the statewide winner-take-all rule, the supporting evidence consists of the canvass of the statewide popular vote for President.⁴⁰⁶ In the case of a state (such as Maine and Nebraska) using the congressional-district approach, the supporting evidence consists of the canvass of the district-wide popular vote for President.⁴⁰⁷

A joint session of Congress in early January reviews each state’s Certificate of Ascertainment and Certificate of Election as part of the constitutional process of counting the votes for the presidential election.

One way to solve the problem of guaranteeing a timely recount in a presidential election would be for Congress to pass a law guaranteeing presidential candidates the right to a timely recount.

A federal law would be beneficial to the operation of the current state-by-state winner-take-all method for awarding electoral votes because of the high frequency of

⁴⁰⁶ See figure 9.5 in section 9.14.1 showing Oregon’s 2012 Certificate of Ascertainment.

⁴⁰⁷ See appendix F for Maine’s 2004 Certificate of Ascertainment and appendix G for Nebraska’s 2004 Certificate of Ascertainment.

disputes in presidential elections under the current system (five litigated state counts in the mere 57 presidential elections).

The high frequency of recounts under the current system results from the fact that each presidential election is really 51 separate state-level elections and that the nation's 57 presidential elections have really been 2,237 separate state-level elections. Although the probability of a recount in any single statewide election is low (1-in-185 according to a study of the 4,072 statewide general elections in the 13-year period between 2000 and 2012⁴⁰⁸) and although recounts appear to be becoming rarer (there being no recounts among the 419 statewide elections in November 2012), the fact that each presidential election under the *current* state-by-state winner-take-all system is really 51 separate state-level elections means that there is a significant chance of future disputed presidential elections under the *current* system.

A federal law would also be potentially beneficial under the national popular vote approach, even though the probability of recounts would be much lower under a national popular vote because there would be a single large national pool of votes (instead of 51 separate pools). One would expect an election close enough to warrant a recount under the National Popular Vote approach about once in 740 years (185 times four). In fact, the probability of a national recount would be even less than 1-in-185 because that rate is based on the history of statewide recounts, and recounts become less likely with larger pools of votes.

Time is of the essence in conducting a recount in a presidential election. The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election. In particular, the Constitution requires the Electoral College to meet on the same day throughout the United States (currently the first Monday after the second Wednesday in December).

Because of this firm deadline, all counting, recounting, and judicial proceedings (state or federal) must be conducted so as to reach a "final determination" prior to the uniform nationwide date for the meeting of the Electoral College. The U.S. Supreme Court has made it clear that the states are expected to make their "final determination" six days before the Electoral College meets (the so-called "safe harbor" date established by section 5 of Title 3 of the United States Code).

A key consideration in constructing a practical schedule for recounts in presidential elections is the fact that *there cannot be a recount until there is a count*. That is, a recount cannot be conducted until the official initial count is completed.

Given the actual practices of many states (including many of the closely divided battleground states), there would be no time to conduct a recount under the current system of electing the President.

In Ohio in 2004, there were more than 150,000 provisional ballots. Bush's final

⁴⁰⁸ See section 9.15.1 for details of the 22 statewide recounts in the 4,072 statewide general elections in the 13-year period between 2000 and 2012.

margin in the state was 118,601.⁴⁰⁹ Senator John Kerry decided that the number of provisional ballots in relation to Bush’s apparent statewide margin on Election Night (before counting the provisional ballots) did not warrant disputing the results, and he therefore conceded on the Wednesday after the election. However, had the margins been closer, a recount might have been warranted. A request for a recount is not ripe until the initial count is completed. In 2004, the initial count in Ohio was not completed and certified until the “safe harbor” day (thereby precluding a recount).

Professor Danial Tokaji at the Michael E. Moritz College of Law at Ohio State University identifies the difficulties associated with a potential contest or recount in Ohio:

“There is no specific Ohio statute addressing a contest in a presidential election. Presumably, the generally applicable election contest procedure described above would apply. The Ohio statutory scheme, however, makes no reference to the federal statutes governing presidential election contests. This could prove problematic. **Under the “safe harbor” provision of 3 U.S.C. § 5, Ohio must reach a final determination of election controversies within 35 days of the presidential election.** A quick review of Ohio’s election contest procedure illustrates the problem. **A contestor must file the petition within 15 days of the election results being certified** (assuming no automatic or requested recount). R.C. 3515.09. Presumably, a contest concerning presidential electors involves a “statewide office” requiring the petition to be filed with the Chief Justice. See R.C. 3515.08. The court must then set the hearing within the 15-to-30-day window of R.C. 3515.10. Even without considering the time delay from election day to certification of results, **meeting the 35-day safe harbor provision is doubtful.** Add to this mix the uncertainty of the 40-day deposition period of R.C. 3515.16 if the contest is “in the supreme court.” Further consider the effect of an appeal—if possible—and the 20-day appellate filing window. **Following the Ohio statutory scheme makes compliance with 3 U.S.C. § 5 unlikely.**”⁴¹⁰ [Emphasis added]

In 2012, eight of the 10 closely divided battleground states did not complete their initial count until November 29; five of the 10 did not complete their initial count until December 5; and two did not complete their initial count until a day before the “safe harbor” date (which was December 11).⁴¹¹

In many other states, the initial count of a presidential election is generally not

⁴⁰⁹ Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

⁴¹⁰ Tokaji, Daniel. 2012. *Election Law@Moritz: Information and Insight on the Laws Governing Federal, State, and Local Elections*. The quotation is from a continuously updated eBook on December 27, 2012. http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount05.html#_edn9.

⁴¹¹ See section 9.13.7 and, in particular, table 9.14.

completed until a week or so before the “safe harbor” date (six days before the Electoral College meets).

The facts are that, under the *current* system, the possibility of conducting a timely recount of a presidential election is largely an illusion.

The precondition for conducting a full ballot-by-ballot recount of a presidential election is rapid completion of the initial count. Because there are only a few weeks between Election Day in early November and the meeting of the Electoral College, the initial count must be completed quickly enough to provide time for a full recount *plus* some additional time for post-recount litigation. Thus, an essential element of federal legislation giving presidential candidates the right to a recount must be acceleration of the initial count. Without acceleration of the initial count, there cannot be a timely recount.

Acceleration of the initial count costs money because of the overtime and additional staffing involved. There is, of course, no reason to spend the money necessary to accelerate the initial count unless there is good reason to believe that the presidential result (usually apparent to the candidates themselves on Election Night) is likely to be changed by a recount.

Taking all of the above considerations into account, we believe that an effective federal recount law for presidential elections should have the following features.

First, a federal recount law should move the uniform national day for the meeting of the Electoral College (currently established by federal law as the Monday after the second Wednesday in December) to December 30 (or to the previous Friday, if December 30 falls on a weekend). If there is no controversy over the outcome of a presidential election, the meeting of the Electoral College is ceremonial and irrelevant to implementation of the presidential transition. If there is a controversy, as much time as possible should be available to arrive at the most accurate possible determination of the presidential vote.

Second, a federal recount law should require that each state’s chief election official prepare and publish a recount plan 90 days before Election Day. This chief election official’s plan would provide for

- (1) conducting an accelerated initial count of the presidential vote, if requested, that would be completed by November 30, and
- (2) conducting a recount of the presidential vote, if requested, that would be completed by December 14 involving a one-by-one examination of each ballot (to the extent possible given the state’s voting equipment and procedures).

In an undisputed presidential election, the only obligation imposed by the proposed federal count law on the state’s chief election official would be the preparation of this plan.

Most states would incur substantial incremental costs (notably in the form of overtime and additional staffing) in accelerating their initial count so that it could be

completed quickly enough to provide time for a full recount as well as time for post-recount litigation.

States would also incur substantial costs if a full recount had to be conducted.

Thus, the chief election official's plan would include a specification of all reasonable *incremental* costs for accelerating the initial count and all reasonable costs for conducting a recount.

Note that the federal right created by the proposed federal legislation is *not* an unfunded mandate on the states because the requesting candidate would be required to pay, in advance, for all reasonable costs as computed by the state's chief election official.

The chief election official's plan would include standards for determining voter intent for all cases that may be reasonably anticipated, given the state's voting equipment and procedures. Most state-specific problems associated with counting votes are well known to state election officials as a result of their years of experience in conducting elections. However, these standards are, in many states, not clearly delineated. Instead, the standards are a mixture of various state statutes, case law, administrative procedures at the state and local level, and unwritten practices. A clear delineation of the rules for determining voter intent in the form of administrative standards would increase the efficiency of the initial count and recount and effectively reduce the number of issues that could be successfully raised in post-recount litigation.

Third, a federal recount law should give each presidential candidate on the ballot in a state the right to call for acceleration of the initial count of the presidential vote in the state, provided that the requesting candidate pays, in advance, for all reasonable incremental costs of that request.

In addition, a federal recount law should give each presidential candidate on the ballot in a state the right to call for a recount of the presidential vote after completion of the initial count, provided that the requesting candidate pays, in advance, for all reasonable costs of that request.

As a practical matter, a presidential candidate who has a realistic chance of overturning an apparent loss of the White House would have no difficulty in quickly raising the money to pay for the requested actions.

These rights should be extended to the candidate's successor if the candidate dies or resigns.

These rights should be given to the presidential candidates themselves (as opposed to the individual candidates for the position of presidential elector, political parties, or private citizens) because the candidates are in the best position to make a realistic and pragmatic political judgment, based on available information, as to whether the election involved is close enough to warrant a potential recount.

The fact that the candidate would have to pay the costs of a requested acceleration of the initial count and the costs of a requested recount would act as a disincentive against unrealistic requests.

Note that it is not desirable or possible to impose any preconditions on requests by the presidential candidates (e.g., closeness of the results). Such preconditions would necessarily have to be couched in terms of *official* election results which (if the initial count is not yet complete) would not be available at the moment when the candidate's decision is needed.

The request for the acceleration of the initial count would have to be lodged quickly, say within six days after Election Day. In practice, it is usually clear by Election Night whether a particular election is close enough to warrant a dispute.

Television networks regularly make decisions to “call” an election on Election Night. Candidates for President (as well as candidates for Governor, U.S. Senate, and all other offices) regularly concede on Election Night. Both candidates and television networks make such decisions despite the fact that there are large numbers of in-person votes cast earlier in the day that are yet to be counted; large numbers of uncounted mail-in, military, and absentee ballots (which, in some states, need not even arrive at vote-counting centers until several days after the election); and large numbers of uncounted provisional ballots (for which voters have 6–10 days to provide evidence in support of their right to vote).

In practice, a presidential candidate's decision to request an acceleration of the initial count would be made on the basis of the same mixture of political intelligence that candidates use in making their decision to publicly concede an election, namely available actual returns announced by election officials; exit polls; estimates of the number of uncounted absentee ballots, uncounted mail-in ballots, uncounted provisional ballots, and uncounted military ballots; and historical information and current polling indicating the likely breakdown of the absentee, mail-in, provisional, and military ballots.

Candidates make their decision to concede because the information at their disposal makes it clear that they have no realistic possibility of winning.⁴¹²

Note that there is no practical way to refund the cost of accelerating the initial count to a “successful” candidate because no official count exists at the time that the candidate would make the request (and hence no benchmark for “success”).

Fourth, a federal recount law should make it clear that it is an option in addition to any procedure available under state law, state administrative procedures, or state case law. Thus, if the candidate fails to act by the deadlines contained in the federal recount law, the candidates would still be able to pursue whatever remedies may be available under existing state law.

Fifth, a federal recount law should clarify that the “safe harbor” date (defined in the existing section 5 of Title 3 of the United States Code) is the deadline for each state to complete its “final determination” of the presidential count in the state.

⁴¹²Of course, candidates do not concede on Election Night (or they hastily retract their concession) if available information indicates that the race is close and that they might possibly win.

Sixth, moving the meeting of the Electoral College to December 30 (thus making December 24 the “safe harbor” day) enables a day such as December 14 to be a reasonable deadline for completing both the accelerated initial count and the recount. Such a deadline would leave 10 days for post-recount litigation. Note that five days would remain available for potential litigation after the “safe harbor” date.

Seventh, a federal recount law should give each presidential candidate on the ballot (or his successor) the right to sue to enforce all the provisions of Title 3 of the U.S. Code concerning presidential elections. To avoid forum-shopping within a state, the action should be required to be brought in the federal district court located in the state capital (or the district court located nearest to the state capital if no federal district court is located in the capital).

Note that an additional advantage of a federal right to a recount in presidential elections is that it would preclude state officials from effectively precluding a recount by “slow walking” the state’s initial count. Slow-walking of the initial count effectively enables state officials (many elected on a partisan basis) to decide whether their own work product is subject to accountability.

Table 9.20 shows the schedule for 2016 under the proposed legislation.

Table 9.20 SCHEDULE FOR 2016 UNDER PROPOSED FEDERAL RECOUNT LEGISLATION

DATE	EVENT
Tuesday August 9, 2016	90 days prior to Election Day—Each state’s chief elections official publishes a plan (1) for conducting an accelerated initial count of the presidential vote that would be completed by November 30 and (2) for conducting a full recount of the presidential vote that would be completed by December 14. Such plan shall specify all reasonable incremental costs for accelerating the initial count and all reasonable costs for conducting the recount. Such plan shall include standards for determining voter intent for all cases that may be reasonably anticipated given the state’s voting equipment and procedures.
Tuesday November 8, 2016	Election Day—Tuesday after the first Monday in November
Monday November 14, 2016	Six days after Election Day—Last day for a presidential candidate to request a state to conduct an accelerated initial count that would be completed by November 30. Such request is to be accompanied by full payment by the requesting candidate of all costs specified in the chief elections official’s plan.
Wednesday November 30, 2016	Last day for completing the accelerated initial count
Friday December 2, 2016	Last day for any presidential candidate to request state(s) that have completed their initial count to conduct a full recount that would be completed by December 14. Such request is to be accompanied by full payment by the requesting candidate of all costs specified in the chief elections official’s plan.
Monday December 14, 2016	Last day for completing the recount—10 days before the “safe harbor” day.
Tuesday December 15, 2016	Beginning of 10-day period for post-recount litigation
Saturday December 24, 2016	“Safe harbor” day—day for the state to make its “final determination” of its count (six days before the meeting of the Electoral College)
Sunday December 25, 2016	Beginning of five-day period for post-Safe-Harbor-Day litigation
Friday December 30, 2016	Meeting of the Electoral College

The proposed federal recount bill (shown below) has the following elements:

- Section 1 of the proposed bill is the bill's title.
- Section 2 of the proposed bill adds a new subsection (b) to section 5 of Title 3 of the United States Code containing five new parts.
 - Part (1) of the new subsection (b) of section 5 of Title 3 makes the “safe harbor” day (defined in the existing portion of section 5—now called subsection (a)) into an actual deadline for each state to complete its “final determination” of the presidential count in the state.
 - Part (2) of the new subsection (b) of section 5 of Title 3 requires the state's chief election official to prepare and publish a plan (1) for conducting an accelerated initial count of the presidential vote that would be completed by November 30 and (2) for conducting a full recount of the presidential vote involving a one-by-one examination (to the extent possible, given the state's voting equipment and procedures) of each ballot that would be completed by December 14—along with all reasonable incremental costs of conducting an accelerated initial count and all reasonable costs of conducting the recount. Such plan shall include standards for determining voter intent for all cases that may be reasonably anticipated given the state's voting equipment and procedures.
 - Part (3) of the new subsection (b) of section 5 of Title 3 gives a presidential candidate on the ballot in the state the opportunity to call for an acceleration of the initial count in a state to be completed by November 30, provided the requesting candidate pays for all reasonable incremental costs of accelerating the initial count. The right to an accelerated initial count created by this subsection must be exercised within six days after Election Day. This right is extended to the presidential candidate's successor if the candidate dies or resigns.
 - Part (4) of the new subsection (b) of section 5 of Title 3 gives a presidential candidate the opportunity to request a recount to be completed by December 14, provided the requesting candidate pays for all reasonable costs of the recount. The right to a recount created by this subsection must be exercised by December 2. This right is extended to the presidential candidate's successor if the candidate dies or resigns.
 - Part (5) of the new subsection (b) of section 5 of Title 3 gives a presidential candidate on the ballot (or his successor) the right to sue to enforce all the requirements of Title 3. To avoid forum-shopping within the state, the action must be brought in the District Court located in the state capital (or the United States District Court located nearest to the state capital if no United States District Court is located in the capital).
 - Part (6) of the new subsection (b) of section 5 of Title 3 explicitly states that the recount made available under part (3) of the new subsection (b) of

section 5 of Title 3 shall be an option available to presidential candidates in addition to any procedure available under state law, administrative procedures, or judicial determinations.

- Section 3 of the proposed bill amends section 6 of Title 3 of the United States Code by requiring that the Certificates of Ascertainment be physically delivered to Washington, D.C., no later than the day after the “safe harbor” day. The current section 6 has an outdated time-consuming process involving registered mail and sets no particular deadline.
- Section 4 of the proposed bill amends section 6 of Title 3 of the United States Code by moving the uniform national day for the meeting of the Electoral College (currently the Monday after the second Wednesday in December) to December 30 (or the previous Friday if December 30 falls on a weekend).
- Section 5 of the proposed bill makes the bill effective for the 2016 elections.

Text of Proposed Federal Recount Bill

To amend title 3, United States Code, to require a State to make available to a presidential candidate a timely initial count and a timely recount of the number of votes cast in the presidential election in the State, to change the date for a State to complete its final canvass or ascertainment of the number of votes cast for each candidate in a presidential election, to change the date of the meeting of presidential electors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Presidential Election Recount Act of ___”.

SEC. 2. DEADLINE FOR FINAL CANVASS AND ASCERTAINMENT OF NUMBER OF VOTES CAST FOR PRESIDENT AND AVAILABILITY OF RECOUNT.

Section 5 of title 3, United States Code, is amended—

(1) by striking “If any State” and inserting “(a) IN GENERAL.—If any State” and by striking “concerning the appointment” and inserting “concerning the canvass or appointment”.

(2) by adding at the end the following new subsection:

“(b) DEADLINE FOR FINAL DETERMINATION OF CANVASS OR ASCERTAINMENT OF VOTES CAST FOR PRESIDENT AND AVAILABILITY OF ACCELERATED INITIAL COUNT AND AVAILABILITY OF RECOUNT—

“(1) DEADLINE FOR FINAL DETERMINATION.—The canvass or ascertainment under the laws of each state of the number of votes given or cast for each candidate for President or presidential elector and the final determination of any controversy or contest concerning such canvass or ascertainment shall be made not later than 6 days before the time fixed for the meeting of the electors under section 7 of this title.

“(2) PREPARATION OF PLAN FOR RECOUNT AND COSTS.—No later than 90 days before the time fixed for appointing electors under section 1 of this title, the state official or body that is authorized to conduct the canvass or ascertainment under the laws of each state of the number of votes given or cast for each candidate for President or presidential elector shall prepare, and make available to the public, a plan for accelerating the initial count of each ballot given or cast for each candidate for President or presidential elector in that state, with such accelerated initial count to be completed by November 30, and a plan for conducting a full recount involving a one-by-one examination (to the extent possible, given the state’s voting equipment and procedures) of each ballot given or cast for each candidate for President or presidential elector in that state, with such recount to be completed by December 10. Such plan shall include standards (not inconsistent with state law) for determining voter intent for all cases that may be reasonably anticipated, given the state’s voting equipment and procedures. Such plan shall include all reasonable incremental costs to the state associated with accelerating the initial count and all reasonable costs to the state for conducting the recount.

“(3) ACCELERATION OF INITIAL COUNT.—If a candidate for the office of President appearing on the ballot in a given state (or a legal successor nominated in lieu of such candidate) shall, no later than 6 days after the time fixed for appointing electors under section 1 of this title, make a written request, accompanied by payment in full of the costs specified in the plan created under part (2) of this subsection, for accelerating the initial count, the state official or body that is authorized to conduct the canvass or ascertainment under the laws of each state of the number of votes given or cast for each candidate for President or elector shall conduct the initial count of the votes cast for each candidate for President or presidential elector, with such recount to be completed by November 30. If more than one candidate makes a request for accelerating the initial count in the state, the state shall divide the costs among the requesting candidates and refund any excess payments received.

“(4) AVAILABILITY OF RECOUNT.—If a candidate for the office of President appearing on the ballot in a given state (or a legal successor nominated in lieu of such candidate) shall by December 2 make a written request, accompanied by payment in full of the costs specified in the plan

created under part (2) of this subsection, for conducting a full recount involving a one-by-one examination (to the extent possible given the State's voting equipment and procedures) of each ballot given or cast for each candidate for President or elector in a given state, the state official or body that is authorized to conduct the canvass or ascertainment under the laws of each state of the number of votes given or cast for each candidate for President or elector shall then conduct a full recount of the votes cast for each candidate for President or presidential elector, with such recount to be completed by December 14. If more than one candidate makes a request for a recount in the state, the state shall divide the costs among the requesting candidates and refund any excess payments received.

“(5) PRIVATE RIGHT OF ACTION.—An individual who is a citizen of the United States who is a resident of the State involved or a candidate for the office of President appearing on the ballot in a given state (or a legal successor nominated in lieu of such candidate) may bring an action against the State in the United States district court located in the capital of the State involved (or the United States district court located nearest to the state capital if no United States district court is located in the capital) for such declaratory or injunctive relief as may be necessary to ensure that the State is in compliance with this title.”

“(6) NON-PRE-EMPTION.—The recount made available under part (3) of this subsection shall be an option available to presidential candidates (or a legal successor nominated in lieu of such candidate) in addition to any procedure available under applicable state laws, administrative procedures, or judicial decisions.

SEC. 3. REQUIRING PROMPT TRANSMISSION OF CERTIFICATIONS.

Section 6 of title 3, United States Code, is amended—

(1) by striking “as soon as practicable” each place it appears and inserting “immediately”;

(2) by striking “to communicate by registered mail” and inserting “to communicate by overnight courier service”; and

(3) by striking “to communicate under the seal of the State” and inserting “to communicate by overnight courier service under the seal of the State”.

SEC. 4. TIME FOR MEETING OF THE ELECTORAL COLLEGE.

Section 7 of title 3, United States Code, is amended by striking “first Monday after the second Wednesday in December next following their appointment” and inserting “30th day of December next following their appointment or the preceding Friday if December 30 is a Saturday or Sunday.”

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall apply to Presidential elections beginning with the elections held in November 2016.

9.15.8. MYTH: A nationwide vote for President should not be implemented as long as any state uses direct-recording electronic (DRE) voting machines lacking a voter-verifiable paper audit trail.

QUICK ANSWER:

- Today, many direct-recording electronic (DRE) voting machines in many states lack a voter-verifiable paper audit trail (VVPAT), thereby making it impossible to conduct a ballot-by-ballot post-election audit or recount.
- The potential problem that may be created by DRE machines without a VVPAT are not uniquely associated with elections conducted under the current state-by-state winner-take-all system or those conducted under the National Popular Vote plan. Indeed, DRE machines without a VVPAT were used in 2012 in battleground states such as Virginia, Colorado, Pennsylvania, and Florida.
- DRE machines without a VVPAT are more likely to affect an election outcome under the current state-by-state winner-take-all system than an election with a single (much larger) national pool of votes.
- While it would be desirable if all voting machines permitted a ballot-by-ballot recount, the probability of a recount in an election in which there is a single pool of votes (such as a nationwide vote for President) is about 1 in 185 (that is, once in 740 years in the case of presidential elections). Moreover, the probability of a recount (itself a rare event) reversing the outcome of an election is only about one in seven. Thus, the (admittedly undesirable) use of DRE machines without a VVPAT is, as a practical matter, unlikely to affect the outcome of any recount in any presidential election.
- In the second half of the 20th century, about two-thirds of all voting in the United States was done on lever-type voting machines that lacked a voter-verifiable paper audit trail (VVPAT). There were no major adverse consequences to the nation because of the absence of the desirable higher degree of post-election verification, and, in particular, no presidential election was affected by the use of lever-type machines.

MORE DETAILED ANSWER:

A caller to a radio debate on the National Popular Vote plan asked:

“With a lot of voting machines without paper trails, there really isn’t a method of doing recounts. So, how would we do an effective recount if we need to?”⁴¹³

⁴¹³ Question called in by Arthur from Palo Alto, California, on KQED debate on October 26, 2012, involving Dr. John R. Koza (Chair of National Popular Vote), Stanford Professor Jack Rakove, Trent England (a lobbyist

Direct-recording electronic (DRE) voting machines are in widespread use in the United States.

Some DREs produce a voter-verifiable paper audit trail (VVPAT) that permits post-election ballot-by-ballot auditing or recounting of the results; however, others do not.

Computer World reported in October 2012:

“A total of 16 states use DREs that do not support a paper trail as their standard polling place equipment, according to Verified Voting. Of these, six states—New Jersey, Delaware, Maryland, South Carolina, Georgia, and Louisiana—will be completely paperless. All ballots that are cast in these states will be on DREs that support no paper trail whatsoever.

“The remaining states, which include Texas, Colorado, Florida, Virginia, and Pennsylvania, will use a mix of paper ballots and DRE voting systems that are paperless. But even here, the states of Virginia, Pennsylvania, and Tennessee will be almost completely reliant on paperless electronic voting systems. In Tennessee, for instance, all but two counties will use paperless DREs, while in Virginia all but seven of 134 counties will use paperless systems. Meanwhile, in a handful of states like Florida, only voters with physical disabilities will use paperless DREs.”⁴¹⁴

The problem of DRE machines without a VVPAT is not uniquely associated with elections conducted under the current state-by-state winner-take-all system or those conducted under the National Popular Vote plan.

The deficiencies of DRE machines without a VVPAT are amplified by the current state-by-state winner-take-all system under which a small number of popular votes in a single battleground state can change the outcome of a national election. In 2000, for example, George W. Bush won Florida by a margin of 537 popular votes out of 5,963,110 votes cast, and those 537 votes determined the outcome of the national election.

Indeed, DRE machines without a VVPAT were used in 2012 in battleground states such as Virginia, Colorado, Pennsylvania, and Florida.

In Virginia, 101 of 134 counties and independent cities in Virginia do not have a paper record of the vote. These places contain over four million voters.⁴¹⁵

In Pennsylvania, 50 of the 67 counties do not keep a voter-verified paper record of voter choices.⁴¹⁶

opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington), and Ace Smith (a political consultant headquartered in San Francisco). <http://www.kqed.org/a/forum/R201210260900>.

⁴¹⁴Vijayan, Jaikumar. Election watchdogs keep wary eye on paperless e-voting systems. *Computer World*. October 30, 2012.

⁴¹⁵Norden, Lawrence. Issue Brief: Election 2012 Recounts. New York, NY: Brennan Center for Justice. Page 32.

⁴¹⁶Norden, Lawrence. Issue Brief: Election 2012 Recounts. New York, NY: Brennan Center for Justice. Page 29.

Jefferson County, Colorado, is the state's fourth most populous county, and it uses iVotronic machines without VVPAT. There are 381,164 registered voters in the county.⁴¹⁷

Florida uses DRE machines with a VVPAT for handicap-accessible voting.⁴¹⁸

In terms of actual consequences in the real world, the (admittedly undesirable) use of DRE machines without a VVPAT is unlikely to have any effect on the outcome of any presidential election held under the National Popular Vote plan.

In the first place, the probability of a recount affecting the outcome of a particular presidential election in which there is a single pool of votes (i.e., a national popular vote) is low. As shown in table 9.16, there were 22 recounts in 4,072 statewide general elections in the 13-year period between 2000 and 2012—that is, one recount for every 185 elections. In terms of presidential elections, this probability indicates that there would be a recount in a nationwide popular vote for President only once in 740 years.

Recounts change only a small number of votes (an average of only 294 votes in statewide elections), and the probability of a recount reversing an election outcome is only one in seven.⁴¹⁹ Thus, the (admittedly undesirable) use of DRE machines without a VVPAT is, as a practical matter, unlikely to affect the outcome of any presidential election.

In the second half of the 20th century, about two-thirds of all voting in the United States was done on lever-type voting machines. These machines (like DREs without a VVPAT) recorded the total count for each candidate, but did not keep a record of each individual ballot. Figure 2.13 shows the face of a lever-type voting machine used in 1960 in Alabama. Votes were recorded on mechanical counters on lever-type voting machines. After the polls closed, each voting machine was opened, and the vote count for each office was read from the mechanical counters. During the many decades when lever-type voting machines were in widespread use in the United States, there were no major adverse consequences to the nation because of the absence of the highest desirable degree of post-election verification. In particular, no presidential election was affected by the use of lever-type machines or the absence of a voter-verifiable paper audit trail.

The (unfortunate) inability to conduct a ballot-by-ballot post-election recount of votes cast on DRE machines without a VVPAT does not mean that an election would be thrown into chaos. It would not even mean that a recount could not be conducted. It would simply mean that the quality and thoroughness of the recount on those particular machines would be severely limited to that which lever-type voting machines provided in the second half of the 20th century (e.g., to catching errors such as incorrectly recording the count from a machine, failing to include the count from a machine, or double-counting a machine).

⁴¹⁷ Norden, Lawrence. Issue Brief: Election 2012 Recounts. New York, NY: Brennan Center for Justice. Page 3.

⁴¹⁸ See table 9.17 in section 9.15.1..

⁴¹⁹ Richie, Rob; Talukdar, Monideepa; and Hellman, Emily. 2010. *A Survey and Analysis of Statewide Election Recounts, 2000–2009*. FairVote. Moreover, three-quarters of all recounts do not change the outcome.

Election authorities in the states have the ability to replace DRE machines with a VVPAT with machines with a VVPAT. Hopefully, they will exercise their power to do so.

9.16. MYTHS ABOUT INTERSTATE COMPACTS AND CONGRESSIONAL CONSENT

9.16.1. MYTH: Interstate compacts are exotic and fishy.

QUICK ANSWER:

- Interstate compacts are authorized by the U.S. Constitution and are in widespread use by every state.

MORE DETAILED ANSWER:

The U.S. Constitution authorizes states to enter into interstate compacts.

“No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power.”⁴²⁰

Interstate compacts predate the Constitution. One interstate compact approved at the time of the Articles of Confederation remained in force until 1958 (when it was replaced by an updated version).

The subject matter of existing interstate compacts varies widely and has included such topics as agriculture, boundaries, bridges, building construction and safety, child welfare, civil defense, conservation, corrections, crime control, cultural issues, education, emergency management, energy, facilities, flood control, gambling and lotteries, health, insurance, interstate school districts, low-level radioactive waste, metropolitan problems, motor vehicles, national guard, natural resources, navigation, parks and recreation, pest control, planning and development, ports, property, public safety, river basins, taxation, transportation, and water.

Examples of compacts include the

- Colorado River Compact (allocating water among seven western states),
- Port Authority of New York and New Jersey (a two-state compact),
- Multistate Tax Compact (whose membership includes 23 states and the District of Columbia),
- Interstate Oil and Gas Compact,
- Interstate Corrections Compact,
- Mutual Aid Compact,
- Great Lakes Basin Compact (to which the Canadian province of Ontario is a party along with various states), and

⁴²⁰U.S. Constitution. Article I, section 10, clause 3.

- Multi-State Lottery Compact (which operates the Powerball lotto game in numerous states).

Compacts are often used on a nationwide basis. For example, the Interstate Compact on the Placement of Children and the Interstate Compact on Juveniles are examples of compacts adhered to by all 50 states and the District of Columbia.

Numerous other compacts are listed in appendix M and discussed in chapter 5.

Once a state enters into an interstate compact, the terms of the compact are legally enforceable against the participating states because the Impairments Clause of the U.S. Constitution provides:

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”⁴²¹

The Council of State Governments summarizes the nature of interstate compacts as follows:

“Compacts are agreements between two or more states that bind them to the compacts’ provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).

“That means that **compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws.** In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and **they take precedence over conflicting state laws, regardless of when those laws are enacted.**

“However, unlike treaties, compacts are not dependent solely upon the good will of the parties. **Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves.** Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That’s why **compacts are considered the most effective means of ensuring interstate cooperation.**”⁴²²

[Emphasis added]

The National Popular Vote plan is an interstate compact—a type of state law that is explicitly authorized by the U.S. Constitution to enable otherwise sovereign states to enter into legally enforceable contractual obligations with one another.

⁴²¹ U.S. Constitution. Article I, section 10, clause 1.

⁴²² Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

9.16.2. MYTH: The topic of elections addressed by the National Popular Vote compact is not an appropriate subject for an interstate compact.

QUICK ANSWER:

- There are no constitutional restrictions on the subject matter of interstate compacts other than the implicit limitation that a compact’s subject matter must be among the powers that the states are permitted to exercise.
- The U.S. Constitution gives each state the “exclusive” and “plenary” power to choose the manner of appointing its presidential electors. Thus, the subject matter of the National Popular Vote compact is among the powers that the states are permitted to exercise.
- The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it. It says, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

MORE DETAILED ANSWER:

The U.S. Constitution places no restriction on the subject matter of an interstate compact other than the implicit limitation that a compact’s subject matter must be among the powers that the states are permitted to exercise. That implicit limitation does not apply to the subject matter of the National Popular Vote compact, because the U.S. Supreme Court has ruled that states possess *exclusive* power to choose the method of awarding their electoral votes.

The National Popular Vote compact concerns the method of appointment of a state’s presidential electors.

The U.S. Constitution gives each state the power to select the manner of appointing its presidential electors.

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .”⁴²³

The U.S. Supreme Court ruled in *McPherson v. Blacker* in 1892:

“In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States. . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise **the power and jurisdiction of the state is exclusive**, with the exception of the pro-

⁴²³ U.S. Constitution. Article II, section 1, clause 2.

visions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.”⁴²⁴ [Emphasis added]

Thus, the subject matter of the National Popular Vote compact is a state power.

The states have used interstate compacts in increasingly creative ways since the 1920s. The judiciary has been repeatedly asked to consider the validity of various novel compacts; however, we are aware of no case in which the courts have invalidated any interstate compact.⁴²⁵

Although there is currently no interstate compact concerned with presidential elections, U.S. Supreme Court Justice Potter Stewart noted the possibility of compacts involving elections in his concurring and dissenting opinion in *Oregon v. Mitchell* in 1970. In that case, the U.S. Supreme Court examined the constitutionality of the Voting Rights Act Amendments of 1970 that removed state-imposed durational residency requirements on voters casting ballots in presidential elections. Justice Stewart concurred with the majority that Congress had the power to make durational residency requirements uniform in presidential elections, and observed:

“Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of § 202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not unreasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play. **In the absence of a unanimous interstate compact, the problem could only be solved by Congress.**”⁴²⁶ [Emphasis added]

We are not aware of any case in which the courts have invalidated *any* interstate compact.⁴²⁷ Given the recent tendencies of the courts to accord even greater deference to states’ rights and even wider and freer use of interstate compacts by the states, it

⁴²⁴ *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

⁴²⁵ There have been cases where a higher court has invalidated a ruling by a lower court invalidating an interstate compact. See, for example, *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22. 1950.

⁴²⁶ *Oregon v. Mitchell*. 400 U.S. 112 at 286–287. 1970.

⁴²⁷ There have been cases where a higher court corrected a ruling by a lower court invalidating an interstate compact. See, for example, *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22. 1950.

is unlikely that the courts would invalidate the National Popular Vote compact. The National Popular Vote compact is an example of federalism in action and of states exercising their rightful powers.

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it and, therefore, the question of whether there are unstated implicit restrictions on the allowable methods for appointing presidential electors.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” [Emphasis added]

Section 1 of Article II contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.⁴²⁸

The 10th Amendment was ratified in 1791 (that is, after ratification of the original Constitution) and thus takes precedence over the original 1787 Constitution. Even if there were implied restrictions on state choices on the manner of appointing their presidential electors (perhaps from penumbral emanations from section 1 of Article II), such implicit restrictions were extinguished by the 10th Amendment in 1791.

In conclusion, nothing in the U.S. Constitution prevents states from using an interstate compact to specify the manner in which they choose their presidential electors.

9.16.3. MYTH: The National Popular Vote compact is defective because Congress did not consent to it prior to its consideration by state legislatures.

QUICK ANSWER:

- Advance congressional consent is not required, nor is it the norm in the field of interstate compacts.
- If a particular compact requires congressional consent, Congress generally considers the matter only after the compact has been approved by the combination of states required to bring the compact into effect.

⁴²⁸The original Constitution contains few specific restrictions on state action that bear on the appointment of presidential electors. Thus, under Article II, section 1, clause 1, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, a state legislature certainly may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a previous presidential election. Similarly, a state legislature may not pass a law imposing criminal penalties on specifically named persons who may have committed fraudulent acts in connection with a presidential election (that is, a bill of attainder). Also, the Constitution’s explicit prohibition against a “law impairing the obligation of contract” operates as a restraint on the delegation of power contained in section 1 of Article II. Of course, various later amendments restrict state choices, including the 14th Amendment (equal protection), the 15th Amendment (prohibiting denial of the vote on account of “race, color, or previous condition of servitude”), the 19th Amendment (woman’s suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

MORE DETAILED ANSWER:

Advance congressional consent is not required, nor is it the norm in the field of interstate compacts.

If a particular compact requires congressional consent, Congress generally considers the matter only after the compact has been approved by the combination of states required to bring the compact into effect.⁴²⁹

As the U.S. Supreme Court ruled in the 1893 case of *Virginia v. Tennessee*:

“The constitution does not state when the consent of congress shall be given, **whether it shall precede or may follow the compact made, or whether it shall be express or may be implied.**”⁴³⁰ [Emphasis added]

9.16.4. MYTH: The National Popular Vote compact is defective because it fails to mention Congress in its text.

QUICK ANSWER:

- Most interstate compacts do not specifically mention congressional consent, regardless of whether the particular compact requires congressional consent.

MORE DETAILED ANSWER:

Most compacts do not specifically mention congressional consent, regardless of whether the states involved intend to seek it.

For example, the Port Authority of New York Compact is silent as to congressional consent. The two states involved did *not* intend to seek congressional consent at the time that they entered into the compact. Later, they decided to seek congressional consent (and received it).

Conversely, the states involved in the Multistate Tax Compact (also silent as to the role of Congress) originally sought congressional consent, but, after realizing that they could not obtain it, the states proceeded to implement the compact without congressional consent. The U.S. Supreme Court ruled in favor of the states (and upheld that sequence of events) in the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*⁴³¹—the leading recent case on the issue of congressional consent of interstate compacts (discussed in detail in section 9.16.5).

There is no need for a compact to mention Congress, even if the states involved intend to seek congressional consent.

⁴²⁹ Congress has, on rare occasions, consented to compacts in advance of action by the states. For example, Congress consented in advance to certain interstate crime control compacts in the Crime Control Consent Act of 1934. Other examples include the Weeks Act of 1911 and the Tobacco Control Act of 1936. See section 5.9.

⁴³⁰ *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

⁴³¹ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. 1978.

9.16.5. MYTH: The National Popular Vote compact requires congressional consent to become effective.

QUICK ANSWER:

- The U.S. Supreme Court has ruled that congressional consent is only necessary for interstate compacts that “encroach upon or interfere with the just supremacy of the United States.” Because the choice of method of appointing presidential electors is an “exclusive” and “plenary” state power, there is no encroachment on federal authority.
- Thus, under established compact jurisprudence, congressional consent would not be necessary for the National Popular Vote compact to become effective.
- Nonetheless, National Popular Vote is working to obtain support for the compact in Congress.

MORE DETAILED ANSWER:

The U.S. Constitution provides:

“No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state. . . .”⁴³²

The U.S. Supreme Court has ruled, in 1893 and in 1978, that the Compacts Clause can “not be read literally” in deciding the question of whether congressional consent is necessary for a particular interstate compact.

The 1893 case of *Virginia v. Tennessee* involved an interstate compact that had not received congressional consent. The U.S. Supreme Court upheld the constitutionality of the compact, saying:

“Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that **the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.**”⁴³³ [Emphasis added]

The Court continued:

“**the test is whether the Compact enhances state power** *quaod* [with regard to] **the National Government.**”⁴³⁴ [Emphasis added]

The 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission* reinforced the Court’s 1893 decision as to the criteria for determining whether a particular interstate compact requires congressional consent.

⁴³² U.S. Constitution. Article I, section 10, clause 3.

⁴³³ *Virginia v. Tennessee*. 148 U.S. 503 at 519. 1893.

⁴³⁴ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

The Multistate Tax Compact was formulated by state tax administrators to stave off federal encroachment on the power of the states to tax multi-state businesses.⁴³⁵ The compact created a commission empowered to conduct audits of businesses operating in multiple states and gave multistate businesses a choice of formulas for calculating their state taxes.

The Multistate Tax Compact provided that it would come into force when any seven or more states enacted it. By 1967, the requisite number of states had approved the compact.

The Multistate Tax Compact was submitted to Congress for its consent. After encountering fierce political opposition in Congress aroused by various business interests concerned about the more stringent tax audits anticipated under the compact, the compacting states proceeded to implement the compact without congressional consent. U.S. Steel and other companies challenged the states' action.

In upholding the constitutionality of the states' implementation of the compact without congressional consent in 1978, the U.S. Supreme Court ruled in *U.S. Steel Corporation v. Multistate Tax Commission*:

“Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.

“The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*.⁴³⁶ **His conclusion [was] that the Clause could not be read literally** [and the Supreme Court's 1893 decision has been] approved in subsequent dicta, but this Court did not have occasion expressly to apply it in a holding until our recent [1976] decision in *New Hampshire v. Maine*,⁴³⁷ *supra*.”

“Appellants urge us to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, **we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.**⁴³⁸ [Emphasis added]

⁴³⁵ *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 4. Appendix GG contains the full opinion.

⁴³⁶ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

⁴³⁷ *New Hampshire v. Maine*, 426 U.S. 363. 1976.

⁴³⁸ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. at 459–460. 1978.

State power over the manner of awarding electoral votes is specified in Article II, section 1, clause 2 of the U.S. Constitution:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .”⁴³⁹

In the 1892 case of *McPherson v. Blacker*, the U.S. Supreme Court ruled:

“The appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States”⁴⁴⁰ [Emphasis added]

The National Popular Vote compact would not be a “combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States” because the choice of manner of appointing presidential electors is “exclusively” a state—not federal—power.

The absence of federal power—much less federal supremacy—over the awarding of electoral votes is made especially clear by comparing the constitutional provision (section 1 of Article I) dealing with presidential elections with the constitutional provision (section 4 of Article II) dealing with congressional elections.

Section 4 of Article II states:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators.” [Emphasis added]

As can be seen, section 4 of Article II gives states *primary*—but not *exclusive*—control over congressional elections. In contrast, section 1 of Article II gives the states *exclusive* control over the manner of appointing presidential electors.

The National Popular Vote compact would not encroach on the “just supremacy of the United States,” because the states have the *exclusive* power to choose the method of appointing their presidential electors.

In upholding the constitutionality of the states’ implementation of the Multistate Tax Compact without congressional consent, the U.S. Supreme Court applied the interpretation of the Compact Clause from its 1893 holding in *Virginia v. Tennessee*, writing that:

“**the test is whether the Compact enhances state power** *quaod* [with regard to] **the National Government.**”⁴⁴¹ [Emphasis added]

The Court also noted that the compact did not

⁴³⁹ U.S. Constitution. Article II, section 1, clause 2.

⁴⁴⁰ *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

⁴⁴¹ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

“authorize the member states to exercise any powers they could not exercise in its absence.”⁴⁴²

In discussing whether the National Popular Vote compact requires congressional consent, Tara Ross, an opponent of the National Popular Vote compact, has argued that the federal government has an “interest” in the compact.

“The federal government has at least one important interest at stake. As Professor Judith Best has noted, the federal government has a vested interest in protecting its constitutional amendment process. If the NPV compact goes into effect, its proponents will have effectively changed the presidential election procedure described in the Constitution, without the bother of obtaining a constitutional amendment.”⁴⁴³ [Emphasis added]

As discussed at length in section 9.1.1, section 9.1.2, section 9.1.3, section 9.1.4, and section 9.1.6, the National Popular Vote compact would not change “the presidential election procedure described in the Constitution.” Indeed, no state law or compact can do that. Instead, the National Popular Vote compact would change *state* winner-take-all statutes. None of these state winner-take-all statutes was originally adopted by means of a federal constitutional amendment. None of these state statutes has constitutional status. The winner-take-all rule was not debated by the Constitutional Convention or mentioned in the *Federalist Papers*. It was used by only three states in the nation’s first presidential election in 1789, and all three states (Maryland, New Hampshire, and Pennsylvania) abandoned it by 1800. It was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states. The winner-take-all rule did not come into widespread use until the Founders had been dead for decades. All of these state statutes may be changed in the same manner as they were adopted, namely by passage of a new state law changing the state’s method of appointing its own presidential electors. Thus, the National Popular Vote compact should not arouse federal “interest” in protecting the constitutional amendment process.

In any case, the question of whether the mere existence of a federal “interest” is sufficient to require that a compact obtain congressional consent was specifically addressed by the majority decision in *U.S. Steel Corporation v. Multistate Tax Commission*. The U.S. Supreme Court stated (in footnote 33):

“The dissent appears to confuse potential impact on ‘federal interests’ with threats to ‘federal supremacy.’ It dwells at some length

⁴⁴² *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 454 at 473. 1978. Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

⁴⁴³ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

on the unsuccessful efforts to obtain express congressional approval of this Compact, relying on the introduction of bills that never reached the floor of either House. This history of congressional inaction is viewed as ‘demonstrat[ing] . . . a federal interest in the rules for apportioning multistate and multinational income,’ and as showing ‘a potential impact on federal concerns.’ Post, at 488, 489. **That there is a federal interest no one denies.**

“The dissent’s focus on the existence of federal concerns misreads *Virginia v. Tennessee* and *New Hampshire v. Maine*. **The relevant inquiry under those decisions is whether a compact tends to increase the political power of the States in a way that ‘may encroach upon or interfere with the just supremacy of the United States.’** *Virginia v. Tennessee*, 148 U.S., at 519. **Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval.**

“In this case, the Multistate Tax Compact is concerned with a number of state activities that affect interstate and foreign commerce. But as we have indicated at some length in this opinion, **the terms of the Compact do not enhance the power of the member States to affect federal supremacy in those areas.**

“**The dissent appears to argue that the political influence of the member States is enhanced by this Compact**, making it more difficult—in terms of the political process—to enact pre-emptive legislation. We may assume that there is strength in numbers and organization. But enhanced capacity to lobby within the federal legislative process falls far short of threatened ‘encroach[ment] upon or interfer[ence] with the just supremacy of the United States.’ Federal power in the relevant areas remains plenary; no action authorized by the Constitution is ‘foreclosed,’ see post, at 491, to the Federal Government acting through Congress or the treaty-making power.

“The dissent also offers several aspects of the Compact that are thought to confer ‘synergistic’ powers upon the member States. Post, at 491-493. **We perceive no threat to federal supremacy in any of those provisions.** See, e.g., *Virginia v. Tennessee*, supra, at 520.”⁴⁴⁴ [Emphasis added]

An interstate compact may potentially affect non-member states.

In a dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission*,

⁴⁴⁴*U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452 at 479. 1978.

U.S. Supreme Court Justices Byron White and Harry Blackmun suggested that courts could consider the possible adverse effects of a compact on non-compacting states in deciding whether congressional consent is necessary for a particular compact.

“A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States.”⁴⁴⁵

The U.S. Supreme Court addressed this argument in *U.S. Steel Corp. v. Multistate Tax Commission* by saying:

“Appellants’ final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States. Appellants declare, without explanation, that if the use of the unitary business and combination methods continues to spread among the Western States, unfairness in taxation—presumably the risks of multiple taxation—will be avoidable only through the efforts of some coordinating body. Appellants cite the belief of the Commission’s Executive Director that the Commission represents the only available vehicle for effective coordination, and conclude that **the Compact exerts undue pressure to join upon nonmember States in violation of their ‘sovereign right’ to refuse.**

“We find no support for this conclusion. It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods **will redound to the benefit of any particular group of States or to the harm of others. Even if the existence of such a situation were demonstrated, it could not be ascribed to the existence of the Compact. Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist.** Risks of unfairness and double taxation, then, are independent of the Compact.

“Moreover, it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. **Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, 2, see, e.g., *Austin v. New Hampshire*, 420 U.S. 656 (1975), it is not clear how our federal structure is implicated.** Appellants do not argue that an individual State’s decision to apportion nonbusiness income—or to define business income broadly, as the regulations of the Commission actually do—touches upon constitu-

⁴⁴⁵ *U.S. Steel Corp. v. Multistate Tax Commission*. 434 U.S. at 494. 1978.

tional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission’s recommendation.”⁴⁴⁶ [Emphasis added]

In the 1985 case of *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the U.S. Supreme Court again considered (and again rejected) arguments that an interstate compact impaired the sovereign rights of non-member states or enhanced the political power of the member states at the expense of other states. The Court wrote that it

“do[es] not see how the statutes in question . . . enhance the political power of the New England states at the expense of other States”⁴⁴⁷

Tara Ross has taken note of the dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission* and has argued that

“non-compacting states have . . . important interests.”⁴⁴⁸

In particular, Ross has identified three potential “interests” of non-compacting states in the National Popular Vote compact.

“NPV deprives these states of their opportunity, under the Constitution’s amendment process, to participate in any decision made about changing the nation’s presidential election system.

“They are also deprived of the protections provided by the supermajority requirements of Article V. . . .

“The voting power of states relative to other states is changed. NPV is the first to bemoan the fact that ‘every vote is not equal’ in the presidential election and that the weight of a voters’ ballot depends on the state in which he lives. **In equalizing voting power, NPV is by definition increasing the political power of some states and decreasing the political power of other states.**”⁴⁴⁹ [Emphasis added]

Concerning Ross’ first point, the National Popular Vote bill has been introduced into all 50 state legislatures and the Council of the District of Columbia, thus providing all states with the “opportunity . . . to participate.”

Concerning Ross’ second point, Article V is the part of the U.S. Constitution that deals with constitutional amendments. The National Popular Vote compact would not

⁴⁴⁶ *Id.* at 477–478.

⁴⁴⁷ *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*. 472 U.S. 159 at 176. 1985.

⁴⁴⁸ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

⁴⁴⁹ Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

change the Constitution. It is an exercise of an exclusive power already granted to the states under section 1 of Article II of the Constitution, namely the power of each state to appoint its own presidential electors in the manner it chooses. The compact would change *state* winner-take-all statutes that came into widespread use more than four decades after the Constitution was ratified. None of these state winner-take-all statutes was originally adopted by means of a federal constitutional amendment, and none has constitutional status. All of these state statutes may be changed in the same manner as they were adopted, namely by passage of a new state law changing the state's method of appointing its own presidential electors. See section 9.1.1, section 9.1.2, section 9.1.3, section 9.1.4, and section 9.1.6.

Ross' third point concerns the potential effect on the *political value* of a vote cast by voters in some non-compacting states.

The National Popular Vote compact would treat votes cast in all 50 states and the District of Columbia equally. A vote cast in a compacting state would be, in every way, equal to a vote cast in a non-compacting state. The National Popular Vote compact would not confer any advantage on states belonging to the compact as compared to non-compacting states.

Ross is, in effect, arguing that certain battleground states might have a *constitutional* right to maintain the *excess* political value of votes cast in their states, but that disadvantaged or altruistic states have no right or ability to create equality in the political value of everyone's votes by exercising their *independent* constitutional power over the method of awarding their own electoral votes.

Of course, it has always been the case that one state's choice of the manner of appointing its presidential electors has affected the *political value* of a vote cast in other states. For example, the use of the winner-take-all rule by a closely divided battleground state plainly diminishes the political value of the votes cast by citizens in the non-battleground states.

It is inherent in the grant by the U.S. Constitution, to *each* state, of the power to choose the method of appointing its presidential electors that one state's decision can enhance the political value of its vote and thereby impact (diminish) the political value of the vote in other states. This is a direct consequence of federalism and the fact that the Constitution gave each individual state the power to decide the method of appointing its own presidential electors.

A present-day battleground state could, of course, eliminate the political effect of its winner-take-all rule on other states by changing its method of appointing its presidential electors. For example, if a battleground state were to change its winner-take-all statute to a proportional method for awarding electoral votes, presidential candidates would pay less attention to that state because only one electoral vote would probably be at stake in the state. However, we are not aware of anyone who currently argues that any present-day battleground state has a constitutional obligation to make such a change in order to reduce its impact on the political value of a vote in the non-battleground states.

If the Constitution gives a closely divided battleground state the power to choose a method of awarding its electoral votes that increases the political value of votes cast in its state, it also gives the power to non-battleground states to choose a method for awarding their electoral votes to counter-balance the political effect of the decision made by the battleground state (and, arguably, create a better overall system in the process).

In any case, the electoral votes of the non-compacting states would continue to be cast in the manner specified by the laws of those states. The electoral votes of the non-compacting states would continue to be counted in the Electoral College in the manner provided by the Constitution. In practical terms, that means that the non-compacting states would continue to cast their votes for the winner of the statewide popular vote (or district-wide popular vote in Maine and Nebraska) after the National Popular Vote compact is implemented. No non-compacting state would be compelled to cast its electoral votes for the winner of the national popular vote.

The political impact of the winner-take-all rule on other states has long been recognized as a political reality. It is not California's winner-take-all rule or Wyoming's winner-take-all rule that makes a vote in California and a vote in Wyoming politically irrelevant in presidential elections. Indeed, a vote in California and Wyoming are equal as a result of the widespread use of the state-by-state winner-take-all rule, and both are equally worthless. Instead, it is the use of the winner-take-all rule in closely divided battleground states that diminishes the political value of the votes cast in California and Wyoming.

The Founding Fathers intended, as part of the political compromise that led to the Constitution, to confer a certain amount of extra influence on the less populous states by giving every state a bonus of two electoral votes corresponding to its two U.S. Senators. The Founders also intended that the Constitution's formula for allocating electoral votes would give the bigger states a larger amount of influence in presidential elections. Their goals with respect to *both* small states and big states were never achieved because of the emergence of political parties in the 1796 presidential election and the subsequent widespread adoption by the states of the winner-take-all rule (mostly in the 1820s and 1830s). The winner-take-all rule drastically altered the political value of votes cast in both small and big states throughout the country.

Interstate comparisons of the *political value* of a vote are not, according to past judicial rulings, a legal basis for contesting any state's decision to adopt a certain method of appointing its own presidential electors under Article II, section 1, clause 2 of the Constitution.

In 1966, the U.S. Supreme Court declined to act in response to a complaint concerning the political impact of one state's choice of the manner of appointing its presidential electors on another state. In *State of Delaware v. State of New York*, Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York in the U.S. Supreme Court. At the time of this lawsuit, New

York was not only a closely divided battleground but also the state possessing the largest number of electoral votes (43). Delaware argued that New York's decision to use the winner-take-all rule effectively disenfranchised voters in the 12 plaintiff states. New York's (defendant) brief is especially pertinent.⁴⁵⁰ Despite the fact that the case was brought under the Court's original jurisdiction, the U.S. Supreme Court declined to hear the case (presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision).⁴⁵¹

In 1968, the constitutionality of the winner-take-all rule was challenged in *Williams v. Virginia State Board of Elections*.⁴⁵² A federal court in Virginia upheld the winner-take-all rule. The full opinion can be found in appendix FF. The U.S. Supreme Court affirmed this decision in a *per curiam* decision in 1969.⁴⁵³ See section 9.1.18.

Section 9.11.3 discusses the specific claim of Professor Norman Williams of Willamette University that compacts that do not receive congressional consent are "toothless."

There is an additional independent argument that the potential political impact on non-compacting states should not be a consideration in evaluating a compact concerned with how states choose to appoint their presidential electors.

Article II, section 1, clause 2 of the U.S. Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ."⁴⁵⁴ [Emphasis added]

Article I, section 4, clause 1 provides

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators." [Emphasis added]

Article I confers on "each state" the power to choose the manner of electing its members of Congress; however, it subjects those state decisions to being overridden at the national level. Congress has, on occasion, overridden state choices that it deemed to not be in the national interest (e.g., electing members of the U.S. House of Representatives at-large, instead of from single-member districts).

Article II is different in that state decisions are not subjected to such congressional scrutiny. "Each state" is empowered to choose the manner of appointing their presidential electors, irrespective of Congress' opinion of the method.

⁴⁵⁰ Delaware's brief, New York's brief, and Delaware's argument in its request for a re-hearing in the 1966 case of *State of Delaware v. State of New York* may be found at http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php.

⁴⁵¹ *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

⁴⁵² *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 - Dist. Court, ED Virginia 1968.

⁴⁵³ *Williams v. Virginia State Board of Elections*, 393 U.S. 320 (1969) (per curiam).

⁴⁵⁴ U.S. Constitution. Article II, section 1, clause 2.

Of course, there is always the possibility that the U.S. Supreme Court might change the legal standards concerning congressional consent contained in its 1893 and 1978 rulings. Because there could be litigation about congressional consent, National Popular Vote is working to obtain support for the compact in Congress.

Because Congress typically considers a compact only after the compact has been approved by the combination of states required to bring the compact into effect, one would expect that any action in Congress would occur after the compact had been approved by the 25 (or so) states possessing the requisite majority of the electoral votes (i.e., 270 of 538).

Congressional consent can be explicitly conferred by a majority vote in both the U.S. House and Senate and approval of the President (or enactment by a two-thirds majority if the President vetoes the bill).

The question of congressional consent is discussed in greater detail in chapter 5.

The specific additional question of congressional consent in relation to a compact's withdrawal procedure is discussed in section 9.16.6.

9.16.6. MYTH: The National Popular Vote compact requires congressional consent because of its withdrawal procedure.

QUICK ANSWER:

- The test as to whether an interstate compact requires congressional consent is based on whether the compact encroaches on federal supremacy—not on the compact's withdrawal procedure.
- The Interstate Compact for the Placement of Children is an example of a judicially upheld compact that did not require congressional consent to become effective and that imposes a two-year delay on the effectiveness of a state's withdrawal.

MORE DETAILED ANSWER:

In *U.S. Steel Corp. v. Multistate Tax Commission*, the U.S. Supreme Court made three observations about the characteristics of the Multistate Tax Compact, including the fact that states could withdraw from that particular compact without delay.

The Multistate Tax Compact permits withdrawal from the compact, without delay or advance notice to other states.

“Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

“No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over any of the parties to the

proceeding necessary to make a binding determination therein.” [Emphasis added]

Von Spakovsky has incorrectly interpreted the U.S. Supreme Court’s observations in *U.S. Steel Corp. v. Multistate Tax Commission* about the characteristics of the Multistate Tax Compact as “prongs” of a legal test as to whether a compact requires congressional consent. Von Spakovsky wrote:

“In *U.S. Steel Corp. v. Multistate Tax Commission*, the Supreme Court of the United States held that the Compact Clause prohibited compacts that

‘encroach upon the supremacy of the United States.’

“The Court emphasized that the real test of constitutionality is whether the compact

‘enhances state power *quoad* the National Government.’ . . .

“To determine this qualification, the Court questioned whether:

(1) The compact authorizes the member states to exercise any powers they could not exercise in its absence;

(2) The compact delegates sovereign power to the commission that it created; or

(3) The compacting states cannot withdraw from the agreement at any time.

“Unless approved by Congress, **a violation of any one of these three prongs is sufficient to strike down a compact as unconstitutional.** . . .

“**Under the third prong of the test delineated in *U.S. Steel Corp.*, the compact must allow states to withdraw at any time. The NPV, however, places withdrawal limitations on compacting states. The plan states that**

‘a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.’

“**This provision is in direct conflict with the *U.S. Steel Corp.* test.**”⁴⁵⁵
[Emphasis added]

The Supreme Court’s three observations about characteristics of the Multistate Tax Compact were not “prongs” of any “test.”

The incorrectness of von Spakovsky’s interpretation of the Supreme Court’s 1978

⁴⁵⁵ Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

decision in *U.S. Steel Corp. v. Multistate Tax Commission* is demonstrated by the 1991 case of *McComb v. Wambaugh* dealing with the enforceability of the Interstate Compact for the Placement of Children.

The Interstate Compact for the Placement of Children did *not require congressional consent* to become effective, and *it delayed withdrawal* for two years.⁴⁵⁶

Article IX of the Interstate Compact for the Placement of Children provides:

“Withdrawal from this compact shall be by the enactment of a statute repealing the same, **but shall not take effect until two years after the effective date of such statute** and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties, and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.” [Emphasis added]

In *McComb v. Wambaugh*, the U.S. Court of Appeals for the Third Circuit interpreted and applied the test established by the U.S. Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission* concerning the question of whether congressional consent was necessary for a compact to become effective. The U.S. Court of Appeals wrote:

“**The Constitution recognizes compacts** in Article I, section 10, clause 3, which reads, ‘No state shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State.’ **Despite the broad wording of the clause Congressional approval is necessary only when a Compact is ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.’** *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468, 98 S.Ct. 799, 810, 54 L.Ed.2d 682 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893)).

“**The Interstate Compact on Placement of Children has not received Congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states.** *In re Burrus*, 136 U.S. 586, 593-

⁴⁵⁶The Interstate Compact for the Placement of Children was written with the expectation that congressional consent would not be required if its membership were limited to states of the United States, the District of Columbia, and Puerto Rico. However, the compact invites the federal government of Canada and Canadian provincial governments to become members. The compact specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party to the compact by saying, “This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of congress, the government of Canada or any province thereof.” As of 1991, no Canadian entity had sought membership in the compact, and the compact was thus put into operation without congressional consent.

94, 10 S.Ct. 850, 852-53, 34 L.Ed. 500 (1890); *Lehman v. Lycoming County Children's Services Agency*, 648 F.2d 135, 143 (3d Cir.1981) (en banc), aff'd, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). **Congressional consent, therefore, was not necessary for the Compact's legitimacy."**

"Because Congressional consent was neither given nor required, the Compact does not express federal law. Cf. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981). Consequently, this Compact must be construed as state law. See Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 *Va.L.Rev.* 987, 1017 (1965) ('[T]he construction of a compact not requiring consent . . . will not present a federal question...')."

"Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states."⁴⁵⁷ [Emphasis added]

As the Third Circuit noted, the test as to whether an interstate compact requires congressional consent is what the U.S. Supreme Court said in the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*, namely

"the test is whether the Compact enhances state power *quaod* the National Government."⁴⁵⁸ [Emphasis added]

Von Spakovsky's "prongs" are not part of any "test" as to whether congressional consent is necessary for an interstate compact to become effective. In particular, the withdrawal provisions of a compact do not determine whether it requires congressional consent to become effective.

9.16.7. MYTH: Adoption of the National Popular Vote compact would establish the precedent that interstate compacts can be used to accomplish something that would otherwise be unconstitutional.

QUICK ANSWER:

- The Compacts Clause of the U.S. Constitution permits states to enter into interstate compacts, but does not expand state powers. All compacts must be consistent with the U.S. Constitution.

MORE DETAILED ANSWER:

Several opponents of the National Popular Vote compact have argued that adoption of the National Popular Vote compact would establish a precedent that interstate compacts can be used to accomplish something that would otherwise be unconstitutional.

⁴⁵⁷ *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

⁴⁵⁸ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 454 at 473. 1978.

Opponents have argued, for example, that adopting the National Popular Vote compact would establish a precedent that could be used to negate a woman’s existing constitutional right to an abortion.

The Compacts Clause of the U.S. Constitution permits states to enter into interstate compacts; however, the Compacts Clause does not expand state powers. All compacts must be consistent with the U.S. Constitution. In particular, a compact’s subject matter must be among the powers that the states are permitted to exercise (as discussed in section 9.16.2).

This invalid line of argument by opponents is based on the opponents’ own invalid argument that a federal constitutional amendment is necessary to change the winner-take-all method of appointing a state’s presidential electors. In fact, the National Popular Vote compact does not change anything in the U.S. Constitution, and therefore no federal constitutional amendment is necessary (as discussed at length in section 9.1.1, section 9.1.2, section 9.1.3, section 9.1.4, and section 9.1.6). Instead, the National Popular Vote compact changes *state* winner-take-all statutes that came into widespread use more than four decades after the Constitution was ratified. None of these state winner-take-all statutes was originally adopted by means of a federal constitutional amendment. These state winner-take-all statutes do not have constitutional status. Winner-take-all statutes may be changed in the same manner in which they were adopted, namely by passage of a new state law changing the state’s method of appointing its own presidential electors.

9.16.8. MYTH: The National Popular Vote compact is a conspiracy.

QUICK ANSWER:

- An interstate compact is not a “conspiracy” but a mechanism provided by the U.S. Constitution that enables sovereign states to enter voluntarily into binding contractual arrangements with one another.

MORE DETAILED ANSWER:

Professor Robert Hardaway of the University of Denver Sturm College of Law, an opponent of the National Popular Vote compact, presented the following testimony on the National Popular Vote bill on February 19, 2010, to the Alaska Senate Judiciary Committee:

“And what would happen if, under the Koza scheme, some of the states decided to withdraw from the **conspiracy**? What federal organ would be empowered to enforce the original terms of that **conspiracy**?⁴⁵⁹ [Emphasis added]

Tara Ross, an opponent of the National Popular Vote compact, refers to the states belonging to the compact as

⁴⁵⁹ See section 9.11 for answers to Professor Hardaway’s concern about withdrawal.

“colluding states.”⁴⁶⁰

A “conspiracy” is an agreement to commit a crime.

An interstate compact is not a “conspiracy,” but, instead, a mechanism provided by the U.S. Constitution that enables sovereign states to enter voluntarily into binding contractual arrangements with one another.

The National Popular Vote compact is based on the exclusive and plenary power of the states to choose the manner of awarding their electoral votes (as provided by section 1 of Article II of the U.S. Constitution):

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors. . . .”⁴⁶¹ [Emphasis added]

Words, such as “conspiracy,” “collusion,” and “scheme,” do not change the fact that the states have the power, under the U.S. Constitution, to award their own electoral votes in the manner that they see fit.

9.17. MYTHS ABOUT MOB RULE, DEMAGOGUES, AND THE ELECTORAL COLLEGE BUFFERING AGAINST POPULAR PASSIONS

9.17.1. MYTH: A national popular vote would be mob rule.

QUICK ANSWER:

- The American people currently cast votes for President in 100% of the states, and they have done so in 100% of the states since the 1880 election. In case anyone thinks it is appropriate to characterize the American electorate as a “mob,” it is a long-settled political reality that the “mob” already rules in American presidential elections.
- The issue presented by the National Popular Vote proposal is not whether the “mob” will vote for President, but whether the “mobs” in certain closely divided battleground states should be more important than the “mobs” in the remaining states.

MORE DETAILED ANSWER:

This myth apparently originates from the failure (by some) to realize that the American people cast votes for President in 100% of the states, and that they have done so in 100% of the states since the 1880 election.⁴⁶²

In case anyone thinks it is appropriate to characterize the American electorate as

⁴⁶⁰ Ross, Tara. 2004. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Page 235.

⁴⁶¹ U.S. Constitution. Article II, section 1, clause 2.

⁴⁶² State legislatures frequently chose presidential electors in the nation’s early years; however, the last time presidential electors were chosen by a state legislature was 1876 in Colorado.

a “mob,” it is now long-settled political reality that the “mob” rules in American presidential elections.

The choice presented by the National Popular Vote is not whether the “mob” is going to control presidential elections, but whether the mob’s votes are going to be tallied on a state-by-state basis versus a nationwide basis.

The National Popular Vote bill is concerned with the relative political importance of popular votes cast in different states for presidential electors. The currently prevailing winner-take-all method (i.e., awarding all of a state’s electoral votes to the candidate who receives the most popular votes in a state) makes votes unequal from state to state. Under the current system, presidential candidates concentrate their attention on voters in a small handful of closely divided battleground states, while ignoring voters in all the other states.

The National Popular Vote plan would address the shortcomings of the current system by making every vote equally important in every state in every presidential election.

Thus, the issue presented by the National Popular Vote proposal is not whether the “mob” will vote for President, but whether the “mobs” in certain closely divided battleground states should be more important than the “mobs” in the remaining states.

9.17.2. MYTH: The Electoral College acts as a buffer against popular passions.

QUICK ANSWER:

- The Electoral College has never operated as a buffer against popular passions.
- There is no reason to think that the Electoral College would ever operate as a buffer against the winner of a presidential election, regardless of whether the winner is determined on the basis of the state-by-state winner-take-all rule or the national popular vote.
- The Electoral College does not operate as a deliberative body.

MORE DETAILED ANSWER:

This myth apparently originates from the failure (by some) to realize that the Electoral College currently does not act as a buffer against popular passions—and indeed never has.

It is true that the Founding Fathers intended that the Electoral College would provide a buffer against the will of the people. They envisioned an Electoral College that would consist of “wise men” who would deliberate on the choice of the President and “judiciously” select the best candidate for the office. As John Jay (the presumed author of *Federalist No. 64*) wrote in 1788:

“As the **select assemblies for choosing the President** . . . will in general be **composed of the most enlightened and respectable citizens**, there

is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues.⁴⁶³ [Emphasis added]

As Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

“[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **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 such complicated investigations.**”⁴⁶⁴ [Emphasis added]

The vision of the Founding Fathers for a deliberative Electoral College was never realized in practice, because the Founders did not anticipate the emergence of political parties (as discussed in section 2.2.2).

In the nation’s first two presidential elections (1789 and 1792), the Electoral College *did not* act as a buffer against popular passions but instead, acted in harmony with the virtually unanimous nationwide consensus favoring George Washington as President.

As soon as George Washington announced that he would not run for a third term as President in 1796, political parties emerged. The competition for power was between two opposing groups holding different visions about how the country should be governed.

In 1796, both the Federalist and Anti-Federalist parties nominated their presidential and vice-presidential candidates at caucuses composed of the members of Congress belonging to their respective parties. As soon as there were national nominees, both parties presented the public with candidates for the position of presidential elector, who, in turn, made it known that they intended to act as willing “rubber-stamps” for their party’s nominees when the Electoral College met. In 1796, all but one of the presidential electors then dutifully voted as expected when the Electoral College met. Moreover, that election established the expectation that presidential electors should “act” and not “think.”⁴⁶⁵

⁴⁶³ The powers of the senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

⁴⁶⁴ Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

⁴⁶⁵ A Federalist supporter famously complained in the December 15, 1796, issue of *United States Gazette* that Samuel Miles, a Federalist presidential elector, had voted for Thomas Jefferson, instead of John Adams, by saying, “What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferon is the fittest man to be President of the United States? No, I chufe him to act, not to think.” [Spelling per original]. Of the 22,991 electoral votes cast for President in the nation’s 57 presidential elections between 1789 and 2012, only 17 were cast in a deviant way. As explained in greater detail in section 2.12, the vote of Federalist elector Samuel Miles for Anti-Federalist Thomas Jefferson in 1796 remains the only instance when the elector might have intended, at the time he cast his unexpected vote, that his vote might affect the national outcome.

The U.S. Supreme Court noted this history in its opinion in the 1892 case of *McPherson v. Blacker*:

“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, **whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power** in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated.”⁴⁶⁶
[Emphasis added]

The political affiliation of the presidential electors has been determined by “the will of the appointing power”—whether a majority (or plurality) of the voters of a state, a majority (or plurality) of voters of a district, or a majority (or plurality) of state legislators (in cases where the legislature directly appointed the presidential electors).

Since the emergence of political parties in 1796, members of the Electoral College have almost always voted for the nominees determined by the nominating caucus or convention of the elector’s own political party.

Thus, the Electoral College has never acted as a buffer against popular passions—either before or after 1796.

There is no reason to think that the Electoral College would ever operate as a buffer against the winner of a presidential election, regardless of whether the winner is determined on the basis of the state-by-state winner-take-all rule or the national popular vote.

Figure 9.6 shows the meeting of the Minnesota Electoral College in St. Paul on December 17, 2012.



Figure 9.6 Meeting of Minnesota Electoral College in St. Paul on December 17, 2012

⁴⁶⁶*McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

9.17.3. MYTH: The current system of electing the President would prevent a Hitler or similar demagogue from coming to power in the United States.

QUICK ANSWER:

- Adolf Hitler did not come to power in Germany as a result of a national popular vote.
- The National Popular Vote compact does not abolish the office of presidential elector or the Electoral College. Thus, there would be no reduction in whatever protection (if any) that the current Electoral College system might provide in terms of preventing a demagogue from coming to power in the United States. However, there is no reason to think that the Electoral College would prevent a demagogue from being elected President of the United States, regardless of whether presidential electors are elected on the basis of the state-by-state winner-take-all rule or the nationwide popular vote.
- It is the responsibility of the voters to ensure that no future President of the United States is a demagogue.

MORE DETAILED ANSWER:

It is sometimes asserted that Adolf Hitler came to power in Germany as a result of a national popular vote and that the current Electoral-College system of electing the President would prevent a similar demagogue from coming to power in the United States.⁴⁶⁷

Adolf Hitler did not come to power in Germany as a result of a national popular vote. In fact, Hitler was rejected by almost a two-to-one nationwide popular-vote margins when he ran for the Presidency of the Weimar Republic.

In the March 13, 1932, election for President, the results were:

- Hindenburg (the incumbent)—49.6%,
- Hitler (National Socialist)—30.1%,
- Thaelmann (Communist)—13.2%, and
- Duesterberg (Nationalist)—6.8%.⁴⁶⁸

Because President Hindenburg did not receive an absolute majority of the votes, a run-off was held on April 10, 1932, among the top three candidates. The results of the run-off were:

- Hindenburg (the incumbent)—53.0%,
- Hitler (National Socialist)—36.8%, and
- Thaelmann (Communist)—10.2%.

⁴⁶⁷ The issue of a demagogue becoming President comes up with moderate frequency, including at a November 13, 2012, debate on the National Popular Vote compact held at a meeting of the National Policy Council of the American Association of Retired Persons in Washington, DC. The debaters included Vermont State Representative Chris Pearson, Professor Curtis Gans, and Dr. John R. Koza (chair of National Popular Vote).

⁴⁶⁸ Shirer, William L. 1960. *The Rise and Fall of the Third Reich*. New York, NY: Simon and Shuster.

On July 31, 1932, parliamentary elections were held in Germany, and Hitler's National Socialist Party won the largest number of seats in the Reichstag (230 out of 608); however, these 230 seats were far from a majority.

On November 6, 1932, another parliamentary election was held, and the strength of Hitler's party was reduced to 196 seats out of 608 in the Reichstag.

On January 30, 1933, a deal was orchestrated by a coalition of parties and power brokers who (mistakenly) thought they could control Hitler. As a result of this deal, President Hindenburg appointed Adolf Hitler as Chancellor of Germany. Once in power as Chancellor, Hitler quickly used his position of Chancellor (and, in particular, the control over the police that his party gained in the deal) to create a one-party dictatorship in Germany.

The National Popular Vote compact would not abolish the office of presidential elector or the Electoral College, so there would be no reduction in whatever protection (if any) that the current structure of the Electoral College might offer in terms of preventing a demagogue from coming to power in the United States.

A demagogue capable of winning the national popular vote in the United States would simultaneously win the popular vote in numerous states, including the closely divided battleground states. There is certainly nothing about the state-by-state winner-take-all method of electing presidential electors that favors or impedes demagogues compared to non-demagogic candidates. The national popular vote winner simultaneously has won a majority of the Electoral College in 53 of the nation's 57 presidential elections from 1789 to 2012, and there is no reason to think that a demagogue would be less likely than a non-demagogic candidate to win a majority of the Electoral College while losing the nationwide popular vote.

Presidential electors are loyal supporters of the nominee of their own political party. There is no reason to think that presidential electors nominated by a demagogue's political party would be any less loyal to their party's nominee than a presidential elector representing a non-demagogic candidate. If anything, presidential electors allied with a demagogue would very likely be more loyal to their candidate.

Thus, it is unlikely that the current Electoral College system could prevent a demagogue from being elected President of the United States, regardless of whether votes for presidential elector are tallied on the basis of the state-by-state winner-take-all rule or on the basis of the total nationwide popular vote.

It is certainly conceivable that a majority of the voters might, at some time in the future, support a demagogue for President of the United States. Indeed, some supporters of the losing presidential candidate entertain this very thought after *every* election. However, if the voters support a demagogue, there is no reason to think that the Electoral College would save the voters from themselves—either under the current state-by-state winner-take-all rule or the National Popular Vote compact.

Ultimately, it is the responsibility of the voters to ensure that no demagogue becomes President of the United States.

9.18. MYTH ABOUT AN INCOMING PRESIDENT'S MANDATE

9.18.1. MYTH: The current state-by-state winner-take-all system gives the incoming President a “mandate” in the form of an exaggerated lead in the Electoral College.

QUICK ANSWER:

- The current system of electing the President does not reliably generate a “mandate” in the form of a larger percentage share of the electoral vote than the candidate’s share of the national popular vote.
- In case anyone believes that an exaggerated margin in the Electoral College is desirable in that it enhances a new president’s ability to lead, the National Popular Vote plan would do an even better job of creating this illusion than the current system.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein has argued:

“**The Electoral College** turns the many winners who fail to win a majority of the popular vote into majority winners. It also **magnifies small majorities in the popular vote into large majorities**. These effects of the Electoral College enhance Americans’ confidence in the outcome of the election and thereby **enhance the new president’s ability to lead**.”⁴⁶⁹
[Emphasis added]

The historical record shows that the above statement is false about as often as it is true. It is, therefore, not an accurate characterization of what happens in the real world.

The current state-by-state winner-take-all system does not reliably deliver an exaggerated margin to the incoming President. For example, despite winning by almost two million votes nationwide, Jimmy Carter won the Electoral College in 1976 with only 297 electoral votes (27 over the 270 needed for election). Despite winning by over three million votes in 2004, George W. Bush won in the Electoral College with only 286 electoral votes (a mere 16 above the 270 needed).

Moreover, the current state-by-state winner-take-all system does not reliably confer an illusory mandate on an incoming President. As a recent example, Bill Clinton did not receive such deference when he came into office with an eye-catching 370 electoral votes but only 43% of the popular vote in 1992. There is certainly no historical evidence that Congress, the media, the public, or anyone else has been more deferential to an incoming President after an election in which he received a larger percentage of the electoral vote than his percentage of the popular vote.

⁴⁶⁹ Debate entitled “Should We Dispense with the Electoral College?” sponsored by PENumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf.

However, in case anyone believes that an exaggerated margin in the Electoral College “enhance[s] the new president’s ability to lead,” the National Popular Vote plan would do an even better job of creating this illusion than the current system.

Under the National Popular Vote compact, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College in any given presidential election. The reason is that the National Popular Vote bill guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would receive at least 270 electoral votes (of 538) from the states belonging to the compact. Then, in addition to this guaranteed minimum bloc of at least 270 electoral votes, the nationwide winning candidate would generally receive some additional electoral votes from whichever non-compacting states he or she happened to carry. If the non-compacting states divided approximately equally between the candidates, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College (that is, about 404 out of 538 electoral votes).

Of course, the current system often does more than just exaggerate an incoming President’s percentage in the Electoral College as compared to his or her percentage in the nationwide popular vote. For example, Samuel Tilden, won the popular vote in 1876 by 3%, but lost the electoral vote. In four of our nation’s 57 presidential elections between 1789 and 2012, the current system has actually awarded the Presidency to a candidate who did not receive the most popular votes nationwide.

This is a failure rate of 1 in 14. Moreover, because about half of American presidential elections are popular-vote landslides (i.e., a margin of greater than 10%), the failure rate is actually 1 in 7 among non-landslide elections.

In virtually all other elections in the United States, the winner is the candidate receiving the most popular votes. Tellingly, there are not examples of Governors, U.S. Senators, and other elected officials receiving a modest popular-vote percentage being hobbled in the execution of their office because they did not have the (argued) advantage of an Electoral-College type of arrangement to (sometimes) exaggerate their margin of victory.

9.19. MYTH ABOUT PRESIDENTIAL POWER

9.19.1. MYTH: The President’s powers would be changed by a national popular vote.

QUICK ANSWER:

- Because the National Popular Vote compact is state legislation that would not alter the U.S. Constitution, no power that the President possesses under the U.S. Constitution would be enhanced or diminished by it.
- If it were true that electing the President on a nationwide basis would increase presidential authority, then it would necessarily have to be the case

that presidential authority today is hobbled because of the use of the state-by-state winner-take-all rule. We are not aware of any evidence that this is the case today.

MORE DETAILED ANSWER:

The National Popular Vote compact is state legislation. It would not alter the U.S. Constitution. In particular, it would not augment or diminish any power possessed by the President under the U.S. Constitution.

The National Popular Vote compact would, in effect, make a change in the “district” from which presidential electors are elected. Under current state winner-take-all statutes, state boundary lines define the “districts” used to elect presidential electors. Under the National Popular Vote compact, presidential electors would be elected from a single national “district.” Changing these “district” boundaries would not diminish or augment any power possessed by the President under the U.S. Constitution.

If it were true that electing the President on a nationwide basis would increase presidential authority, then it would necessarily have to be the case that presidential authority today is hobbled because of the use of the state-by-state winner-take-all rule. We are not aware of any evidence that the power of the Presidency is hobbled by the current system.

9.20. MYTHS ABOUT THE VOTING RIGHTS ACT

9.20.1. MYTH: Section 2 of the Voting Rights Act precludes the National Popular Vote compact.

QUICK ANSWER:

- The National Popular Vote compact would not deny or abridge the right to vote. On the contrary, it would make every person’s vote for President equal—consistent with a main goal of the Voting Rights Act.
- The National Popular Vote compact received pre-clearance from the Department of Justice in 2012 under section 5 of the Voting Rights Act.

MORE DETAILED ANSWER:

Dave Gringer has argued that the National Popular Vote compact:

“may run afoul of sections 2 and 5 of the Voting Rights Act—as either minority vote dilution or retrogression in the ability of minority voters to elect the candidate of their choice.”^{470,471}

⁴⁷⁰ Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008.

⁴⁷¹ In fact, Gringer has gone so far as to state (without any knowledge about the operation of the National Popular Vote organization or any attempt to acquire the facts) that the authors of the National Popular

The purpose of the Voting Rights Act is to guarantee voting equality throughout the United States (particularly in relation to racial minorities that historically suffered discrimination in certain states or areas).

Section 2 of the Act prohibits the denial or abridgment of the right to vote.

Section 5 requires certain states (that historically violated the right to vote) to obtain advance approval for proposed changes in their state election laws to ensure that they do not have a discriminatory purpose or effect. The advance approval can be obtained in two ways:

- a favorable declaratory judgment from the U.S. District Court for the District of Columbia, or
- pre-clearance by the U.S. Department of Justice (the more common path).

The National Popular Vote compact manifestly would make every person's vote for President equal throughout the United States in an election to fill that office. It is, therefore, consistent with the goals of the Voting Rights Act.

There have been court cases under the Voting Rights Act concerning contemplated changes in voting methods for various representative legislative bodies (e.g., city councils and county boards). Opponents of the National Popular Vote compact often quote from these cases involving multi-member representative legislative bodies.⁴⁷² However, these cases do not bear on elections to fill a *single office* (i.e., the Presidency).

In *Butts v. City of New York Dept. of Housing Preservation and Development*, the United States Court of Appeals for the Second Circuit addressed the question of whether the Voting Rights Act applies to a run-off election for the single office of Mayor, Council President, or City Comptroller in a New York City primary election. The court opined:

“We cannot . . . take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member officers.”⁴⁷³

The court also stated:

“There is no such thing as a ‘share’ of a single member office.” [Emphasis added]

It then added:

Vote compact have “failed to recognize that their plan implicates the Voting Rights Act.” The fact that pre-clearance would be required was recognized by the National Popular Vote organization as early as the period when the National Popular Vote legislation was being debated by the California Assembly in 2006.

⁴⁷² Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008. Pages 182–230.

⁴⁷³ *Butts v. City of New York Dept. of Housing Preservation and Development*, 779 F.2d 141 at 148 (1985).

“It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.”

In *Dillard v. Crenshaw County*, the U.S. Court of Appeals for the Eleventh Circuit addressed the question of whether the at-large elected chairperson of the Crenshaw County Commission in Alabama is a single-member office. The office’s duties are primarily administrative and executive, but also include presiding over meetings of the commissioners and voting to break a tie. The court stated that it was unsatisfied that

“The chairperson will be sufficiently uninfluential in the activities initiated and in the decisions made by the commission proper to be evaluated as a single-member office.”⁴⁷⁴

The case was remanded to the U.S. District Court for either “a reaffirmation of the rotating chairperson system” or approval of an alternative proposal preserving “the elected integrity of the body of associate commissioners.”

In 1989, in *Southern Leadership Conference v. Siegelman*,⁴⁷⁵ the U.S. District Court for the Middle District of Alabama distinguished between election of a single judge to a one-judge court and the election of multiple judges to a single Alabama circuit court or judicial court. Pre-clearance was required when more than one judge was to be elected, but not when only one judge was to be elected.

Given that every vote would be equal under the National Popular Vote compact, the assertion that the compact would diminish the influence of minorities must be based on the premise that the current state-by-state winner-take-all system of electing the President gives minorities *more than their fair share of influence*. As discussed in section 9.20.2, the facts do not support the notion that minorities receive more than their fair share of influence under current state winner-take-all statutes. The facts do not support Gringer’s contention that the National Popular Vote compact would result in:

“minority vote dilution or retrogression in the ability of minority voters to elect the candidate of their choice.”⁴⁷⁶

Finally, despite Gringer’s arguments, it should be noted that the National Popular Vote compact received pre-clearance from the Department of Justice under section 5 of the Voting Rights Act in January 2012. This pre-clearance was granted shortly after California enacted the National Popular Vote compact in 2011.⁴⁷⁷

⁴⁷⁴ *Dillard v. Crenshaw County*, 831 F.2d 246 at 253 (11th Cir. 1987).

⁴⁷⁵ *Southern Leadership Conference v. Siegelman*, 714 F. Supp. 511 at 518 (M.D. Ala. 1989).

⁴⁷⁶ Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008.

⁴⁷⁷ Letter dated January 13, 2012, concerning Assembly Bill 459 (the National Popular Vote compact) from T. Christian Herren of the Civil Rights Division of the Department of Justice to Robbie Anderson, Senior Elections Counsel of the state of California.

9.20.2. MYTH: The political influence of racial and ethnic minorities would be diminished by a national popular vote.

QUICK ANSWER:

- Given that every vote would be equal under the National Popular Vote compact, the assertion that the compact would diminish the influence of minorities must be based on the premise that current state winner-take-all statutes give minorities more than their fair share of influence. There is no evidence that this is the case.

MORE DETAILED ANSWER:

Six Colorado professors issued a written statement at a Colorado legislative committee hearing in 2007, arguing that the National Popular Vote plan would

“diminish the political influence of racial and ethnic minorities in the United States in presidential elections.”⁴⁷⁸

Curtis Gans (an opponent of the National Popular Vote plan) made a similar claim in a speech at the National Civic Summit in Minneapolis on July 17, 2009.

Given that every vote would be equal under the National Popular Vote compact, the assertion that the compact would diminish the influence of minorities must be based on the premise that the current state-by-state winner-take-all system of electing the President gives minorities *more than their fair share of influence*.

The facts do not support the notion that minorities receive more than their fair share of influence under current state winner-take-all statutes. As FairVote’s *Presidential Election Inequality* report points out:

“In the 1976 presidential election, 73% of African Americans were in a classic swing voter position; they lived in highly competitive states (where the partisanship is 47.5%–52.5%) in which African Americans made up at least 5% of the population. By 2000, that percentage of potential swing voters declined to 24%. In 2004, it fell to just 17%.”⁴⁷⁹

The National Popular Vote bill has been sponsored by 135 minority state legislators and endorsed by organizations such as the National Black Caucus of State Legislators, the National Latino Congreso, and the NAACP.

In endorsing the National Popular Vote bill, the NAACP cited the fact that it supported “the ideal of one person, one vote.”

⁴⁷⁸ Statement signed by Professors Robert D. Loevy, Danial Clayton, Edward Roche, Robert M. Hardaway, Jim L. Riley, and Dennis Steele.

⁴⁷⁹ FairVote. 2006. *Presidential Elections Inequality: The Electoral College in the 21st Century*. <http://www.fairvote.org/media/perp/presidentialinequality.pdf>.

Finally, it should be noted that the National Popular Vote compact received pre-clearance from the U.S. Department of Justice under section 5 of the Voting Rights Act in January 2012. This pre-clearance was granted shortly after California enacted the National Popular Vote compact in 2011.⁴⁸⁰

9.21. MYTH ABOUT A FEDERAL ELECTION BUREAUCRACY

9.21.1. MYTH: A federal election bureaucracy would be created by the National Popular Vote compact.

QUICK ANSWER:

- The National Popular Vote compact would not create any bureaucracy—much less a federal election bureaucracy appointed by the sitting President.
- Implementation of the National Popular Vote compact would not necessitate the creation of any new bureaucracy. It would involve adding up the popular vote totals that are already being routinely tabulated by existing state officials under existing laws and procedures.

MORE DETAILED ANSWER:

A brochure published by the Evergreen Freedom Foundation of Olympia, Washington, suggests that the National Popular Vote plan would result in

“nationalizing election administration, potentially putting presidential appointees in charge of presidential elections.”⁴⁸¹ [Emphasis added]

Trent England (a lobbyist opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington) has written:

“Because of the Electoral College, the United States has no national election bureaucracy—no presidential appointee in charge of presidential elections.”⁴⁸² [Emphasis added]

Professor Robert Hardaway of the University of Denver Sturm College of Law repeated this theme in his testimony on February 19, 2010, to the Alaska Senate Judiciary Committee:

“Under the Koza scheme, who would be the national official who would decide what the popular vote is? And what would happen if a

⁴⁸⁰ Letter dated January 13, 2012, concerning Assembly Bill 459 (the National Popular Vote compact) from T. Christian Herren of the Civil Rights Division of the Department of Justice to Robbie Anderson, Senior Elections Counsel of the state of California.

⁴⁸¹ Evergreen Freedom Foundation. Olympia, Washington.

⁴⁸² England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

state officer decides that the popular vote tally is one figure, and **someone from the federal government**, like the Congressional Budget Office, the *Congressional Quarterly*,⁴⁸³ decides that it's something else?"

Gary Gregg II, a strong supporter of the current system of electing the President and editor of a book defending the current system, says:

“Will we have to create and pay for a new federal agency to verify the accuracy of popular vote totals? Probably.”⁴⁸⁴

The National Popular Vote compact provides for the adding up of the vote totals for President from all 50 states and the District of Columbia. These vote totals are election results that are already created by, and certified by, state election officials under existing laws and procedures.

These state-level vote totals would be generated by each state in exactly the same manner as they are today. Each state's vote totals would be officially recorded in a “Certificate of Ascertainment”⁴⁸⁵—just as they are today. Each state's results would then be reported to Congress as required under the 12th Amendment—just as they are today.

The National Popular Vote compact would not create (or necessitate) any bureaucracy—much less a federal bureaucracy.

The states would continue to control elections, as provided by the U.S. Constitution—just as they do today.

The states would continue to reach a “final determination” as to the popular vote count in their state—just as they do today. Section 6 of Title 3 of the United States Code specifies:

“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass** or other ascertainment under

⁴⁸³Note that the Congressional Budget Office has nothing to do with elections, and that the *Congressional Quarterly* is a private publishing corporation.

⁴⁸⁴Gregg, Gary. Keep Electoral College for fair presidential votes. *Politico*. December 5, 2012.

⁴⁸⁵Appendices E, F, G, H, and I show examples of certificates of ascertainment from Minnesota, Maine, Nebraska, New York, and Mississippi. Figure 6.1 shows Vermont's 2008 Certificate of Ascertainment. Figure 9.5 shows Oregon's 2012 Certificate of Ascertainment. The Certificates of Ascertainment from all 50 states and the District of Columbia are available online for the 2000, 2004, and 2008 presidential elections. For the 2004 presidential election, see http://www.archives.gov/federal-register/electoral-college/2004/certificates_of_ascertainment.html.

the laws of such State of **the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State. . . .” [Emphasis added]

9.22. MYTHS ABOUT THE DISTRICT OF COLUMBIA

9.22.1. MYTH: The National Popular Vote compact would permit the District of Columbia to vote for President, even though it is not a state.

QUICK ANSWER:

- The District of Columbia has had the vote for President since ratification of the 23rd Amendment to the U.S. Constitution in 1961.

MORE DETAILED ANSWER:

This (somewhat widespread) myth stems from a failure to realize that citizens of the District of Columbia already have been able to vote for President and Vice President since ratification of the 23rd Amendment in 1961. The District has three electoral votes.

The 23rd Amendment specifies that presidential electors representing the District of Columbia

“shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state.” [Emphasis added]

The National Popular Vote compact is consistent with the 23rd Amendment in that it treats the District of Columbia as a “state” for the purposes of presidential elections. The compact adds up the popular vote from all 50 states and the District of Columbia to determine the national popular vote winner.

9.22.2. MYTH: Because it is not a state, the District of Columbia may not enter into interstate compacts.

QUICK ANSWER:

- The District of Columbia may be a party to interstate compacts, and it indeed belongs to numerous compacts.

MORE DETAILED ANSWER:

The Council of State Governments (CSG) lists 17 major interstate compacts to which the District of Columbia is a party.⁴⁸⁶ Examples include the Interstate Com-

⁴⁸⁶ Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments.

pact on Juveniles and the Interstate Compact on the Placement of Children (both of which are compacts to which all 50 states and the District of Columbia belong). The Interstate Compact for Education encompasses 48 states, including the District of Columbia.

The District of Columbia approved the National Popular Vote compact in 2010.

9.22.3. MYTH: Only Congress may enter into interstate compacts on behalf of the District of Columbia.

QUICK ANSWER:

- The Council of the District of Columbia may enter into interstate compacts under Congress' delegation of authority to the Council in the District of Columbia Home Rule Act of 1973.
- The Council has entered into interstate compacts on numerous occasions under the authority of the District of Columbia Home Rule Act of 1973.

MORE DETAILED ANSWER:

Prior to 1973, it was customary for Congress to enact interstate compacts on behalf of the District of Columbia.

However, in the District of Columbia Home Rule Act of 1973, Congress delegated its authority to pass laws concerning the District to the Council of the District of Columbia in all but 10 specifically identified areas listed in section 602(a) of the Act.⁴⁸⁷

None of the 10 specific restrictions in section 602(a) of the Home Rule Act precluded the District of Columbia from entering into interstate compacts.

Accordingly, the District of Columbia Council has entered into numerous interstate compacts since 1973. For example, the Council entered into the Interstate Parole and Probation Compact⁴⁸⁸ in 1976 (three years after enactment of the Home Rule Act). In 2000, the Council entered into the Interstate Compact on Adoption and Medical Assistance.⁴⁸⁹ In 2002, the Council entered into the Emergency Management Assistance Compact.⁴⁹⁰

In 2010, the District of Columbia approved the National Popular Vote compact.

⁴⁸⁷ D.C. Code § 1-233.

⁴⁸⁸ D.C. Code § 24-452.

⁴⁸⁹ Title 4, Chapter 3, D.C. St § 4-326, June 27, 2000, D.C. Law 13-136, § 406, 47 DCR 2850.

⁴⁹⁰ Interestingly, the Council originally entered into this compact on an emergency 90-day temporary basis (by D.C. Council Act 14-0081) under the authority of section 412(a) of the Home Rule Act. The Council subsequently entered into this same compact (by D.C. Council Act A14-0317) under the authority of section 602(c)(1) of the Home Rule Act (providing for the usual 30-day congressional review period).

9.22.4. MYTH: Only Congress may change the winner-take-all rule for the District of Columbia.

QUICK ANSWER:

- The District of Columbia Council has authority to change its election laws under Congress' delegation of authority to the Council by the District of Columbia Home Rule Act of 1973.

MORE DETAILED ANSWER:

This question arises because of the appearance of the word “Congress” in the 23rd Amendment to the U.S. Constitution (ratified in 1961):

“Section 1. The District constituting the seat of government of the United States shall appoint **in such manner as the Congress may direct**:

“A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the small state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

“Section 2. The Congress shall have power to enforce this article by appropriate legislation.” [Emphasis added]

Of course, the word “Congress” also appears in Article I, section 8, clause 17 of the Constitution concerning the enumerated powers of Congress in connection with the District of Columbia:

“**The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District** (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .”

After ratification of the 23rd Amendment to the Constitution in 1961, Congress enacted a law establishing the winner-take-all method of awarding the District of Columbia's electoral votes (which, at the time, was the method used by all 50 states).

The winner-take-all method for awarding the District of Columbia's electoral votes is currently contained in section 1-1001.10(a)(2) of the D.C. Code:

“The electors of President and Vice President of the United States shall be elected on the Tuesday next after the 1st Monday in November in every 4th year succeeding every election of a President and Vice President of the United States. Each vote cast for a candidate for President or Vice President whose name appears on the general election ballot shall be counted as

a vote cast for the candidates for presidential electors of the party supporting such presidential and vice presidential candidate. **Candidates receiving the highest number of votes in such election shall be declared the winners.**” [Emphasis added]

In the District of Columbia Home Rule Act of 1973, Congress delegated its authority to pass laws concerning the District to the District of Columbia Council in all but 10 specifically identified areas listed in section 602(a) of the Act.⁴⁹¹

Election law is *not* one of the 10 specifically excluded areas in section 602(a) of the Home Rule Act.

Moreover, section 752 of the District of Columbia Self-Government and Governmental Reorganization Act passed by Congress in 1973 specifically states:

“Notwithstanding any other provision of this Act [Home Rule Act] or of any other law, the Council shall have authority to enact **any act or resolution with respect to matters involving or relating to elections in the District.**”⁴⁹² [Emphasis added]

Therefore, the District of Columbia Council may change section 1-1001.10(a)(2) of the D.C. Code establishing the winner-take-all rule as the method for awarding the District’s electoral votes.

In 2010, the District of Columbia approved the National Popular Vote compact.

9.22.5. MYTH: Because it is not a state, the District of Columbia cannot bind itself by means of an interstate compact.

QUICK ANSWER:

- The District of Columbia Home Rule Act of 1973 specifically applied the Impairments Clause of the U.S. Constitution to the District, thereby permitting the District to bind itself to an interstate compact in the same manner as a state.

MORE DETAILED ANSWER:

Because the District of Columbia is not a state, the question has been raised⁴⁹³ concerning whether it would be bound by an interstate compact in the same way that a state is.

Section 302 of the District of Columbia Home Rule Act states:

“Except as provided in sections 601, 602, and 603, the legislative power of the District shall extend to all rightful subjects of legislation within the

⁴⁹¹D.C. Code § 1-233.

⁴⁹²P.L. 93-198, 87 Stat. 774, (1973), codified at D.C. Statutes section 1-207.52.

⁴⁹³In order to promote free-flowing debate of speculative ideas, the blog involved does not permit attribution. September 23, 2010.

District consistent with the Constitution of the United States and the provisions of this Act **subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution** of the United States.” [Emphasis added]

Section 10 of Article I of the U.S. Constitution contains about three dozen restrictions on states. In particular, clause 1 of section 10 contains the Impairments Clause, stating that:

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”⁴⁹⁴

The Impairments Clause prevents states from violating the terms of an interstate compact.

Section 302 of the Home Rule Act applies the Impairments Clause to the District of Columbia, thereby preventing it from violating the terms of any interstate compact to which it is a party.

The Impairments Clause is discussed in greater detail in section 9.11.1.

9.22.6. MYTH: The enactment of the National Popular Vote compact by the District of Columbia Council is incomplete because Congress has not approved the Council’s action.

QUICK ANSWER:

- The process by which Congress approved of the District of Columbia’s action on the National Popular Vote compact is specified by the District of Columbia Home Rule Act of 1973. All of the requirements of the process were completed on December 7, 2010.

MORE DETAILED ANSWER:

The enactment of the National Popular Vote compact in the District of Columbia in 2010 was governed by the District of Columbia Home Rule Act of 1973.⁴⁹⁵

Under the Home Rule Act, Congress delegated its plenary authority to pass laws concerning the District regarding certain matters (including elections) to the District of Columbia Council.

Section 102 of the Act states:

“Subject to the retention by Congress of the ultimate legislative authority over the nation’s capital granted by article I, 8, of the Constitution, **the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia. . . .**” [Emphasis added]

Section 601 provides:

⁴⁹⁴ U.S. Constitution. Article I, section 10, clause 3.

⁴⁹⁵ D.C. Code § 1-233.

“Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.”

The District of Columbia Council gave its final approval to the bill (B18-0769) on September 21, 2010. Bill B18-0769 contained the following provision:

“This act shall take effect following **approval by the Mayor** (or in the event of veto by the Mayor, action by the Council to override the veto), **a 30-day period of Congressional review** as provided in section 602(c) (1) of the District of Columbia Home Rule Act, approved December 21 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and **publication in the District of Columbia Register.**” [Emphasis added]

On September 22, 2010, Tara Ross, an opponent of the National Popular Vote plan, wrote in the *National Review*:

“And so the dominoes continue to fall. The D.C. Council yesterday approved the National Popular Vote plan that has been pending before several state legislatures. D.C.’s approval comes less than two months after Massachusetts approved the plan. **Two procedural steps remain before NPV is officially enacted in D.C.: The mayor must sign the legislation and Congress has 30 days to review it.** If these two hurdles are overcome, then D.C.’s approval will bring the total number of entities supporting the bill to seven: Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Washington.”⁴⁹⁶ [Emphasis added]

Ross then issued a call to action:

“The Council’s action gives constitutionalists in both parties an excellent opportunity to highlight their allegiance to the Constitution during this election season. **Constitutionalists in the House and Senate should sponsor resolutions of disapproval** if and when NPV is signed by D.C.’s mayor.”⁴⁹⁷ [Emphasis added]

Ross’ call to action to “Constitutionalists in the House and Senate” to “sponsor resolutions of disapproval” is based on the fact that a *single* member of the U.S. House of Representatives or a *single* member of the U.S. Senate may introduce a joint resolu-

⁴⁹⁶ Ross, Tara. The electoral college takes another hit. *National Review*. September 22, 2010. <http://www.nationalreview.com/corner/247368/electoral-college-takes-another-hit-tara-ross>.

⁴⁹⁷ *Id.*

tion to disapprove any action of the District of Columbia Council and force a floor vote on the matter.

If the committee to which a disapproval resolution has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order for a *single* member to make a motion on the floor to discharge the committee.

A single member's motion on the floor to discharge the committee is "highly privileged," and debate on the motion to discharge is limited to not more than one hour.

Thus, a motion to discharge the House or Senate committees of a resolution disapproving of an action of the District of Columbia Council is ensured an expeditious vote on the floor of the House or Senate. In particular, a vote on the floor is assured regardless of whether there is majority support in the relevant committee or subcommittee or whether the leadership of the House or Senate wishes the question to come to a vote.

The motion to discharge is *not* subject to a filibuster in the Senate.

The motion to discharge does *not* require the usual discharge petition bearing the signatures of a majority of House members (218 of 435).

After the motion to discharge the committee is agreed to on the floor of the House or Senate, debate on the resolution of disapproval itself is limited to not more than 10 hours. That is, the resolution disapproving of an action of the District of Columbia Council is assured an expeditious vote on the floor of the House or Senate.

The resolution of disapproval is *not* subject to a filibuster in the Senate.

In short, a *single* member of the House or a *single* member of the Senate can, without the support of the subcommittee or committee involved and without the support of the leadership of the chamber, force a vote on the floor of a resolution disapproving of an action of the District of Columbia Council.

The procedure for congressional consideration of an action of the District of Columbia Council is contained in section 604 of the District of Columbia Home Rule Act of 1973.

"This section is enacted by Congress--

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such these provisions are deemed a part of the rule of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by this section; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rule (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

“(b) For the purpose of this section, **‘resolution’ means only a joint resolution, the matter after the resolving clause of which is as follows: ‘That the ___ approves/disapproves of the action of the District of Columbia Council described as follows: ___,** the blank spaces therein being appropriately filled, and either approval or disapproval being appropriately indicated; but does not include a resolution which specifies more than 1 action.

“(c) A resolution with respect to Council action shall be referred to the Committee on the District of Columbia of the House of Representatives [now the House Committee on Oversight and Government Reform], or the Committee on the District of Columbia of the Senate [now the Senate Committee on Homeland Security and Governmental Affairs], by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

“(d) **If the Committee to which a resolution has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move to discharge the Committee** from further consideration of any other resolution with respect to the same Council action which has been referred to the Committee.

“(e) **A motion to discharge may be made only by an individual favoring the resolution, is highly privileged** (except that it may not be made after the Committee has reported a resolution with respect to the same action), **and debate thereon shall be limited to not more than 1 hour**, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

“(f) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the Committee be made with respect to any other resolution with respect to the same action.

“(g) **When the Committee has reported, or has been discharged from further consideration of, a resolution, it is at any time thereafter in order** (even though a previous motion to the same effect has been disagreed to) **to move to proceed to the consideration of the resolution.** The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

“(h) **Debate on the resolution shall be limited to not more than 10 hours**, which shall be divided equally between those favoring and those

opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

“(i) Motions to postpone made with respect to the discharge from Committee or the consideration of a resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

“(j) Appeals from the decisions of the chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate.”
[Emphasis added]

The National Popular Vote bill was signed by Mayor Adrian Fenty on October 12, 2010.⁴⁹⁸

On October 18, 2010, the bill was transmitted to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform. In the Senate, the bill was referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. In the House committee, the bill was referred to the Federal Workforce, Postal Service and the District of Columbia Subcommittee.

On October 22, 2010, the bill was published in the *District of Columbia Register*.⁴⁹⁹

Despite Ross’ call to action to “Constitutionalists in the House and Senate” to “sponsor resolutions of disapproval,” not a single member of either the U.S. House or Senate introduced a resolution of disapproval or a motion to discharge the committees.

All of the requirements of the District of Columbia Home Rule Act of 1973 concerning congressional consideration were completed on December 7, 2010, and the National Popular Vote compact became District of Columbia law number 18-274.

Representative Chellie Pingree of Maine made the following remarks on the floor of the U.S. House of Representatives in December 2010:

“Madam Speaker, I rise today to recognize and congratulate the District of Columbia for its recent enactment of the National Popular Vote bill, which would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states and the District.

“Just a few weeks ago, Mayor Fenty signed this important legislation, which was passed by unanimous consent by the D.C. Council. National Popular Vote is now law in 7 jurisdictions, and has been passed by 31 legislative chambers in 21 states.

⁴⁹⁸The entire legislative history of bill B18-0769 is available at <http://www.dccouncil.us/lims/legislation.aspx?LegNo=B18-0769>.

⁴⁹⁹District of Columbia Register. Volume 57. Page 9869.

“The shortcomings of the current system stem from the winner-take-all rule. Presidential candidates have no reason to pay attention to the concerns of voters in states where they are comfortably ahead or hopelessly behind. In 2008, candidates concentrated over two-thirds of their campaign visits and ad money in just six closely divided ‘battleground’ states. A total of 98 percent of their resources went to just 15 states. Voters in two-thirds of the states are essentially just spectators to presidential elections.

“Under the National Popular Vote, all the electoral votes from the enacting states would be awarded to the presidential candidate who receives the most popular votes in all 50 states and D.C.. The bill assures that every vote will matter in every state in every Presidential election.

“I look forward to more states, all across the country passing this important piece of legislation.”⁵⁰⁰

9.23. MYTHS ABOUT CONGRESSIONAL OR PROPORTIONAL ALLOCATION OF ELECTORAL VOTES

9.23.1. MYTH: It would be better to allocate electoral votes by congressional district.

QUICK ANSWER:

- Allocating electoral votes by congressional district would make a bad system even worse.
- District allocation would reduce the percentage of Americans living in closely divided battleground areas.
- District allocation would not guarantee the Presidency to the candidate who receives the most popular votes nationwide.
- District allocation would not make every vote equal.
- District allocation would increase the incentive to gerrymander congressional districts and magnify the effects of gerrymandering.

MORE DETAILED ANSWER:

Under the congressional-district approach for allocating electoral votes (as currently used in Maine and Nebraska), the voters elect two presidential electors statewide and one presidential elector for each of a state’s congressional districts.⁵⁰¹

⁵⁰⁰ *Congressional Record*. December 15, 2010. Page E2143.

⁵⁰¹ There are variations on the district approach. For example, in the nation’s first presidential election in 1789, when Virginia had 12 electoral votes, Virginia chose electors from 12 special presidential elector districts. Virginia used this same system in 1789, 1792, and 1796. In 1892, Michigan chose one presidential elector from each of its 12 congressional districts and one additional elector from each of two special districts (each encompassing six congressional districts).

Curtis Gans and Leslie Francis (opponents of direct election of the President) advocate use of the district system.

“The lack of competition and campaigning in a majority of states owes itself not to the existence of the Electoral College’s indirect method of choosing presidents but rather to the winner-take-all method of choosing electors in all but two states. If a party knows either that it can’t win a single elector in a state or has an easy road to winning all of them, it sends its resources to where it has a competitive chance.

“There are alternatives to winner-take-all that do not involve abandoning the positive aspects of the Electoral College. **All states could adopt the system that now exists in Maine and Nebraska**, where all but two electors are chosen by congressional district, and the other two go to the statewide winner. Or states might explore what was recently proposed in Colorado—that electors be allocated in proportion to each candidate’s share of the popular vote above a certain threshold. **Either would provide a reason for both parties to compete in most states because there would be electors to win. Either would likely produce an electoral vote count closer to the popular vote.**”⁵⁰² [Emphasis added]

In fact, the congressional-district approach fails when evaluated against the criteria of whether it would make presidential elections more competitive, whether it would accurately reflect the nationwide popular vote, and whether it would make every vote equal. In short, allocating electoral votes by congressional district would make a bad system even worse.

As to competitiveness, even fewer Americans live in presidentially competitive congressional districts than live in battleground states. In the 2000 presidential election, there were only 55 congressional districts (out of 435 districts) in which the difference between George W. Bush and Al Gore was 4% or less in the district. Similarly, in 2004, there were only 42 congressional districts nationwide in which the difference between George W. Bush and John Kerry was 4% or less in the district. That is, only about a tenth of the population of the country lives in a congressional district that is closely divided in presidential elections. In contrast, about a fifth of the country’s population currently lives in a battleground state.

One reason for this difference is that congressional districts are often gerrymandered in favor of one particular political party in many states. Gerrymandering is most commonly done to give one party an unfair political advantage. If electoral votes were allocated by congressional district, state legislatures would have even greater incentives to gerrymander districts than they do now.

⁵⁰² Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

Gerrymandering is also occasionally done as part of a bipartisan agreement to ensure safe seats to incumbents of both parties.

As to accurately reflecting the nationwide popular vote, a second-place candidate could easily win the Presidency under the congressional-district approach. If the congressional-district approach had been applied to the results of the 2000 presidential election, Bush would have received 288 electoral votes (53.3% of the total number of electoral votes), and Gore would have received 250 electoral votes (46.5% of the total). That is, the congressional-district approach would have given Bush a 6.8% lead in electoral votes over Gore in 2000. Under the existing system, Bush received 271 electoral votes in 2000 (50.4% of the total number of electoral votes)—a 0.8% lead in electoral votes over Gore. The congressional district approach would have greatly magnified Bush's lead in electoral votes in an election in which Gore received 50,992,335 popular votes (50.2% of the nationwide two-party popular vote) compared to Bush's 50,455,156 votes. In summary, the congressional-district approach would have been even less accurate than the existing state-by-state winner-take-all system in terms of reflecting the nationwide will of the voters.

In the 2004 presidential election, George W. Bush carried 255 (59%) of the 435 congressional districts, whereas John Kerry carried 180. Bush also carried 31 (61%) of the 51 jurisdictions (the 50 states plus the District of Columbia) entitled to appoint presidential electors. If the congressional-district approach had been used nationwide for the 2004 presidential election, Bush would have won 317 (59%) of the 538 electoral votes in an election in which he received 51.5% of the two-party nationwide popular vote.

As to making every vote equal, there is a wide disparity in the number of votes cast in various congressional districts for a variety of reasons. Inside some states, there is a three-to-one disparity in the number of votes cast in particular districts (due to factors such as population changes since the last federal census and variations in turnout level among districts).

In a 2012 analysis, Thomas, Gelman, King, and Katz concluded that

“the current electoral college and direct popular vote are both substantially fairer compared to those alternatives where states would have divided their electoral votes by congressional district.”⁵⁰³

The congressional-district approach could be implemented in two ways.

First, an individual state could decide to allocate its electoral votes by district (as Maine and Nebraska currently do).

Second, a federal constitutional amendment could be adopted to implement the congressional-district approach on a nationwide basis.

Of course, passing a constitutional amendment requires an enormous head of steam at the beginning of the process (i.e., getting a two-thirds vote in both houses of

⁵⁰³Thomas, A. C.; Gelman, Andrew; King, Gary; and Katz, Jonathan N. 2012. Estimating partisan bias of the Electoral College under proposed changes in elector apportionment. SSRN-id2136804. August 27, 2012.

Congress). There have been only 17 amendments ratified since the Bill of Rights. The last time Congress successfully launched a federal constitutional amendment (voting by 18-year-olds) was in 1971.

There is a prohibitive political impediment associated with the adoption of the congressional-district approach on a piecemeal basis by individual states. In 1800, Thomas Jefferson argued that Virginia should switch from its then-existing district system of electing presidential electors to the statewide winner-take-all system because of the political disadvantage suffered by states (such as Virginia) that divided their electoral votes by districts in a political environment in which other states used the winner-take-all approach:

“while 10. states chuse either by their legislatures or by a general ticket [winner-take-all], **it is folly & worse than folly** for the other 6. not to do it.”⁵⁰⁴ [Spelling and punctuation as per original] [Emphasis added]

Indeed, the now-prevailing statewide winner-take-all system became entrenched in the political landscape in the 1830s precisely because dividing a state’s electoral votes diminishes the state’s political influence relative to states using the statewide winner-take-all approach.

The “folly” of individual states adopting the congressional-district approach on a piecemeal basis is shown by the fact that there were only 55 congressional districts in which the difference between George W. Bush and Al Gore was 4% or less in the 2000 presidential election. Suppose that as many as 48 or 49 states were to allocate their electoral votes by district, but that just one or two large, closely divided battleground states did not. The one or two state(s) retaining the winner-take-all system would immediately become the only state(s) that would matter in presidential politics. Thus, if states were to start adopting the congressional-district approach on a piecemeal basis, each state adopting the approach would increase the influence of the remaining winner-take-all states and thereby decrease the chance that the remaining states would adopt that approach. A state-by-state process of adopting the congressional-district approach would bring itself to a halt.

For additional information on the congressional-district approach, see sections 3.3 and 4.2.

Congressional-District Proposal in Pennsylvania

In September 2011, Senate Majority Leader Dominic Pileggi (R) introduced a bill in the Pennsylvania legislature to award the state’s electoral votes by congressional district.

Pileggi’s proposed bill would have replaced Pennsylvania’s current winner-take-all statute (allocating all 20 of the state’s electoral votes to the candidate who receives

⁵⁰⁴The January 12, 1800, letter is discussed in greater detail and quoted in its entirety in section 2.2.3. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G.P. Putnam’s Sons. 9:90.

the most popular votes statewide) with a statute similar to that currently used by Maine and Nebraska. Under Pileggi's proposed bill, the candidate winning each congressional district would receive one electoral vote, and the candidate winning the state would receive a bonus of two at-large electoral votes.

At the time Senator Pileggi introduced his bill in 2011, the Democratic nominee for President had won Pennsylvania in the five elections since 1992. In the fall of 2011, it was widely expected that President Obama would win Pennsylvania again in 2012. In fact, Obama did win Pennsylvania in November 2012.

The Republicans won control of both houses of the Pennsylvania legislature and the Governor's office in November 2010. At the time Senator Pileggi introduced his bill in 2011, it was widely expected that the legislature would adopt a congressional districting plan that would be favorable to the Republican Party. The legislature did, in fact, adopt such a plan in 2012.

The congressional-district approach was criticized on the basis that it would diminish the state's clout in presidential elections by dividing Pennsylvania's 20 electoral votes.

State Senator Daylin Leach (a leading Democratic opponent of the bill) said:

"Pennsylvania is a battleground state, it gets a ton of attention, a ton of resources. **The day this bill passes we become irrelevant to electoral campaigns.** . . . We become Utah on the day this bill passes."⁵⁰⁵ [Emphasis added]

In a September 27, 2011, article entitled "Specter Bluntly Says Electoral Change Will Cut Fed Funding for PA," former U.S. Senator Arlen Specter (who was a Republican until he changed parties in 2009) said:

"I think it'd be very bad for Pennsylvania because we wouldn't attract attention from Washington on important funding projects for the state."

"Under the current electoral system, Obama has good reason to give us the money to carry Pennsylvania. Because Presidents think that way. It affects their decisions."

"In 2004, when I ran with Bush, he was running for re-election and so was I. The President came to Pennsylvania 44 times, and he was looking for items the state needed to help him win the state."

"That has been the tradition with the Presidents I served with and it helped us get federal funding throughout the state. It has worked pretty well for us for 30 years, I can tell you."

⁵⁰⁵ Quinn, Bowman. Pennsylvania Electoral College proposal divides GOP officials, public. *PBS News Hour*. September 27, 2011. <http://www.pbs.org/newshour/rundown/2011/09/republican-officials-divided-over-pennsylvania-electoral-college-proposal-slim-majority-of-public-op.html>.

“It’s undesirable to change the system so Presidents won’t be asking us always for what we need, what they can do for us.”

“For 30 years, that system has worked pretty well for us, and **it’s undesirable to alter a system that is not broken.**”⁵⁰⁶ [Emphasis added]

Former Pennsylvania Governor Ed Rendell (D) said on September 17, 2011:

“Why would you pay any attention to Pennsylvania? **Why would you care, day in and day out, about doing things for Pennsylvania?** . . . We’re sacrificing tremendous clout that we presently have.”⁵⁰⁷ [Emphasis added]

On September 13, Rendell said that presidential elections are decided by

“basically Pennsylvania, Michigan, Ohio and Florida . . .”

“That gives us tremendous clout when the governor of Pennsylvania asks the president or Congress for something, such as disaster recovery aid, Rendell said. If the disaster’s cost is close to what qualifies the state for federal aid, its electoral votes tip the balance in its favor.”⁵⁰⁸

Some Republicans did not support Pileggi’s congressional-district proposal in 2011, including Rob Gleason, the Republican State Chairman. Gleason said:

“We would no longer be a battleground state with all the benefits that come with that.”⁵⁰⁹

National Republican Congressional Committee Chairman Pete Sessions raised the concern that focusing the presidential campaign on Pennsylvania’s closely divided congressional districts might endanger some Republican incumbents (particularly ones elected to Congress for the first time in the November 2010 Republican sweep).⁵¹⁰

The congressional-district proposal was widely discussed by Republicans in Wisconsin, Michigan, and other states that Obama had carried in 2008 and where the Republican Party controlled both houses of the legislature and the Governor’s office.

⁵⁰⁶ DeCoursey, Peter L. Specter bluntly says electoral change will cut fed funding for PA. *Pennsylvania Capitol Wire*. September 27, 2011. <http://www.politicspa.com/927-morning-buzz/28145/>.

⁵⁰⁷ Chron.com. September 17, 2011.

⁵⁰⁸ Wereschagin, Mike and Bumsted, Brad Bumsted. GOP plan could jeopardize Pennsylvania’s political clout. *Pittsburgh Tribune-Review*. September 13, 2011. http://triblive.com/x/pittsburghtrib/news/regional/s_756446.html#axzz2FzxzjtKI.

⁵⁰⁹ Heidenreich, Sari and Gibson, Keegan. Less hawkish tone from Gleason, Priebus about Electoral College changes. *PoliticsPA*. September 17, 2011. <http://www.politicspa.com/less-hawkish-tone-from-gleason-priebus-about-electoral-college-changes/27881/>.

⁵¹⁰ Yadron, Danny. Pete Sessions: Pa. Electoral College change would put house races at risk. September 15, 2011. http://blogs.wsj.com/washwire/2011/09/15/pete-sessions-pa-electoral-college-change-would-put-house-races-at-risk/?mod=WSJBlog&utm_source=twitterfeed&utm_medium=twitter.

In the end, the congressional-district proposal was not enacted by Pennsylvania or any other state in 2012.

In a December 2012 article entitled “Electoral College Chaos: How Republicans Could Put a Lock on the Presidency,” Rob Richie discussed the political effect of the congressional-district proposal in six states that President Obama won in both 2008 and 2012 and where the Republican party controlled both houses of the legislature and the Governor’s office (that is, Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida).⁵¹¹

In November 2012, President Obama won the electoral votes of these six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida) by a 106–0 margin over Governor Romney. This 106–0 margin helped President Obama win the Electoral College by a 62-vote margin (332–206).

Table 9.21 shows the effect (using data from Richie’s article) of applying Senator Pileggi’s proposed congressional-district approach to the actual 2012 election returns from six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida). Columns 2 and 3 show the November 2012 statewide election results. Columns 4 and 5 show the number of congressional districts won by President Obama and Governor Romney in 2012 in each state, respectively. Columns 6 and 7 show the assignment of the bonus of two at-large electoral votes (all of which went to Obama because Obama carried all six states). Columns 8 and 9 show the total Democratic and Republican electoral votes under the congressional-district approach.

Table 9.21 POLITICAL EFFECT OF SENATOR PILEGGI’S CONGRESSIONAL-DISTRICT APPROACH IN SIX STATES THAT OBAMA CARRIED IN 2012

STATE	D	R	D DISTRICTS	R DISTRICTS	D AT-LARGE	R AT-LARGE	D TOTAL	R TOTAL
FL	50%	49%	11	16	2	0	13	16
MI	54%	45%	5	9	2	0	5	9
OH	51%	48%	4	12	2	0	6	12
PA	52%	47%	5	13	2	0	7	13
VA	51%	47%	4	7	2	0	6	7
WI	53%	46%	3	5	2	0	5	5
Total			32	62	12	0	44	62

Under the congressional-district approach (currently used by Maine and Nebraska and proposed by Pennsylvania Senator Pileggi in 2011), President Obama would have received only 44 electoral votes to Governor Romney’s 62 electoral votes in the six states in table 9.21, and President Obama would have ended up with a razor-thin 270–268 win in the Electoral College in 2012.

⁵¹¹ Richie, Rob. Electoral College chaos: How Republicans could put a lock on the presidency. December 13, 2012. <http://www.fairvote.org/electoral-college-chaos-how-republicans-could-put-a-lock-on-the-presidency>.

A *National Journal* article entitled “The GOP’s Electoral College Scheme” in December 2012 reported:

“Republicans alarmed at the apparent challenges they face in winning the White House are preparing an all-out assault on the Electoral College system in critical states, an initiative that would significantly ease the party’s path to the Oval Office.

“Senior Republicans say they will try to leverage their party’s majorities in Democratic-leaning states in an effort to end the winner-take-all system of awarding electoral votes. Instead, bills that will be introduced in several Democratic states would award electoral votes on a proportional basis. . . .

“If more reliably blue states like Michigan, Pennsylvania, and Wisconsin were to award their electoral votes proportionally, Republicans would be able to eat into what has become a deep Democratic advantage.

“All three states have given the Democratic nominee their electoral votes in each of the last six presidential elections. Now, senior Republicans in Washington are overseeing legislation in all three states to end the winner-take-all system. . . .

“The proposals, the senior GOP official said, are likely to come up in each state’s legislative session in 2013. Bills have been drafted, and legislators are talking to party bosses to craft strategy. . . .

“In the long run, Republican operatives say they would like to pursue similar Electoral College reform in Florida, Ohio, and Virginia. Obama won all three states, but Romney won a majority of the congressional districts in each state.

“Rewriting the rules would dramatically shrink or eliminate the Democratic advantage, because of the way House districts are drawn. . . .

“If Republicans go ahead with their plan, Democrats don’t have the option of pushing back. . . . Some consistently blue presidential states have Republican legislatures; the reverse is not true.”⁵¹² [Emphasis added]

In December 2012, state Representatives Robert Godshall (R) and Seth Grove (R) announced that they intended to introduce a bill to implement the congressional-district approach in Pennsylvania in 2013.

PoliticsPA pointed out that Pennsylvania lost its battleground status in 2012:

⁵¹² Wilson, Reid. The GOP’s Electoral College scheme. *National Journal*. December 17, 2012. <http://www.nationaljournal.com/columns/on-the-trail/the-gop-s-electoral-college-scheme-20121217>.

“Once a reliable battleground state, Pennsylvania spent most of the 2012 presidential campaign on the sidelines.”⁵¹³

The memo soliciting colleagues to co-sponsor the congressional-district bill said:

“I believe that the Congressional District Method will increase voter turnout and **encourage candidates to campaign in all states rather than just those that are competitive**. . . . Most importantly, this method of selecting presidential electors will give a stronger voice to voters in **all regions** of our great Commonwealth.” [Emphasis added]

For additional information on the congressional-district approach, see sections 3.3 and 4.2.

See section 9.23.2 for a discussion of Senator Pileggi’s proposal in December 2012 to divide 18 of Pennsylvania’s 20 electoral votes in proportion to each party’s state-wide vote for President and to award a bonus of two at-large electoral votes to the candidate winning the state as a whole.

Congressional-District Proposal in Michigan

A December 18, 2012, article entitled “Shake up the Electoral College? GOP Proposal Would Have Helped Mitt Romney Win Michigan” reported that state Representative Pete Lund (R), Chair of the House Redistricting and Elections Committee, announced that he planned to introduce a bill in the legislature in 2012 to enact the congressional-district approach (that is, the approach currently used in Maine and Nebraska and that was proposed by Senator Pileggi in Pennsylvania in 2011).⁵¹⁴

In another article, Representative Lund stated:

“It’s more representative of the people. . . . A person doesn’t win a state by 100 percent of the vote, so this is a better, more accurate way. . . . People would feel voting actually matters. It’s an idea I’ve had for several years.”⁵¹⁵

An Associated Press story reported:

“Pete Lund, Michigan’s House Republican whip, said next year is an opportune time to renew the push for his bill to award two electoral votes to the statewide winner and allocate the rest based on results in each congressional district—the method used by Nebraska and Maine.

⁵¹³Gibson, Keegan. House Republicans resurrect congressional-based Electoral College plan. *PoliticsPA*. December 20, 2012. <http://www.politicspa.com/house-rs-resurrect-congressional-based-electoral-college-plan/44960/>.

⁵¹⁴Oosting, Jonathan. Shake up the Electoral College? GOP proposal would have helped Mitt Romney win Michigan. *MLive*. December 18, 2012. http://www.mlive.com/politics/index.ssf/2012/12/shake_up_the_electoral_college.html.

⁵¹⁵Lund: Divide Electoral College votes by congressional district. *Michigan Information and Research Service*. December 17, 2012. www.mirsnews.com/alert.php?alert_id=1352.

“The 2016 election ‘is still a few years away and no one knows who the candidates are going to be,’ said Lund.”⁵¹⁶

A December 20, 2012, article in the *Christian Post* entitled “GOP Operatives Eye Reversal of Democrats’ Electoral College Edge” reported:

“The current method of calculating electoral college votes in most states gives Democrats an edge in presidential races. Republicans operatives are working to undo that edge, not by supporting a popular vote, though, as most Americans would prefer, but by supporting changes that would give Republicans an edge.

“In all but two states, Maine and Nebraska, the candidate who wins the majority of votes in the state receives all the electors for that state. In Maine and Nebraska, electors are assigned by congressional district. A candidate gets one elector for each congressional district they win and two more electors if they win the popular vote in the state.

“Republican operatives are working to cherry pick a few select states to change the system to one like Maine and Nebraska in order to pick up a few more electors in the next presidential election.

“The states they are looking at are Michigan, Pennsylvania and Wisconsin. Obama won all three of those states in 2008 and 2012. Combined, those states netted 46 electors for President Barack Obama. If those states had assigned electors by congressional district, though, at least 26 electors would have likely gone to Republican presidential candidate Mitt Romney instead of Obama, according to calculations by Reid Wilson for *National Journal*. It would not have been enough for Romney to win, but would at least put future Republican candidates in a better position to win in future elections.

“One aspect that all three of those states have in common is their state governments are controlled by Republicans, making the change possible. It also means that the 2010 redistricting in those states was controlled by the Republicans, thus giving them an advantage in drawing congressional district lines favorable to their party. . . .

“The current plan pursued by some Republicans is not aimed at fixing perceived flaws in the system, though. Rather, it is aimed at simply helping Republicans win. (Notice they are not proposing the same system for states like Texas, which would help Democrats gain a few more electors.)”⁵¹⁷ [Emphasis added]

⁵¹⁶ Associated Press. Changes advocated in Pennsylvania electoral vote counting. *PennLive*. December 22, 2012. http://www.pennlive.com/midstate/index.ssf/2012/12/changes_advocated_in_pennsylva.html.

⁵¹⁷ Nazworth, Napp. GOP operatives eye reversal of Democrats’ Electoral College edge. *Christian Post*. December 20, 2012. <http://www.christianpost.com/news/gop-operatives-eye-reversal-of-democrats-electoral-college-edge-87014/>.

Congressional-District Proposal in Virginia

In December 2012, Virginia state Senator Charles Carrico proposed a variation of the congressional-district approach.⁵¹⁸ Under Carrico’s proposed legislation, the candidate winning each congressional district would receive one electoral vote, and the candidate winning a majority of Virginia’s 13 districts would receive a bonus of two at-large electoral votes.

In November 2012, President Obama won four of Virginia’s 11 districts and Governor Romney won seven.

If the congressional-district approach that is currently used in Maine and Nebraska were applied to the 2012 election results in Virginia, President Obama would have won six of the state’s 13 electoral votes to Governor Romney’s seven (even though Obama carried the state).

If Senator Carrico’s proposal were applied to the 2012 election results in Virginia, President Obama would have won four of Virginia’s 13 electoral votes to Governor Romney’s nine (even though Obama carried the state).

Congressional-District Proposal in Wisconsin

A December 22, 2012, *Milwaukee Journal Sentinel* article entitled “Walker Open to Changing state’s Electoral College Allocations” reported that:

“Gov. Scott Walker is open to having Wisconsin allocate its Electoral College votes based on results from each congressional district—a move that would offer Republicans a chance to score at least a partial victory in a state that has gone Democratic in the last seven presidential elections.

“The idea is being considered in other battleground states that have tipped toward Democrats as Republicans try to develop a national plan to capture the presidency in future years. . . .

“In the weeks since Obama won re-election, Republicans are now eyeing splitting up electoral votes in other key battleground states, according to the *National Journal*. If Wisconsin, Michigan and Pennsylvania went to such a system, Republicans would have a chance to edge into the national Electoral College advantage that Democrats now enjoy.

“While those states lend an advantage to Democrats in presidential years, Republicans control all of state government in those three states after the GOP sweep of 2010. . . .

“Republicans last year bolstered their chances in congressional races by re-drawing district lines. Those boundaries have to be redrawn every decade

⁵¹⁸Lee, Tony. OH, VA Republicans Consider Changes to Electoral Vote System. *Breitbart*. December 10, 2012. <http://www.breitbart.com/Big-Government/2012/12/10/OH-VA-Republicans-Float-Idea-Of-Getting-Rid-Of-Winner-Take-All-System-Of-Awarding-Electoral-Votes>.

to account for population changes, and Republicans were able to use that opportunity to their advantage since they controlled state government.”⁵¹⁹

A December 27, 2012, *Milwaukee Journal Sentinel* article reported that incoming Assembly Speaker Robin Vos had sponsored a bill (Assembly Bill 589) to divide Wisconsin’s electoral votes by congressional district in 2008.⁵²⁰

For additional information on the congressional-district approach, see sections 3.3 and 4.2.

9.23.2. MYTH: It would be better to allocate electoral votes proportionally.

QUICK ANSWER:

- Allocating electoral votes proportionally would make a bad system even worse.
- Proportional allocation would not guarantee the Presidency to the candidate who receives the most popular votes nationwide.
- Proportional allocation would not make every vote equal.
- One of the counter-intuitive aspects of the whole-number proportional approach (which retains the Electoral College and the office of presidential elector) would result in most states being ignored in presidential elections.
- The fractional proportional approach (which requires a constitutional amendment to abolish the Electoral College and abolish the office of presidential elector) would make every voter in every state politically relevant to presidential candidates; however, in a close election such as 2000, it would not have given the Presidency to the candidate who received the most popular votes nationwide. Moreover, it would not make every vote equal.

MORE DETAILED ANSWER:

Proportional allocation of electoral votes could be implemented in two ways, and there are significant differences between the two approaches.

First, a federal constitutional amendment could be adopted to implement the system on a nationwide basis. If an amendment were used, the Electoral College and the position of presidential elector would be abolished. It would therefore be possible to divide a state’s electoral votes into small decimal *fractions* (say, one-thousandth of an electoral vote). This approach (called the “fractional proportional approach”) was advocated in 1950 by Massachusetts Senator Henry Cabot Lodge (R) and Texas Repre-

⁵¹⁹ Marley, Patrick. Walker open to changing state’s Electoral College allocations. *Milwaukee Journal Sentinel*. December 22, 2012. <http://www.jsonline.com/news/statepolitics/walker-open-to-changing-states-electoral-college-allocations-8884ck6-184566961.html>.

⁵²⁰ Marley, Patrick. Vos previously backed changing electoral vote rules. *Milwaukee Journal Sentinel*. December 27, 2012. <http://www.jsonline.com/news/statepolitics/vos-previously-backed-changing-electoral-vote-rules-jb865ct-184975431.html>.

sentative Ed Gossett (D). The Lodge-Gossett amendment passed the U.S. Senate by a 64–27 margin on February 1, 1950. This “fractional proportional approach” was also advocated by U.S. Senator Howard Cannon in 1969 (as discussed in detail in section 3.2).

Second, an individual state could decide to allocate its own electoral votes proportionally by state legislation. Under this approach (called the “whole-number proportional approach”), the Electoral College and the position of presidential elector would remain in existence. A presidential elector is a person, and a person’s vote cannot be divided into fractions. As a result, each state would have to allocate its electoral votes in *whole numbers*. Colorado voters considered a ballot initiative to divide their state’s nine electoral votes in this manner in 2004 (but rejected it by a two-to-one margin).

Both forms of the proportional approach fail when evaluated against the criteria of whether they would accurately reflect the nationwide popular vote and whether they would make every vote equal.

As shown in table 4.21, if the whole-number proportional approach had been in use throughout the country in the nation’s closest recent presidential election (2000), it would *not* have awarded the most electoral votes to the candidate receiving the most popular votes nationwide. Instead, the result would have been a tie of 269–269 in the Electoral College, even though Al Gore led by 537,179 popular votes across the nation. The presidential election would have been thrown into Congress. Given the composition of the U.S. House of Representatives in January 2001, the whole-number proportional approach would have resulted in the election of the second-place presidential candidate.

If the fractional proportional approach had been used in 2000, it would *not* have awarded the most electoral votes to the candidate receiving the most popular votes nationwide. As shown in table 3.1, Al Gore would have received 259.969 electoral votes; George W. Bush would have received 260.323 electoral votes; and Ralph Nader would have received 17.707 electoral votes. Thus, the election would have been thrown into Congress. Given the composition of the U.S. House of Representatives in January 2001, the fractional proportional approach would have resulted in the election of the second-place presidential candidate.

Concerning the criterion of making every vote equal, every vote would not be equal under the proportional approach. The proportional approach would disadvantage rapidly growing states (e.g., Utah, Nevada) because electoral votes are only redistributed among the states every 10 years (after each federal census). The proportional approach would penalize states with a high degree of civic participation and high voter turnout (e.g., Oregon). The proportional approach would disadvantage certain states in relation to other states. For example, Montana and Wyoming each have one congressman and hence three electoral votes. However, Wyoming had a population of 495,304 in 2010, whereas Montana had a population of 905,316. See section 3.1 for additional details.

If a federal constitutional amendment were adopted along the lines of proposals that have been previously introduced in Congress, the Electoral College and presidential electors would be abolished. Under these proposals, the electoral votes of each

state and the District of Columbia would be divided proportionally according to the percentage of votes (carried out to three decimal places) received in that state by each presidential slate.

The fractional proportional approach would succeed in making voters relevant in all 50 states and the District of Columbia because some fraction of an electoral vote would always be at stake in every state.

If, on the other hand, individual states were to adopt the proportional system on a piecemeal basis through state legislation, the proportional system would be constrained to operating with *whole numbers* (not fractions carried out to several decimal places). Each participating state's electoral vote would have to be rounded off to the nearest whole number. This rounding-off has counter-intuitive effects. In particular, there would be fewer battleground states under this system than under the current system.

This counter-intuitive result comes about because of the rounding-off to whole numbers and the relatively small size of the Electoral College. There are only 538 electoral votes in the Electoral College (i.e., one for each U.S. Representative and Senator). The average number of electoral votes per state is, therefore, only about 11. Moreover, about three-quarters (36) of the states have a below-average number of electoral votes. The median number of electoral votes per state is only seven.

Campaigning is rarely capable of shifting more than 8% of the vote during a typical presidential campaign. If one considers an average-sized state (i.e., a state with 11 electoral votes), one electoral vote would correspond to 9% of the popular vote in the state. In smaller states, one electoral vote would correspond to an even larger percentage of the popular vote in the state. In a state of median size (i.e., seven electoral votes), one electoral vote would correspond to 14% of the popular vote in the state. In the case of the seven states with three electoral votes, one electoral vote would correspond to 33% of the popular vote.

As discussed in great detail in section 4.1, the only battleground states under the whole-number proportional approach would be those where popular sentiment in the state fortuitously hovers right at the critical boundary point where one electoral vote might be shifted. The vast majority of the states would not be poised anywhere near that critical boundary point. Presidential campaigns would consequently ignore every state where no electoral votes would be at stake. In the relatively small number of states fortuitously hovering right at the boundary point, the only "battle" in most cases would be for one electoral vote. That is, the whole-number proportional approach would be, in effect, a "winner-take-one" system (that is, the candidate receiving the most popular votes in the state would win an advantage of one electoral vote over the second-place candidate). The only exceptions would be that two or three electoral votes might be in play in California (with 55 electoral votes) and that two electoral votes might occasionally be in play in Texas (38 electoral votes), New York (29 electoral votes), and Florida (29 electoral votes). Texas, New York, and Florida, would be "winner-take-two" or "winner-take-one" states, and California would be a "winner-take-two" or a "winner-take-three" state. Under the whole-number proportional ap-

proach, most states would not hover anywhere near the critical boundary point and hence would be ignored by presidential campaigns.⁵²¹

In addition, there is a prohibitive political impediment associated with the adoption of the whole-number proportional approach on a piecemeal basis by individual states. Any state that enacts the proportional approach on its own would reduce its own influence. This was the most telling argument that caused Colorado voters to agree with Republican Governor Bill Owens and to reject, by a two-to-one margin, the ballot measure in November 2004 to award Colorado's electoral votes using the whole-number proportional approach. This inherent defect cannot be remedied unless *all* 50 states and the District of Columbia were to *simultaneously* enact the proportional approach. This inherent defect cannot be remedied if, for example, 10, 20, 30, or even 40 states were to enact the whole-number proportional approach on a piecemeal basis. If as many as 48 or 49 states allocated their electoral votes proportionally, but just one or two large, closely divided battleground winner-take-all states did not, the state(s) continuing to use the winner-take-all system would immediately become the only state(s) that would matter in presidential politics. Thus, if states were to start adopting the proportional approach on a piecemeal basis, each additional state adopting the approach would increase the influence of the remaining winner-take-all states and thereby decrease the chance that the additional winner-take-all states would adopt the approach. A state-by-state process of adopting the proportional approach would bring itself to a halt.

For more details on the fractional proportional approach, see section 3.2.

For more details on the whole-number proportional approach, see section 4.1.

2012 Proportional Proposal in Pennsylvania

In December 2012, Senate Majority Leader Dominic Pileggi (R)⁵²² announced that he planned to introduce a bill in the Pennsylvania legislature in 2013 to award 18 of Pennsylvania's 20 electoral votes proportionally. Senator Pileggi's proposal called for awarding 18 electoral votes using the whole-number proportional approach, while awarding a bonus of two at-large electoral votes to the candidate winning the state.⁵²³

Table 9.22 shows how Pennsylvania's 20 electoral votes would be divided under Pileggi's 2012 proportional approach (with a bonus of two at-large electoral votes) in a race with two major-party candidates.⁵²⁴ In a state with 18 electoral votes, each

⁵²¹ For more details, see section 3.2 and chapter 4.

⁵²² As previously discussed in section 9.32.1, Senator Pileggi proposed the congressional-district approach for dividing Pennsylvania's electoral votes in September 2011.

⁵²³ Varghese, Romy. Pennsylvania proposal may help Republicans win electoral votes. *Bloomberg*. December 3, 2012. <http://www.bloomberg.com/news/2012-12-03/pennsylvania-proposal-may-help-republicans-win-electoral-votes.html>.

⁵²⁴ The whole-number proportional approach can be implemented in several slightly different ways, depending how third parties, fractions, and round-offs are treated. Senator Pileggi did not release legislative language at the time of announcing his proposal in December 2012. The calculation here assumes use of the whole-number proportional approach as described in section 4.1 of this book and also assumes only two major-party candidates.

Table 9.22 DIVISION OF PENNSYLVANIA'S 20 ELECTORAL VOTES UNDER SENATOR PILEGGI'S PROPORTIONAL APPROACH (WITH BONUS OF TWO AT-LARGE ELECTORAL VOTES)

CANDIDATE RECEIVING STATEWIDE POPULAR VOTE OF	WINS THIS NUMBER OF "PROPORTIONAL" ELECTORAL VOTES	WINS THIS NUMBER OF "BONUS" ELECTORAL VOTES	WINS THIS TOTAL NUMBER OF ELECTORAL VOTES
Between 0% and 2.78%	0	0	0
Between 2.78% and 8.33%	1	0	1
Between 8.33% and 13.89%	2	0	2
Between 13.89% and 19.44%	3	0	3
Between 19.44% and 25.00%	4	0	4
Between 25.00% and 30.56%	5	0	5
Between 30.56% and 36.11%	6	0	6
Between 36.11% and 41.67%	7	0	7
Between 41.67% and 47.22%	8	0	8
Between 47.22% and 49.99%	9	0	9
Between 50.01% and 52.78%	9	2	11
Between 52.78% and 58.33%	10	2	12
Between 58.33% and 63.89%	11	2	13
Between 63.89% and 69.44%	12	2	14
Between 69.44% and 75.00%	13	2	15
Between 75.00% and 80.56%	14	2	16
Between 80.56% and 86.11%	15	2	17
Between 86.11% and 91.67%	16	2	18
Between 91.67% and 97.22%	17	2	19
Between 97.22% and 100%	18	2	20

electoral vote represents 5.56% of the statewide vote. Note that a candidate receiving between 47.22% and 49.99% of the statewide vote wins nine electoral votes. However, a candidate receiving between 50.01% and 52.78% of the statewide vote receives 11 electoral votes because of the the bonus of two at-large electoral votes.

In a December 2012 article entitled "Electoral College Chaos: How Republicans Could Put a Lock on the Presidency," Rob Richie discussed the political effect of Senator Pileggi's 2012 proportional proposal (with his proposed bonus of two at-large electoral votes) in six states that President Obama won in both 2008 and 2012 and where the Republican party controlled both houses of the legislature and the Governor's office (that is, Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida).⁵²⁵

In November 2012, President Obama won the electoral votes of these six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida) by a 106–0 margin over Governor Romney. This 106–0 margin helped President Obama win the Electoral College by a 62-vote margin (332–206).

Table 9.23 shows the effect (using data from Richie's article) of applying Senator Pileggi's 2012 proportional proposal (with his proposed bonus of two at-large electoral

⁵²⁵ Richie, Rob. Electoral College chaos: How Republicans could put a lock on the presidency. December 13, 2012. <http://www.fairvote.org/electoral-college-chaos-how-republicans-could-put-a-lock-on-the-presidency>.

Table 9.23 POLITICAL EFFECT OF PILEGGI'S 2012 PROPORTIONAL APPROACH (WITH BONUS OF TWO AT-LARGE ELECTORAL VOTES) IN SIX STATES THAT OBAMA CARRIED IN 2012

STATE	D	R	D PROPORTIONAL	R PROPORTIONAL	D AT-LARGE	R AT-LARGE	D TOTAL	R TOTAL
FL	50%	49%	14	13	2	0	16	13
MI	54%	45%	8	6	2	0	10	6
OH	51%	48%	8	8	2	0	10	8
PA	52%	47%	9	9	2	0	11	9
VA	51%	47%	6	5	2	0	8	5
WI	53%	46%	4	4	2	0	6	4
Total			49	45	12	0	61	45

votes) to the actual 2012 election returns from six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida).

Under Pileggi's 2012 proportional proposal (with his proposed bonus of two at-large electoral votes), President Obama would have received only 61 electoral votes to Governor Romney's 45 electoral votes in the six states in table 9.23, and President Obama would have ended up with a 287–251 win in the Electoral College (that is, much closer than his actual 332–206 win in 2012).

For comparison, table 9.24 shows the effect of applying the whole-number proportional approach to *all* of a state's electoral votes (as described in section 4.1 of this book) using the actual 2012 election results from the six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida).⁵²⁶

Table 9.24 POLITICAL EFFECT OF WHOLE-NUMBER PROPORTIONAL APPROACH IN SIX STATES THAT OBAMA CARRIED IN 2012

STATE	D	R	D TOTAL	R TOTAL
FL	50%	49%	15	14
MI	54%	45%	9	7
OH	51%	48%	9	9
PA	52%	47%	11	9
VA	51%	47%	7	6
WI	53%	46%	5	5
Total			56	50

As shown in table 9.24, under the whole-number proportional approach, President Obama would have received only 56 electoral votes to Governor Romney's 50 electoral votes in those six states, and President Obama would have ended up with a 282–256 win in the Electoral College (that is, much closer than his actual 332–206 win in 2012).

⁵²⁶The whole-number proportional approach can be implemented in several slightly different ways, depending how fractions, round-offs, and third parties are treated. Senator Pileggi did not release legislative language for his 2012 proportional proposal as of the time of this writing. The calculation here assumes use of the whole-number proportional approach as described in chapter 4 of this book.

Clifford B. Levine, a prominent Democrat in Pennsylvania, said the following in a speech to the meeting of the Electoral College in Harrisburg, Pennsylvania, on December 17, 2012:

“If Pennsylvania became the third state to split its electors—lightly populated Maine and Nebraska are the only states that do so now—it would have little influence in future presidential elections, diminishing the voice of Pennsylvania on the national stage.

“Worse, seems a more nefarious nationwide scheme is being orchestrated by far-right strategists.

“In 2010, Republicans took control of state legislatures in many battleground states, including Pennsylvania, Ohio, Michigan, Wisconsin, Virginia and Florida, which have voted Democratic in recent presidential elections. Instead of listening to voters, Republican leaders in those states have recently proposed similar drastic changes to the elector-selection process, seeking a pro rata allocation of electors in their states.

“These partisans assert this allocation is fair because the winner-take-all approach deprives the losing party of a voice. What these partisan Republicans do not address—and what every voter and journalist in America should ask—is whether the pro rata systems are being proposed in red states, where Republicans control the state government and which vote Republican in presidential elections. Texas, Georgia, Mississippi, North Carolina and Missouri apparently will retain the winner-take-all selection method. Only in blue states are proposals being made to dilute Democratic strength. **The result would be a country of red states and irrelevant states, with preordained election results.**”⁵²⁷ [Emphasis added]

9.24. MYTH THAT ONE STATE COULD DERAIL THE NATIONAL POPULAR VOTE COMPACT

9.24.1. MYTH: Abolition of popular voting for President and abolition of the short presidential ballot are “Achilles’ heels” that would enable one state to obstruct the National Popular Vote compact.

QUICK ANSWER:

- The National Popular Vote compact was specifically drafted to prevent a single dissident state from derailing the operation of the compact by abolishing popular voting for President or by abolishing the short presidential ballot.

⁵²⁷ Levine, Clifford B. Hands off the Electoral College! *Pittsburgh Post-Gazette*. December 30, 2012. <http://www.post-gazette.com/stories/opinion/perspectives/hands-off-the-electoral-college-668327/>.

- Proposals to abolish popular voting for President and to deliberately inconvenience and confuse voters are parlor games devoid of any connection to political reality. In fact, the public overwhelmingly supports a nationwide vote for President in every state for which state-level polling data are available.
- Far from representing the “Achilles’ heel” of the National Popular Vote compact, these proposals constitute an “Achilles’ boot” that would kick out of office any Governor and legislature that attempted to implement them.

MORE DETAILED ANSWER:

All 50 states and the District of Columbia currently permit the people to vote for President.

Professor Norman R. Williams of Willamette University has suggested that a single state could obstruct the operation of the National Popular Vote compact by abolishing popular voting for President.

“The most dramatic way in which a non-signatory state could obstruct the determination of which candidate was the most popular across the nation is for the state to eliminate its statewide popular elections for President and have its legislature (or somebody other than the state’s voters) appoint its Presidential electors.”⁵²⁸

We certainly acknowledge that Williams’ proposal is “dramatic.”

We also acknowledge that his proposal would be constitutional. Indeed, in the nation’s first presidential election in 1789, presidential electors were chosen by the state legislature in many states. In New Jersey, presidential electors were chosen by the Governor and his Council.

A similarly “dramatic” proposal has been advanced by Professor Alexander S. Belenky, who has suggested that a single state could obstruct the operation of the National Popular Vote compact by abolishing the “short presidential ballot.”

All 50 states and the District of Columbia currently use the so-called “short presidential ballot”—that is, they permit their voters to vote for President with a convenient single vote. For example, the “short presidential ballot” permitted a California voter in 2008 to cast a convenient single vote for “McCain” and to have that single vote to be deemed to be a vote for each of the 55 Republican candidates for the position of presidential elector in California. The short presidential ballot eliminates the burden of locating the 55 Republican candidates for presidential elector on the ballot (out of a total of 330 candidates for presidential elector in California in 2008) and then casting 55 separate votes for the Republican candidates.

In the absence of the short presidential ballot, a certain number of voters in Cali-

⁵²⁸ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 209–210.

ifornia, would inevitably get tired or confused by the process of voting separately for 55 candidates from among 330 candidates for the position of presidential elector. Each of the 55 winning elector candidates would thus inevitably receive slightly different numbers of votes. Consequently, there would be no single number of popular votes associated with the candidacy of John McCain or Barack Obama in California.

Professor Belenky claimed in an op-ed:

“Opposing states can turn the plenary right of every state to choose a manner of appointing its electors . . . into the **NPV’s Achilles’ heel**.

“By allowing voters to favor individual electors of their choice from any slate of state electors . . . , **the legislature of each opposing state can make it impossible to tally votes cast there as part of the national popular vote for president.**”⁵²⁹ [Emphasis added]

Belenky’s proposed ballot is, of course, constitutional. The short presidential ballot did not come into widespread use until the middle of the 20th century.⁵³⁰

Ballots requiring that the voter cast a separate vote for each presidential elector were abolished for the obvious reason that they were inconvenient and confusing and, in a close election in a particular state, frequently resulted in a haphazard division of a state’s electoral vote among the political parties.

Figure 2.13 shows the presidential ballot in Alabama in 1960. It illustrates how the presidential ballot would look under Belenky’s proposal. In Alabama in 1960, voters cast 10 separate votes for presidential electors (out of a total of 50 candidates on the ballot). Note that the names of the actual candidates (John F. Kennedy and Richard Nixon) did not appear on the ballot when voters voted for individual presidential electors.

Neither Williams’ nor Belenky’s proposals represent an “Achilles’ heel” that would permit a single state to paralyze the operation of the National Popular Vote compact. In fact, the National Popular Vote compact was specifically drafted to prevent a discordant state from derailing the operation of the compact along the lines of Williams’ and Belenky’s proposals.

Article II of the National Popular Vote compact creates a legally binding obligation to conduct a popular election for President and Vice President in each member state.

“Each member state shall conduct a **statewide popular election** for President and Vice President of the United States.” [Emphasis added]

The term “statewide popular election” is specifically defined in Article V of the compact as

⁵²⁹ Belenky, Alexander S. The Achilles Heel of the popular vote plan. Guest column. *Daily News Tribune*. January 30, 2009. <http://www.dailynewstribune.com/opinion/x625264242/Belenky-The-Achilles-Heel-of-the-popular-vote-plan>.

⁵³⁰ The last state to adopt the short presidential ballot was Vermont (in 1980).

“a general election at which **votes are cast for presidential slates** by individual voters and counted on a statewide basis.” [Emphasis added]

The term “presidential slate” is defined in Article V of the compact in the following way:

“‘Presidential slate’ shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state.”

That is, the National Popular Vote compact commits each member state to continue to allow its people to vote for President (something the state is not required to do by the U.S. Constitution) and also to vote for “presidential slates” rather than individual candidates for presidential elector (something else that the state is not required to do). These two requirements guarantee that each member state will generate a *single* number representing the popular vote for each presidential-vice-presidential slate as part of a “statewide popular election.”

Of course, non-member states are not bound by the National Popular Vote compact. Although all 50 states and the District of Columbia currently (and wisely) permit their voters to vote for President and (wisely) give their voters the convenience of using the “short presidential ballot,” a non-member state would not be obligated to continue these policies.

Thus, a non-member state may effectively opt out of participation in the national popular vote either by repealing its current law establishing the “short presidential ballot” or by repealing its current law of permitting its own voters to vote for President.⁵³¹

The National Popular Vote compact addresses both of these unlikely possibilities by specifying that the popular votes that are to be included in the “national popular vote total” are those that are

“ . . . cast for each presidential slate in **each State of the United States** and in the District of Columbia **in which votes have been cast in a statewide popular election.**” [Emphasis added]

If a state continues to let its people vote for President and continues to employ the convenient “short presidential ballot,” it would be conducting a “statewide popular election” (as that term is specifically defined in the compact). That state would, therefore, be automatically included in the “national popular vote total” computed under the National Popular Vote compact.

⁵³¹The Colorado Constitution is unique in that it establishes the right of the people to vote for President (starting in 1880). Thus, legislation alone could not deprive the people of the right to vote for President in Colorado. Such a change would require a state constitutional amendment in Colorado.

In the unlikely event that a non-member state were to pass a law abolishing the “short presidential ballot” or abolishing popular voting for President, that state would be effectively choosing to opt out of the national popular vote count. If a state were to opt out of the national popular vote count in either of these two ways, it would, of course, be entitled to appoint its presidential electors in its chosen manner, and its electors would be able to cast their votes for President in the Electoral College. Meanwhile the compact would operate as intended for the remaining 49 states and the District of Columbia.

In short, the National Popular Vote compact automatically includes all 50 states and the District of Columbia for the purpose of determining the national popular vote winner.

Of course, there is no legitimate public policy reason to adopt either Williams’ proposal for abolishing popular voting for President or Belenky’s proposal to deliberately inconvenience, confuse, and disenfranchise voters other than to attempt to obstruct the operation of the National Popular Vote compact.

Both Williams’ and Belenky’s proposals assume that there would be a Governor and state legislature that is fanatically opposed to a nationwide vote for President and that public opinion in their state would permit them to disenfranchise their own state’s voters in order to protest a national popular vote. However, the political reality is that public opinion surveys show high levels of public support for a national popular vote for President in every state for which state-level polls are available, including battleground states, small states, Southern states, border states, and other states:

- Alaska–70%,
- Arizona–67%,
- Arkansas–80%,
- California–70%,
- Colorado–68%,
- Connecticut–74%,
- Delaware–75%,
- District of Columbia–76%,
- Florida–78%,
- Kentucky–80%,
- Idaho–77%,
- Iowa–75%,
- Maine–77%,
- Massachusetts–73%,
- Michigan–73%,
- Minnesota 75%,
- Mississippi–77%,
- Missouri–70%,
- Montana–72%,
- Nebraska–67%,
- Nevada–72%,
- New Hampshire–69%,
- New Mexico–76%,
- New York–79%,
- North Carolina–74%,
- Ohio–70%,
- Oklahoma–81%,
- Oregon–76%,
- Pennsylvania–78%,
- Rhode Island–74%,
- South Carolina–71%,
- South Dakota–75%,
- Utah–70%,
- Vermont–75%,
- Virginia–74%,
- Washington–77%,
- West Virginia–81%,
- Wisconsin–71%, and
- Wyoming–69%.

In addition, more than 70% of the American people have favored a nationwide election for President since the Gallup poll started asking this question in 1944. The 2007 *Washington Post*, Kaiser Family Foundation, and Harvard University poll showed 72% support for direct nationwide election of the President. Numerous state-level polls confirm this high level of support.⁵³² Additional polling data are found in section 7.1.

In support of his proposal to abolish popular voting for President, Professor Williams says:

“Nonsignatory states that traditionally favor one party in the presidential election could eliminate their popular vote without much outcry. For example, if Utah’s Republican-dominated legislature were to return to legislative appointment of its electors in order to undermine the NPVC, **the state’s large majority of Republicans would not likely complain.** The end result—the award of the state’s electors to the Republican candidate—would be the same. **Ditto for traditionally Democratic states, such as Vermont.**⁵³³ [Emphasis added]

Professor Williams is apparently unaware that 70% of Utah voters favor a national popular vote for President, including 66% of Utah Republicans. He also is apparently unaware that 75% of Vermont voters favor a national popular vote for President and that Vermont has already enacted the National Popular Vote compact.

Moreover, states such as Utah and Vermont “that traditionally favor one party in the presidential election” are the most disadvantaged under the current state-by-state winner-take-all rule. It has been decades since Utah or Vermont has received any attention from a presidential candidate. In fact, the year 2012 is the 100th anniversary of the last time the popular-vote difference in Utah was less than 6% and the last time that Utah voters were even slightly relevant to the general-election campaign for President.

Before the results of the 2012 presidential election were known, it was generally recognized that Mitt Romney could not be elected President in November 2012 without winning the bulk of the closely divided battleground states that Barack Obama won in 2008. Six of these battleground states (Ohio, Pennsylvania, Virginia, Florida, Michigan, and Wisconsin) had Republican Governors and Republican legislatures in 2012. These six states possessed 95 electoral votes—the exact margin by which Obama won the Electoral College in 2008. State legislatures indisputably have the legal power, *under the current system*, of abolishing popular voting for President in their states and choosing all 95 of these presidential electors themselves. If abolishing the people’s vote for President were politically plausible in the 21st century, as Professor Williams claims, the Republican Party could have saved itself the expense, effort, and *risk* of

⁵³² These polls (and many others) are available on National Popular Vote’s web site at <http://www.nationalpopularvote.com/pages/polls>.

⁵³³ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 214–215.

campaigning for President in these six states and simply appointed 95 Republican presidential electors to represent these states. Those 95 electoral votes would have effectively guaranteed the Presidency to Mitt Romney.

Vikram David Amar commented on Professor Williams' suggestion that popular voting for President could be abolished:

“Is it really politically plausible to think a state legislature could try, in the twenty-first century, to eliminate the statewide vote for presidential electors? And if it is, **why are we not worried about the equally troubling possibilities for similar subversion under the current regime?** . . .

“[is it really politically plausible to think] a state legislature could claim the ‘plenary’ power that Professor Williams discusses to override a state popular vote?

“The reason these things do not happen is not that the current system lacks loopholes, but rather that the legitimacy of majority rule is so entrenched that **any politician who blatantly tried to subvert the vote would be pilloried**. And given the national polling data in support of a move towards direct national election, it is almost certain that the nonlegal ‘democracy norm’ would prevent the most blatant of the shenanigans that Professor Williams fears.”⁵³⁴ [Emphasis added]

Professor Williams is probably correct in assuming that only a one-party state (e.g., Utah or Vermont) might consider a proposal as extreme as abolishing popular voting for President.

Utah (one of the states suggested by Professor Williams) generated a margin in 2012 in favor of Governor Romney of 488,787 votes. If Utah were to opt out of the National Popular Vote compact by abolishing popular voting for President, it would cost the Republican nominee for President almost a half million votes—a number approximately equal to Nixon’s nationwide popular-vote margin in 1968.

Thus, if the Governor and legislature of a one-party state were to contemplate opting out of the National Popular Vote compact as proposed by Professors Williams, the national committee and prospective presidential candidates of the party that would ordinarily win that state’s popular vote would pressure the Governor and legislature not to opt out.

In short, Williams’ proposal for abolishing popular voting for President and Belenky’s proposal to deliberately inconvenience and confuse voters by abandoning the short presidential ballot are parlor games devoid of any connection to real-world politics.

⁵³⁴ Amar, Vikram David. 2011. Response: The case for reforming presidential elections by sub-constitutional means: The Electoral College, the National Popular Vote compact, and congressional power. 100 *Georgetown Law Journal* 237 at 249.

Far from spotting the “Achilles’ heel” of the National Popular Vote compact; Professors Williams and Belenky have actually identified an “Achilles’ boot” that would kick out of office any Governor and legislature that attempted to disenfranchise their own voters in the manner proposed by these two opponents of the National Popular Vote plan.

9.25. MYTH ABOUT DECLINE IN VOTER TURNOUT

9.25.1. MYTH: A national popular vote would decrease turnout.

QUICK ANSWER:

- In 2012, voter turnout averaged 11% higher in battleground states than in spectator states. Therefore, one would reasonably expect that voter turnout would rise in the four out of five states that are currently ignored by presidential campaigns if the President were elected on the basis of the national popular vote.

MORE DETAILED ANSWER:

Curtis Gans, in a speech at the National Civic Summit in Minneapolis on July 17, 2009, asserted that a national popular vote would decrease voter turnout in presidential elections.

In 2012, Curtis Gans and Leslie Francis said:

“By its very size and scope, **a national direct election will lead to nothing more than a national media campaign**, which would propel the parties’ media consultants to inflict upon the entire nation what has been heretofore limited to the so-called battleground states: an ever-escalating, distorted arms race of tit-for-tat unanswerable attack advertising polluting the airwaves, denigrating every candidate and eroding citizen faith in their leaders and the political process as a whole.”

“Because a direct election would be, by definition, national and resource allocation would be **overwhelmingly dominated by paid television advertising, there would be little impetus for grass-roots activity. That, in turn, would likely diminish voter turnout.**”⁵³⁵ [Emphasis added]

These criticisms of direct election of the President ignore the political reality that presidential campaigns under the *current* system are “media campaigns” that are “dominated by paid television advertising.” Under the current state-by-state winner-take-all system, presidential campaigns cater to the approximately 60,000,000 people living in the closely divided battleground states. The fact that 240,000,000 other Americans are

⁵³⁵ Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

ignored because they live in spectator states does not change the fact that present-day campaigns are “media campaigns” among the 60,000,000 people who matter.

The claim by Gans and Francis that voter turnout would suffer under a national popular vote is contrary to the evidence about voter turnout from numerous studies over the years.

In 2012, voter turnout was 11% higher in the battleground states than in the remainder of the country.

Professor Michael P. McDonald of George Mason University computed voter turnout for each state and the nation as a whole.⁵³⁶

Based on the 130,234,600 ballots that were counted in the November 2012 elections, the national turnout rate was 59.4%.

Voter turnout in the nine battleground states identified by the *Cook Political Report* in its October 18, 2012, electoral scorecard (table 1.18) was as follows:

- 71.1% in Colorado,
- 63.6% in Florida,
- 70.2% in Iowa,
- 57.2% in Nevada,
- 70.9% in New Hampshire,
- 65.2% in North Carolina
- 65.2% in Ohio
- 66.9% in Virginia, and
- 72.5% in Wisconsin.

The average voter turnout in the nine battleground states was 67.0%—11% higher than the 59.4% rate for the nation as a whole.

In *America Goes to the Polls: A Report on Voter Turnout in the 2008 Election*, the Nonprofit Voter Engagement Network found that in 2008

“Voter turnout in the 15 battleground states averaged **seven points higher** than in the 35 non-battleground states.”⁵³⁷ [Emphasis added]

Concerning the 2004 election, Daniel E. Bergan reported in *Public Opinion Quarterly* that

“Battleground states had turnout rates that are **five percentage points higher** than those of nonbattleground states.”⁵³⁸ [Emphasis added]

⁵³⁶The figures are from the web page entitled “2012 General Election Turnout Rates” found at http://elections.gmu.edu/Turnout_2012G.html on December 31, 2012. The voter turnout figures are those for the number of ballots that were counted, except for Wisconsin where the highest office turnout rate was used.

⁵³⁷*America Goes to the Polls: A Report on Voter Turnout in the 2008 Election*. Nonprofit Voter Engagement Network. 2008.

⁵³⁸Bergan, Daniel E. et al. 2005. Grassroots mobilization and voter turnout in 2004. 69 *Public Opinion Quarterly*. Volume 69. Pages 760 and 772.

USA Today reported the following about the 2012 election:

“Swing-state voters are a bit more enthusiastic about voting this year than those living elsewhere, perhaps reflecting the attention they’re given in TV ads and candidate visits. Nearly half of those in battleground states are extremely or very enthusiastic about voting for president this year.⁵³⁹”

A 2005 Brookings Institution report entitled *Thinking About Political Polarization* pointed out:

“The electoral college can depress voter participation in much of the nation. Overall, the percentage of voters who participated in last fall’s election was almost 5 percent higher than the turnout in 2000. Yet, most of the increase was limited to the battleground states. Because the electoral college has effectively narrowed elections like the last one to a quadrennial contest for the votes of a relatively small number of states, people elsewhere are likely to feel that their votes don’t matter.”^{540,541}

If presidential campaigns stopped ignoring 240,000,000 of 300,000,000 Americans, voter turnout would rise in the portion of the country that is currently ignored by presidential campaigns.

Tellingly, the headline of an October 28, 2004, report *issued by Curtis Gans* acknowledged the higher rate of voter participation in closely divided battleground states:

“Registration Rises Moderately—Battleground States Lead the Way.”

Curtis Gans’ own report goes on to say:

“Registration increases in battleground states were geometrically higher than the increases in non-battleground states.”

“Registration increased by 3.9 percentage points in the 12 battleground states which had final figures for this report, while it only increased by 0.1 percentage point in the 14 non-battleground states which reported their final figures.” [Emphasis added]

Moreover, *according to Curtis Gans*, the turnout in the 2012 presidential election was higher in the battleground states than spectator states. During a televised panel

⁵³⁹ Page, Susan. Swing states poll: Amid barrage of ads, Obama has edge. *USA Today*. July 8, 2012.

⁵⁴⁰ Nivola, Pietro S. 2005. *Thinking About Political Polarization*. Washington, DC: The Brookings Institution. Policy Brief 139. January 2005.

⁵⁴¹ Voter turnout is adversely affected in non-battleground states because voters of both parties in such states realize that their votes do not matter in presidential elections. As reported by the Committee for the Study of the American Electorate, “Turnout in battleground states increased by 6.3 percentage points, while turnout in the other states (and the District of Columbia) increased by only 3.8 percentage points.” See Committee for the Study of the American Electorate. President Bush, mobilization drives propel turnout to post-1968 high. November 4, 2004.

discussion on November 9, 2012, at the Bipartisan Policy Center, Curtis Gans said the following:

“In the 9 states where we have campaigns, well I added Pennsylvania, 10 battleground states, the turnout was 62.8%, In the rest, turnout was 54.8%.”⁵⁴² [Emphasis added]

9.26. MYTH THAT OUR NATION’S FREEDOM, SECURITY, AND PROSPERITY ARE PROTECTED BY THE WINNER-TAKE-ALL RULE

9.26.1. MYTH: Our nation’s freedom, security, and prosperity are protected by the current winner-take-all method of awarding electoral votes.

QUICK ANSWER:

- The state-by-state winner-take-all method of awarding electoral votes has no connection with our nation’s freedom, security, or prosperity.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, argues:

“This important aspect of our Constitution [the Electoral College] continues to **protect our freedom**, just as it did when it was created in 1787.”⁵⁴³ [Emphasis added]

A brochure published by the Evergreen Freedom Foundation of Olympia, Washington states:

“[The Electoral College is] essential to our **security** and **prosperity** and, in the end, to keeping America free.”⁵⁴⁴ [Emphasis added]

Neither Ross nor the Evergreen Freedom Foundation offers any argument that establishes a cause-and-effect relationship between our nation’s prosperity and state winner-take-all statutes (i.e., awarding all of a state’s electoral votes to the candidate who receives the most votes in the state).

Similarly, there is no argument as to how the nation’s security is enhanced by the winner-take-all rule.

Is there any evidence that our nation’s freedom was endangered by the fact that only three states used the winner-take-all rule in our nation’s first presidential election in 1789?

⁵⁴² Bipartisan Policy Center examines voter turnout statistics. C-SPAN. November 9, 2012. Quotation from Curtis Gans appears at time stamp of 36 minutes into program.

⁵⁴³ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

⁵⁴⁴ Evergreen Freedom Foundation. 2010. Olympia, Washington.

Was prosperity reduced when Nebraska in 1992, and Maine in 1969, adopted the congressional district system of awarding electoral votes? It should be noted that *all* the states used the winner-take-all rule during the Great Depression.

9.27. MYTH ABOUT THE REPLACEMENT OF A DEAD, DISABLED, OR DISCREDITED PRESIDENTIAL CANDIDATE

9.27.1. MYTH: Use of the winner-take-all rule permits replacement of a dead, disabled, or discredited President-Elect between Election Day and the meeting of the Electoral College, but the National Popular Vote compact does not.

QUICK ANSWER:

- The National Popular Vote compact would not abolish the Electoral College. Therefore, a dead, disabled, or discredited President-Elect could be replaced by the Electoral College in the same manner as is currently the case.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein points out that use of the winner-take-all rule permits replacement of a dead, disabled, or discredited President-Elect after the people vote in November, but before the Electoral College meets in December.

Lowenstein says that this feature of the Electoral College is

“what might someday turn out to be the Electoral College’s greatest benefit.”

Lowenstein continues:

“What is needed for such problems is a political solution. And the Electoral College is ideal for the purpose. The decision would be made by people in each state selected for their loyalty to the presidential winner. Therefore, abuse of the system to pull off a *coup d’etat* would be pretty much out of the question. But in a situation in which the death, disability or manifest unsuitability plainly existed, the group would be amenable to a party decision, which seems to me the best solution.”

The National Popular Vote compact would not abolish the Electoral College. It would reform the method of choosing the presidential electors so that they reflect the choice of all the people of the United States, instead of the choice of the people on a state-by-state basis using the winner-take-all rule.

Therefore, the National Popular Vote compact does not eliminate the ability of the Electoral College to perform the function envisioned by Professor Lowenstein. Under the National Popular Vote compact, presidential electors associated with the

political party that just won the national election would be available to replace a dead, disabled, or discredited President-Elect.

9.28. MYTH THAT THE WINNER-TAKE-ALL RULE PRODUCES GOOD PRESIDENTS

9.28.1. MYTH: The state-by-state winner-take-all method for awarding electoral votes produces good Presidents.

QUICK ANSWER:

- State winner-take-all statutes have nothing to do with producing good Presidents.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein has argued that there are “11 good reasons”⁵⁴⁵ not to change the current system of electing the President:

“The Electoral College produces good presidents. . . . The Electoral College has produced Washington, Jefferson, Jackson, Lincoln, Cleveland, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, and Reagan.”⁵⁴⁶

Although these 11 Presidents were indeed distinguished, Lowenstein does not offer any argument connecting the ascension of these 11 individuals to the Presidency and the state-by-state winner-take-all rule (i.e., awarding all of a state’s electoral votes to the candidate who receives the most votes in the state).

Moreover, Lowenstein does not offer any argument as to why these same talented individuals (or other equally talented individuals) could not have risen to the Presidency without the winner-take-all rule. How, for example, was the winner-take-all rule essential to the emergence of, say, Eisenhower or Reagan?

Moreover, Lowenstein provides no argument as to why a system in which the candidate who receives the most popular votes in all 50 states and the District of Columbia would necessarily not result in good Presidents.

Tellingly, Lowenstein includes two Presidents on his list who were *defeated* in the Electoral College by a candidate who received fewer popular votes nationwide, namely Andrew Jackson in 1824 and Grover Cleveland in 1888. Why does Lowenstein credit the Electoral College with success when it elected “good Presidents” such as Jackson in 1828 and Cleveland in 1892, but not acknowledge the failure of the Electoral College when it rejected “good Presidents” such as Jackson in 1824 and Cleveland in 1888?⁵⁴⁷

Why does Lowenstein credit the Electoral College with success when it elected

⁵⁴⁵ Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008.

⁵⁴⁶ Debate entitled “Should We Dispense with the Electoral College?” sponsored by PENnumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf.

⁵⁴⁷ Lowenstein includes Thomas Jefferson on his list even though the Electoral College defeated Jefferson in 1796.

“good Presidents” such as Thomas Jefferson in 1804, but not acknowledge the failure of the Electoral College when it *defeated* Jefferson in 1796 or handed Jefferson a tie in the Electoral College in 1800 (requiring 36 ballots in the House of Representatives to resolve)?

Moreover, Lowenstein includes two Presidents on his list who were elected *before* the era when the state-by-state winner-take-all rule became widespread. Only three states used the state-by-state winner-take-all rule when George Washington was elected in 1789 and 1792.⁵⁴⁸ Only two states used the state-by-state winner-take-all rule when Thomas Jefferson was elected in 1800.⁵⁴⁹

Lowenstein also credits the winner-take-all rule for producing Theodore Roosevelt and Harry Truman, even though they both ascended to the Presidency on the death of their predecessor.

Tellingly, Lowenstein’s list of 11 Presidents fails to account for the 33 remaining Presidents produced by the Electoral College, including those who were totally ineffectual when the country was at a moment of crisis (e.g., Pierce, Buchanan, Hoover), those whose administrations were exceedingly corrupt (e.g., Harding, Grant), and those who were thoroughly mediocre and forgettable (but cannot be named here because we have forgotten their names).

9.29. MYTH ABOUT UNEQUAL TREATMENT OF VOTERS IN MEMBER AND NON-MEMBER STATES

9.29.1. MYTH: Voters in states that haven’t signed onto the compact will be treated differently than voters in states that have.

QUICK ANSWER:

- The National Popular Vote compact does not treat voters in non-member states differently than voters in member states.

MORE DETAILED ANSWER:

U.S. Senator Mitch McConnell (R–Kentucky) has stated that the National Popular Vote compact

“violates the equal protection of voters. The Equal Protection Clause of the 14th Amendment, ensures that every voter is treated equally. Yet under NPV, **voters in states that haven’t signed onto the compact will be treated differently than voters in states that have.**”⁵⁵⁰ [Emphasis added]

⁵⁴⁸New Hampshire, Maryland, and Pennsylvania used the winner-take-all rule in the nation’s first presidential election (1789) and in the second (1792).

⁵⁴⁹Only Virginia used the winner-take-all rule in the 1800 election. The legislatures of New Hampshire and Pennsylvania directly appointed presidential electors in 1800, and Maryland switched to a district system in 1796.

⁵⁵⁰McConnell, Mitch. The Electoral College and National Popular Vote Plan. December 7, 2011. Washington, DC.

The National Popular Vote compact would not treat voters in non-member states differently than voters in member states.

Voters in all 50 states and the District of Columbia would be treated equally by the National Popular Vote compact—regardless of whether their state belongs to the compact. The first clause of Article III of the compact provides:

“. . . the chief election official of each member state shall determine the number of votes for each presidential slate **in each State of the United States and in the District of Columbia** in which votes have been cast in a statewide popular election **and shall add such votes together to produce a ‘national popular vote total’** for each presidential slate.” [Emphasis added]

The popular-vote counts from *all* 50 states and the District of Columbia are included in the “national popular vote total” regardless of whether the jurisdiction is a member of the compact. That is, the compact counts the popular votes from member states on equal footing with those from non-member states. Votes from *all* states and the District of Columbia are treated equally in calculating the “national popular vote total.”

Although the National Popular Vote compact would treat all voters equally, it should be noted that the Equal Protection Clause of the 14th Amendment does not apply to interstate matters. The Equal Protection Clause of the 14th Amendment reads:

“no state shall . . . deny **to any person within its jurisdiction** the equal protection of the laws.” [Emphasis added]

As Jennings Wilson observed:

“**There is no legal precedent for inter-state equal protection claims.** Successful equal protection claims have always been brought by citizens being disadvantaged vis-à-vis other citizens of their own state.”⁵⁵¹ [Emphasis added]

The Equal Protection Clause of the 14th Amendment restricts a particular state in the manner in which it treats persons “within its jurisdiction.” The Equal Protection Clause imposes no obligation on a given state concerning a “person” in another state who is not “within its [the first state’s] jurisdiction.”

On the other hand, the current state-by-state winner-take-all system treats voters unequally in several ways:

- Four out of five voters are ignored by presidential campaigns (as discussed in section 1.2.1);

⁵⁵¹ Wilson, Jennings Jay. 2006. Bloc voting in the Electoral College: How the ignored states can become relevant and implement popular election along the way. 5 *Election Law Journal* 384 at 387.

- The current system does not reliably reflect the nationwide popular vote (as discussed in section 1.2.2); and
- Every vote is not equal under the current system (as discussed in section 1.2.3).

9.30. MYTH ABOUT VOTERS FROM NON-MEMBER STATES NOT BEING COUNTED BY THE NATIONAL POPULAR VOTE COMPACT

9.30.1. MYTH: The rights of voters from states outside the compact would be diminished because they would not have an equal opportunity to influence the selection of the President.

QUICK ANSWER:

- A quick reading of the National Popular Vote compact will disprove the claim that “For a state outside the compact, voters’ rights are diminished because they would not have an equal opportunity to influence the selection of the President in the Electoral College.”
- The National Popular Vote compact would count votes from *all* 50 states and the District of Columbia in the “national popular vote total”—regardless of whether the state belongs to the compact.
- All voters in all states would be treated equally under the National Popular Vote compact—regardless of whether their state belongs to the compact.

MORE DETAILED ANSWER:

In a *New York Times* forum on the National Popular Vote compact, Professor Emeritus Martin G. Evans of the Rotman School of Management, University of Toronto, said:

“For a state outside the compact, voters’ rights are diminished because **they would not have an equal opportunity to influence the selection of the president** in the Electoral College.” [Emphasis added]

Professor Robert Hardaway of the University of Denver Sturm College of Law said:

“The idea is as few as 13 states can enter into a conspiracy. **That is an agreement to basically cut out all of the other states.**”^{552,553} [Emphasis added]

WND published a “WND Exclusive” subtitled “Plan Would See Majority-Dem States Decide Presidency for All Voters.” The article states:

⁵⁵² Debate at the League of Women Voters of Larimer County, Colorado on June 28, 2012, involving Professor Robert Hardaway of University of Denver Sturm College of Law, Professor Robert Hoffert of Colorado State University, Elena Nuñez of Common Cause of Colorado, and Patrick Rosenstiel of Ainsley-Shea. YouTube video at 31:53. http://www.youtube.com/watch?v=U_yCSqgm_dY.

⁵⁵³ Our response to Professor Hardaway’s claim that the National Popular Vote compact would involve only 13 states is covered in section 9.1.23. Our response to Professor Hardaway’s claim that the National Popular Vote compact is a “conspiracy” is covered in section 9.16.8.

“Al Gore’s claim that an end to the Electoral College will ensure all voters get equal representation in a popular vote is contradicted by a recently released book that documents how **the ‘popular vote’ campaign could see only 14 states—those with the largest populations, most of which are majority-Democrat—decide the presidency for voters in all 50 states.**” . . .

“There is a very interesting movement under way that takes it state by state that may really have a chance of succeeding,’ [Gore] said.” . . .

“That ‘interesting movement’ is dissected in the recently released *New York Times* bestselling book, *Fool Me Twice: Obama’s Shocking Plans for Four More Years Exposed*, by Aaron Klein and Brenda J. Elliott.” . . .

“**Under the rubric of a National Popular Vote, the plan would allow the 14 most populous American states, mostly majority-Democrat, to determine the outcome of future presidential elections. The voters of the 36 less populous states would then effectively be disenfranchised,**’ warn Klein and Elliott.”⁵⁵⁴ [Emphasis added]

If one simply reads the National Popular Vote compact, it is evident that all of the above statements by Professor Martin G. Evans, Professor Robert Hardaway, and WND are false.

Voters in all 50 states and the District of Columbia would be treated equally by the National Popular Vote compact—regardless of whether their state belongs to the compact.

The popular-vote counts from *all* 50 states and the District of Columbia would be included in the “national popular vote total” regardless of whether or not the jurisdiction happens to be a member of the compact.

The first clause of Article III of the compact provides:

“ . . . the chief election official of each member state shall determine the number of votes for each presidential slate **in each State of the United States and in the District of Columbia** in which votes have been cast in a statewide popular election **and shall add such votes together to produce a ‘national popular vote total’** for each presidential slate.” [Emphasis added]

That is, the compact counts the popular votes from member states on an equal footing with those from non-member states. Votes from *all* 50 states and the District of Columbia are included in calculating the “national popular vote total.”

⁵⁵⁴ WND Exclusive: Gore’s ‘popular vote’ scheme to ensure Democrat rule? Plan would see majority-Dem states decide presidency for all voters. *WND*. August 31, 2012. <http://www.wnd.com/2012/08/gores-popular-vote-scheme-to-ensure-democrat-rule/>.

All of the above incorrect statements are apparently based on the speaker's incorrect belief that only votes from the member states are added together to determine the awarding of the electoral votes possessed by the member states.

9.31. MYTH THAT A NATIONWIDE VOTE FOR PRESIDENT WOULD FAVOR ONE POLITICAL PARTY OVER THE OTHER

9.31.1. MYTH: The Republican Party would find it difficult to win the most votes nationwide.

QUICK ANSWER:

- Nationwide voting for President would not be advantageous to either political party because, politically, the United States is an evenly divided country.
- The cumulative nationwide presidential vote for the two parties in the 20 presidential elections between 1932 and 2008 has been virtually tied—a grand total of 746,260,766 votes for the Democrats and 745,502,654 for the Republicans.
- The Republican Party has fared well in terms of the national popular vote. Since the formation of the Republican Party, nine Republicans have won more than 53% of the national popular vote, namely Ulysses Grant, Theodore Roosevelt, Warren Harding, Calvin Coolidge, Herbert Hoover, Dwight Eisenhower, Richard Nixon, Ronald Reagan, and George H.W. Bush, whereas only two Democrats have done so (Franklin Roosevelt and Lyndon Johnson).
- The candidate who is best aligned with the views and values of the country's voters generally wins the national popular vote.

MORE DETAILED ANSWER:

If Democrats had an inherent advantage in winning the national popular vote for President, we would see some evidence of this tendency in the historical record.

The United States is, politically, an evenly divided country in which the cumulative nationwide vote for the two parties from the start of the modern political era in 1932 through 2008 (table 9.25) has been virtually tied:

- 746,260,766 total votes for the Democrats and
- 745,502,654 total votes for the Republicans.

Table 9.25 shows the national popular vote for President between 1932 and 2008. Columns 4 and 5 show the Democratic and Republican margin, respectively, in each election.

The Republican Party has fared well in terms of the national popular vote. Since the formation of the Republican Party, nine Republicans have won more than 53% of the national popular vote, namely Ulysses Grant, Theodore Roosevelt, Warren Harding, Calvin Coolidge, Herbert Hoover, Dwight Eisenhower, Richard Nixon, Ronald

Table 9.25 THE NATIONAL POPULAR VOTE FOR PRESIDENT 1932–2008

ELECTION	DEMOCRAT	REPUBLICAN	D MARGIN	R MARGIN
1932	22,818,740	15,760,426	7,058,314	–
1936	27,750,866	16,679,683	11,071,183	–
1940	27,343,218	22,334,940	5,008,278	–
1944	25,612,610	22,021,053	3,591,557	–
1948	24,105,810	21,970,064	2,135,746	–
1952	27,314,992	33,777,945	–	6,462,953
1956	26,022,752	35,590,472	–	9,567,720
1960	34,226,731	34,108,157	118,574	–
1964	43,129,566	27,178,188	15,951,378	–
1968	31,275,166	31,785,480	–	510,314
1972	29,170,383	47,169,911	–	17,999,528
1976	40,830,763	39,147,793	1,682,970	–
1980	35,483,883	43,904,153	–	8,420,270
1984	37,577,185	54,455,075	–	16,877,890
1988	41,809,074	48,886,097	–	7,077,023
1992	44,909,326	39,103,882	5,805,444	–
1996	47,402,357	39,198,755	8,203,602	–
2000	50,992,335	50,455,156	537,179	–
2004	59,028,111	62,040,610	–	3,012,499
2008	69,456,898	59,934,814	9,522,084	–
Total	746,260,766	745,502,654		

Reagan, and George H.W. Bush, whereas only two Democrats have done so (Franklin Roosevelt and Lyndon Johnson).

Based on past performance, there is nothing to indicate the Republican Party is either advantaged or disadvantaged if presidential elections are decided on the basis of the national popular vote.

The candidate who is best aligned with the views and values of the country's voters generally wins the national popular vote.

Former Congressman and presidential candidate Tom Tancredo (R–Colorado) said in an article entitled “Should Every Vote Count?”

“There is another reason why I have come to support the concept of the National Popular Vote Initiative. I believe, as do many of my readers, we are a center-right nation.”⁵⁵⁵

Those who believe that the United States is inherently a center-right country should expect center-right results from a national popular vote for President. Those who believe that there is no bias in the national popular vote—including the authors of this book—should prefer a level playing field that eliminates the gaming of the system inherent in presidential campaigns that concentrate on only a handful of closely divided battleground states.

⁵⁵⁵Tancredo, Tom. Should every vote count? November 11, 2011. <http://www.wnd.com/index.php?pageId=366929>.

9.31.2. MYTH: Republican voters do not support a national popular vote.**QUICK ANSWER:**

- Republican voters support a national popular vote for President by an average of 66% in states where state-level polls are available.

MORE DETAILED ANSWER:

Republican voters support the idea of a national popular vote for President by an average of 66% in states where state-level polls are available.

Table 9.26 shows the results, by party, from these polls.⁵⁵⁶

Table 9.26 RESULTS, BY PARTY, FROM STATE-LEVEL POLLS

STATE	REPUBLICAN	DEMOCRATIC	OTHER	OVERALL
Alaska	66%	78%	69%	70%
Arizona	60%	79%	57%	67%
Arkansas	71%	88%	79%	80%
California	61%	76%	74%	70%
Colorado	56%	79%	70%	68%
Connecticut	67%	80%	71%	74%
Delaware	69%	79%	76%	75%
D.C.	48%	80%	74%	76%
Florida	68%	88%	76%	78%
Idaho	75%	84%	75%	77%
Iowa	63%	82%	77%	75%
Kentucky	71%	88%	70%	80%
Maine	70%	85%	73%	77%
Massachusetts	54%	82%	66%	73%
Michigan	68%	78%	73%	73%
Minnesota	69%	84%	68%	75%
Mississippi	75%	79%	75%	77%
Montana	67%	80%	70%	72%
Nebraska	62%	78%	63%	67%
Nevada	66%	80%	68%	72%
New Hampshire	57%	80%	69%	69%
New Mexico	64%	84%	68%	76%
New York	66%	86%	70%	79%
Ohio	65%	81%	61%	70%
Oklahoma	75%	84%	75%	81%
Oregon	70%	82%	72%	76%
Pennsylvania	68%	87%	76%	78%
South Carolina	64%	81%	68%	71%
South Dakota	67%	84%	75%	75%
Utah	66%	82%	75%	70%
Vermont	61%	86%	74%	75%
Washington	65%	88%	73%	77%
West Virginia	75%	87%	73%	81%
Wisconsin	63%	81%	67%	71%
Wyoming	66%	77%	72%	69%
Average	66%	82%	71%	74%

⁵⁵⁶ Detailed reports on all of these polls (and others), including the cross-tabs, are available at the web site of National Popular Vote at <http://www.nationalpopularvote.com/pages/polls.php>.

9.31.3. MYTH: The small states give the Republican Party an advantage in presidential elections.

QUICK ANSWER:

- Contrary to political mythology, the Republican Party gains no partisan advantage from the 13 smallest states (i.e., those with three or four electoral votes) under the current state-by-state winner-take-all system. In the six presidential elections between 1992 and 2012, the 13 smallest states have divided 7–6 in favor of the Democrats four times, 8–5 in favor of the Democrats once, and 7–6 in favor of the Republicans once.
- Seven of the 13 smallest states have almost always gone Democratic (Hawaii, Vermont, Maine, Rhode Island, Delaware, the District of Columbia, and New Hampshire), while six others have almost always gone Republican (Alaska, Idaho, Montana, Wyoming, North Dakota, and South Dakota).
- The pattern is similar for the 25 smallest states (i.e., those with seven or fewer electoral votes). The 25 smallest states divided 13–12 in favor of the Republicans in 2008 and 2012. They divided 57–58 in terms of electoral votes in 2008 and 60–56 in 2012. In 2008, the 25 smallest states were approximately tied in popular votes, with the Democrats receiving about 10 million votes, compared to the Republican's 9.8 million votes. In 2012, the Republicans led by 10.1 million to 9.2 million.

MORE DETAILED ANSWER:

The myth that the small states (i.e., those with three or four electoral votes) confer a partisan advantage on the Republican Party is prevalent because *it was once true*. However, this statement is not true today, and it has not been true for two decades.

In the 1960s and 1970s, most of the 13 smallest states usually voted Republican in most presidential elections. During that period, Rhode Island, Hawaii, and the District of Columbia were usually the only small jurisdictions that voted Democratic.

However, in the six presidential elections in the two-decade period between 1992 and 2012, seven of the 13 smallest states have gone Democratic (with only one exception in 2000⁵⁵⁷), namely

- Delaware,
- the District of Columbia,
- Hawaii,
- Maine,
- New Hampshire,
- Rhode Island, and
- Vermont.

⁵⁵⁷The exception is that George W. Bush carried New Hampshire in 2000.

During the same two-decade period, six of the 13 smallest states have gone Republican (with only one exception in 1992⁵⁵⁸), namely

- Alaska,
- Idaho,
- Montana,
- North Dakota,
- South Dakota, and
- Wyoming.

Only one of the 13 smallest states (New Hampshire) has been a closely divided battleground state during this two-decade period. Although it has been hotly contested, New Hampshire has ended up supporting the Democratic nominee in five of the six elections between 1992 and 2012.

Curiously, the Democratic presidential candidate has sometimes enjoyed a distinct political advantage among the small states because of the state-by-state winner-take-all system.

In 2004, Senator John Kerry won more electoral votes than President George W. Bush in the 13 smallest states (25 for Kerry to 19 for Bush), despite the fact that Kerry received only about two-thirds as many popular votes as Bush (453,286 for Kerry and 650,421 for Bush).

Table 9.27 BUSH'S 650,421-VOTE LEAD IN THE SIX RELIABLY REPUBLICAN SMALL STATES YIELDED 19 ELECTORAL VOTES.

STATE	BUSH	KERRY	BUSH LEAD	ELECTORAL VOTES
Alaska	151,876	86,064	65,812	3
Idaho	408,254	180,920	227,334	4
Montana	265,473	173,363	92,110	3
North Dakota	195,998	110,662	85,336	3
South Dakota	232,545	149,225	83,320	3
Wyoming	167,129	70,620	96,509	3
Total	1,421,275	770,854	650,421	19

Table 9.27 shows the 2004 presidential election results in the six reliably Republican small states. The table shows that George W. Bush's 650,421-vote lead in the six reliably Republican small states yielded him 19 electoral votes.

Table 9.28 shows the 2004 presidential election results in the seven usually-Democratic small states. The table shows that John Kerry's 453,286-vote lead yielded him 25 electoral votes. In other words, Kerry won more electoral votes than Bush with considerably fewer popular votes.

⁵⁵⁸ The exception is that Bill Clinton carried Montana in 1992 (undoubtedly because of Ross Perot's presence on the ballot).

Table 9.28 KERRY'S 453,286 VOTE LEAD IN THE SEVEN USUALLY DEMOCRATIC SMALL STATES YIELDED 25 ELECTORAL VOTES.

STATE	BUSH	KERRY	KERRY LEAD	ELECTORAL VOTES
Delaware	171,531	199,887	28,356	3
D.C.	19,007	183,876	164,869	3
Hawaii	194,109	231,318	37,209	4
Maine	330,374	395,391	65,017	4
New Hampshire	331,237	340,511	9,274	4
Rhode Island	161,654	247,407	85,753	4
Vermont	120,710	183,621	62,911	3
Total	997,385	1,441,500	453,286	25

The reason for this outcome under the current winner-take-all system is that the small red states are redder than the small blue states are blue.

Specifically, the popular-vote percentages in the reliably Republican six small states in 2004 were uniformly overwhelming:

- Alaska—64%,
- Idaho—69%,
- Montana—61%,
- North Dakota—64%,
- South Dakota—61%, and
- Wyoming—70%.

In contrast, the Democrats won three of their small states (Delaware, Hawaii, and Maine) with just 54% of the vote.⁵⁵⁹ In addition, the Democrats carried two of their small states (Vermont and Rhode Island) with only 60% of the vote—a percentage smaller than the percentage by which the Republicans carried *any* of their six small states. The District of Columbia (with three electoral votes) is the only small jurisdiction where the Democrats won by an overwhelming margin. The Democrats won the battleground state of New Hampshire by a 2% margin in 2004.

Overall, an enormous number of Republican votes in the small states were wasted because of the overwhelming victory margins in the six reliably Republican small states, compared to the Democrat's modest margins of victory in their states. This can be seen by pairing each of the six Republican states with one of the Democratic states.

- Wyoming's 96,509-vote Republican margin exceeded Vermont's 62,911-vote Democratic margin.
- Alaska's 65,812-vote Republican margin exceeded Delaware's 28,356-vote Democratic margin.

⁵⁵⁹ A 46%–54% margin is generally viewed as the boundary that places a state out of reach for the opposition during a typical presidential campaign (as discussed in section 1.2.1). Thus, the Democrats secured all the electoral votes from these three states (Delaware, Hawaii, and Maine) without having to devote any effort or money to win them.

- North Dakota's 85,336-vote Republican margin exceeded Hawaii's 37,209-vote Democratic margin.
- Montana's 92,110-vote Republican margin exceeded Rhode Island's 85,753-vote Democratic margin.
- South Dakota's 83,320-vote Republican margin exceeded Maine's 65,017-vote Democratic margin.
- Idaho's 227,334-vote Republican margin exceeded the District of Columbia's 164,869-vote Democratic margin.

To place the magnitude of these wasted Republican votes into perspective, consider the fact that George W. Bush's margin of 227,334 votes in 2004 in Idaho *alone* was almost twice his margin of 118,599 votes in the crucial and decisive state of Ohio. Presidential candidates of both parties vigorously solicited votes in Ohio on the basis of Ohio issues and values because Ohio voters were important, while they ignored Idaho issues and values.

Even if one expands the discussion from the nation's 13 smallest states (i.e., those with three or four electoral votes) to the 25 smallest states (i.e., those with seven or fewer electoral votes), the Republican Party receives no partisan advantage under the state-by-state winner-take-all system.

In the 2008 election, the 25 smallest states

- divided 12–13 by party,
- divided 57–58 in electoral votes, and
- the Democrats led with 9,965,724 votes (compared to the Republicans' 9,821,558 votes).

Table 9.29 shows that the 25 smallest states divided almost equally in 2008 in terms of number of states won, electoral votes, and the popular vote. Column 1 shows each state's number of electoral votes (EV). Columns 3 and 4 show the number of popular votes won by the Democrats (D) and the Republicans (R), respectively. Columns 5 and 6 show the number of electoral votes won by the Democrats and the Republicans, respectively.⁵⁶⁰ Columns 7 and 8 show the Democratic and Republican margins, respectively, for each state that the party carried. Column 9 shows the number of campaign events (a total of 43) out of 300 post-convention events in these states in 2008.

In the 2012 election, the 25 smallest states

- divided 12–13 by party (exactly the same states and numbers),
- divided 60–56 in electoral votes, and
- the Republicans led with 10,098,119 votes (compared to the Democrats' 9,221,230 votes).

⁵⁶⁰ Nebraska awards three of its five electoral votes by congressional district. In 2008, Barack Obama won one electoral vote by carrying the 2nd congressional district of Nebraska (the Omaha area). Thus, Nebraska's electoral votes in 2008 were divided 4–1 in favor of McCain. In 2012, Governor Romney won all three of Nebraska's congressional districts.

Table 9.29 THE 25 SMALLEST STATES DIVIDED ALMOST EQUALLY IN 2008.

EV	STATE	D VOTES	R VOTES	D EV	R EV	D MARGIN	R MARGIN	EVENTS
3	Wyoming	82,868	164,958	–	3	–	82,090	–
3	North Dakota	141,278	168,601	–	3	–	27,323	–
3	Alaska	123,594	193,841	–	3	–	70,247	–
3	South Dakota	170,924	203,054	–	3	–	32,130	–
3	Montana	231,667	242,763	–	3	–	11,096	–
3	Vermont	219,262	98,974	3	–	120,288	–	–
3	D. C.	245,800	17,367	3	–	228,433	–	1
3	Delaware	255,459	152,374	3	–	103,085	–	–
4	Hawaii	325,871	120,566	4	–	205,305	–	–
4	Rhode Island	296,571	165,391	4	–	131,180	–	–
4	Maine	421,923	295,273	4	–	126,650	–	2
4	New Hampshire	384,826	316,534	4	–	68,292	–	12
4	Idaho	236,440	403,012	–	4	–	166,572	–
5	Nebraska	333,319	452,979	1	4	–	119,660	–
5	West Virginia	303,857	397,466	–	5	–	93,609	1
5	Utah	327,670	596,030	–	5	–	268,360	–
5	New Mexico	472,422	346,832	5	–	125,590	–	8
5	Nevada	533,736	412,827	5	–	120,909	–	12
6	Arkansas	422,310	638,017	–	6	–	215,707	–
6	Kansas	514,765	699,655	–	6	–	184,890	–
6	Mississippi	554,662	724,597	–	6	–	169,935	–
7	Oklahoma	502,496	960,165	–	7	–	457,669	–
7	Iowa	828,940	682,379	7	–	146,561	–	7
7	Connecticut	997,773	629,428	7	–	368,345	–	–
7	Oregon	1,037,291	738,475	7	–	298,816	–	–
115	Total	9,965,724	9,821,558	57	58			43

Table 9.30 shows that the 25 smallest states divided almost equally in 2012 in terms of number of states won, electoral votes, and the popular vote. Column 9 shows the number of campaign events (a total of 53) out of 253 post-convention events in these states in 2012.

Appendices CC, DD, and EE show the popular vote for President for 2000, 2004, and 2008, respectively. Appendix HH shows the 2012 results.

Former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote the following in an article entitled “Should Every Vote Count?”

“Today the chase for electoral votes is a force for corruption and special-interest payoffs. I will never forget the torture of sitting in the House and watching as our ‘leadership’ went about threatening, bribing and breaking arms of my colleagues until they got the requisite number of votes to pass Bush’s trillion-dollar Medicare prescription drug plan. A bigger piece of garbage I have never seen—especially one being pushed by the Republican Party.

“One could rationally ask **why, in heaven’s name, the party of smaller government would push so hard for what was, at the time, the big-**

Table 9.30 THE 25 SMALLEST STATES DIVIDED ALMOST EQUALLY IN 2012.

EV	STATE	D VOTES	R VOTES	D EV	R EV	D MARGIN	R MARGIN	EVENTS
3	Alaska	122,640	164,676	—	3	—	42,036	—
3	Delaware	242,584	165,484	3	—	77,100	—	—
3	D.C.	267,070	21,381	3	—	245,689	—	—
3	Montana	201,839	267,928	—	3	—	66,089	—
3	North Dakota	124,966	188,320	—	3	—	63,354	—
3	South Dakota	145,039	210,610	—	3	—	65,571	—
3	Vermont	199,239	92,698	3	—	106,541	—	—
3	Wyoming	69,286	170,962	—	3	—	101,676	—
4	Hawaii	306,658	121,015	4	—	185,643	—	—
4	Idaho	212,787	420,911	—	4	—	208,124	—
4	Maine	401,306	292,276	4	—	109,030	—	—
4	New Hampshire	369,561	329,918	4	—	39,643	—	13
4	Rhode Island	279,677	157,204	4	—	122,473	—	—
5	Nebraska	302,081	475,064	—	5	—	172,983	—
5	New Mexico	415,335	335,788	5	—	79,547	—	—
5	West Virginia	238,230	417,584	—	5	—	179,354	—
6	Arkansas	394,409	647,744	—	6	—	253,335	—
6	Iowa	822,544	730,617	6	—	91,927	—	27
6	Kansas	440,726	692,634	—	6	—	251,908	—
6	Mississippi	562,949	710,746	—	6	—	147,797	—
6	Nevada	531,373	463,567	6	—	67,806	—	13
6	Utah	251,813	740,600	—	6	—	488,787	—
7	Connecticut	905,083	634,892	7	—	270,191	—	—
7	Oklahoma	443,547	891,325	—	7	—	447,778	—
7	Oregon	970,488	754,175	7	—	216,313	—	—
116	Total	9,221,230	10,098,119	56	60			53

gest increase in government since the creation of Medicare. Alas the reason was crystal clear: Bush needed Florida for his re-election.

“I wish I could say that was the only time something like that happened, but, of course, it’s not. It is part of the routine practice of buying electoral votes. I am sick of it. **Whether it’s buying Pennsylvania’s electoral votes with steel tariffs or Ohio’s with ‘No Child Left Behind,’ it all stinks to high heaven. . . .**

“Some argue that the present system protects the interests of small states, especially those that hold conservative values. However, today 12 of the 13 smallest states are ignored after party conventions and are derisively referred to as ‘flyover’ country. . . .

“Under the [National Popular Vote] plan, an evangelical voter in rural Wyoming would count the same as the union steward in Cleveland.”⁵⁶¹
[Emphasis added]

⁵⁶¹ Tancredo, Tom. Should every vote count? November 11, 2011. <http://www.wnd.com/index.php?pageId=366929>.

9.31.4. MYTH: The National Popular Vote effort is funded by left-wingers.

QUICK ANSWER:

- Over 90% of the contributions supporting the National Popular Vote effort have come—in about equal total amounts—from a pro-life, anti-*Buffett*-rule, registered Republican businessman and a pro-choice, pro-*Buffett*-rule, registered Democratic businessman.

MORE DETAILED ANSWER:

Hans von Spakovsky has stated:

“National Popular Vote Inc. is one of California’s lesser-known advocacy organizations. Its chairman, John Koza, is best known as the co-founder of Scientific Games Inc., the company that invented the instant lottery ticket.

“Now Mr. Koza **and his fellow liberal activists** want to ‘scratch off’ the Electoral College.”⁵⁶² [Emphasis added]

The facts are that over 90% of the contributions supporting the National Popular Vote effort have come—in about equal total amounts—from

- Tom Golisano (a pro-life, anti-*Buffett*-rule, registered Republican businessman residing in Florida) and
- John R. Koza (l a pro-choice, pro-*Buffett*-rule, registered Democratic businessman residing in California).

John R. Koza’s contributions have largely been spent by National Popular Vote, a 501(c)4 non-profit corporation.

Tom Golisano’s contributions have largely been spent by Support Popular Vote, a 501(c)4 non-profit corporation (originally called “National Popular Vote Initiative”).

Support for a nationwide popular vote for President has been bipartisan for some time. Appendix S shows, state by state, members of Congress who have sponsored proposed constitutional amendments for nationwide popular election of the President in recent years or who voted in favor of constitutional amendments in the 338–70 roll call in the House of Representatives in 1969 or the 1979 roll call in the Senate. As shown in appendix S, there has been at least one supporter in Congress from each of the 50 states. As of 2012, over 250 Republican state legislators have either sponsored or cast a recorded vote in favor of the National Popular Vote bill. See section 9.31.2 for recent state-level polling results showing that Republican voters support a nationwide vote for President.

⁵⁶² von Spakovsky, Hans A. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

9.31.5. MYTH: The long-term trend in the Electoral College favors the Republicans because Republican-leaning states have gained electoral votes with each recent census.

QUICK ANSWER:

- The fact that Republican-leaning states have gained population with each recent census is not necessarily helpful to the Republican cause. Population growth may upset a state's political complexion depending on the relative number of newcomers and leavers and the (usually very significant) difference in political outlook between newcomers and leavers.
- Recent rapid population growth in Virginia, North Carolina, Colorado, Nevada, and Florida was not helpful to the Republican cause because it converted states that had voted Republican for decades in presidential elections into battleground states (all won by Obama in 2008).
- Arizona's recent rapid population growth (largely due to an influx of Hispanics and, to a lesser extent, former California residents) has the potential of changing Arizona from a reliably Republican state into a battleground state (perhaps as soon as 2016 or 2020).
- Texas's recent rapid population growth (largely due to Hispanics) has the potential of changing Texas from a reliably Republican state in presidential elections into a battleground state (perhaps as soon as 2020).

MORE DETAILED ANSWER:

As a result of each recent census, Republican-leaning states have gained population (and hence electoral votes) at the expense of Democratic-leaning states. Some have argued that this fact should be interpreted as a long-term trend favoring the Republican Party in the Electoral College. In fact, this trend is not necessarily helpful to the Republican cause.

Consider the 2010 census. The Republican Party would have received 12 more electoral votes in the 2008 presidential election if the allocation of electoral votes based on the 2010 census had been in effect for the 2008 election. Five states that voted Republican in the 2008 presidential election gained electoral votes as a result of the 2010 census, namely Arizona (+1), Georgia (+1), South Carolina (+1), Utah (+1), and Texas (+4), but only two states that voted Republican in 2008 lost electoral votes, namely Louisiana (-1) and Missouri (-1). In addition, eight states that voted Democratic in the 2008 presidential election lost electoral votes as a result of the 2010 census, namely Illinois (-1), Iowa (-1), Massachusetts (-1), Michigan (-1), New Jersey (-1), New York (-2), Ohio (-2), and Pennsylvania (-1), but only three states that voted Democratic in 2008 gained electoral votes, namely Florida (+2), Nevada (+1), and Washington state (+1).⁵⁶³

⁵⁶³ See table 2.1 for the distribution of electoral votes for the elections between 1992 and 2020.

The above facts about the census do not, however, constitute a long-term trend favoring the Republicans in the Electoral College because population growth does not necessarily reinforce a state's pre-existing political complexion. In fact, population growth frequently upsets a state's political complexion.

Population growth occurs as the result of a net difference in the number of newcomers versus the number of leavers.

There is usually a considerable difference in the political outlook of

- newcomers to a state,
- leavers, and
- those staying in a state.

People come to a state, leave a state, and stay in a state because of numerous economic, demographic, and psychological factors. As a result, population growth is not necessarily advantageous to the currently dominant political party in a given state.

For example, Florida, Virginia, Colorado, Nevada, and North Carolina were reliably Republican for decades in presidential elections until recently. Virginia, Colorado, Nevada, and North Carolina were not even considered battleground states as recently as 2004. Rapid population growth converted Florida into a battleground state in 1996 (when Clinton carried the state after several decades of Republican victories at the presidential level). However, population growth upset the political equilibrium of these states with the result that Obama swept *all* of these states in 2008. Population growth not only contributed to the Republican's loss of all these states in 2008, but also increased the electoral-vote prize when the Democratic Party won them.

Arizona's recent rapid population growth (largely due to an influx of Hispanics and, to a lesser extent, newcomers from California) appears to be transforming it from a reliably Republican state in presidential elections into a battleground state (perhaps as early as 2016).⁵⁶⁴

Rapid population growth (largely due to Hispanics) in Texas (with 38 electoral votes) creates the possibility of destabilizing Republican control of the nation's second largest state (perhaps as early as 2020). As Charles Mahtesian wrote in a *Politico* article entitled "Obama's Texas Battleground Prediction":

"When Barack Obama asserted Tuesday that Texas will be a battleground state 'soon,' he was echoing the belief, commonly held among

⁵⁶⁴ Arizona has voted Republican in every presidential election since 1952, except for Johnson's win in 1964 and Clinton's win in 1996, Obama lost Arizona in 2008 by only 8%, despite Arizona being John McCain's home state. The Obama campaign tested the waters in Arizona in 2012 to determine whether it might become a battleground state. The growth of the state's Hispanic population has suggested that Arizona might soon become a battleground state. As a result, the Obama campaign opened numerous campaign offices in Arizona in early 2012. However, Arizona did not become a battleground state in 2012. The 2012 Obama campaign made similar explorations in Georgia.

Democrats, that the state’s changing demographics make the transition from red to blue inevitable.”^{565,566} [Emphasis added]

Meanwhile, there does not appear to be any Democratic-leaning big state (even among the numerous Democratic-leaning states that lost electoral votes as a result of the 2010 census) moving in the Republican direction to counter-balance possible future changes in the political environment in states such as Arizona and Texas.

9.31.6. MYTH: Nationwide voting for President would give voters of as few as 11 or 12 states a controlling majority of the Electoral College, enabling them to decide presidential elections.

QUICK ANSWER:

- Under a national popular vote, every vote in every state would be equal throughout the United States. The votes cast in the 12 biggest states would be no more, or less, valuable or controlling than votes cast anywhere else.
- Many criticisms of nationwide popular voting for President are based on a hypothetical scenario in which a candidate wins the White House by receiving 100% of the popular vote in the 12 biggest states and 0% in the remaining 39 smaller jurisdictions. Such scenarios are politically implausible because the popular vote is relatively close in the 12 biggest states (e.g., it split 54%–46% in 2012 and split 50.2%–49.8% in 2004). Moreover, *no* big state delivered more than 63% of its popular vote (that is, five out of eight votes) to *any* candidate in the 2000, 2004, 2008, or 2012 presidential elections.
- Opponents of a nationwide vote for President complain that if 100% of the voters of the 11 biggest states were to vote for one candidate, they alone could elect a President—while ignoring the fact that 50.01% of the voters of these same 11 states could elect a President *today* under the *current* state-by-state winner-take-all system.

MORE DETAILED ANSWER:

The 12 biggest states contain more than half the population of the United States and possess 53% of the electoral votes (283 of 538). In fact, the 11 biggest states contain a bare majority of the electoral votes (270 of 538).

Critics of a nationwide popular vote for President sometimes argue that only the 12 biggest states would matter under such a system.

Under the critics’ hypothetical scenario, candidates would win the White House

⁵⁶⁵ Mahtesian, Charles. Obama’s Texas battleground prediction. *Politico*. July 18, 2012.

⁵⁶⁶ Hallman, Tristan. Obama: Texas will be a battleground state “soon.” *Dallas Morning News*. July 17, 2012. The quote from Obama was “You’re not considered one of the battleground states, although that’s going to be changing soon.”

by winning 100% of the popular vote in the 12 biggest states and 0% in the 39 remaining jurisdictions (i.e., 38 states and the District of Columbia).

Referring to the National Popular Vote compact, Hans A. von Spakovsky stated in 2011:

“This would give the most populous states a **controlling majority** of the Electoral College, **letting the voters of as few as 11 states control the outcome of presidential elections.**”⁵⁶⁷ [Emphasis added]

Senator Mitch McConnell said in 2011:

“**This would mean that from now on, just 12 states could decide our presidential elections.** A few of the most populous and most liberal states determine who actually wins.”⁵⁶⁸ [Emphasis added]

Ed Gillespie stated in 2011:

“With 11 of the most populous states accounting for 56 percent⁵⁶⁹ of the population, **the presidential election will essentially become a race for a dozen states with big cities.**”⁵⁷⁰ [Emphasis added]

A 2011 letter signed by House Speaker John Boehner (R–Ohio), Senator Mitch McConnell (R–Kentucky), and Governor Rick Perry (R–Texas) stated:

“The goal of this effort is clear: to put the fate of every presidential election in the hands of the voters in as few as 11 states and thus to **give a handful of populous states a controlling majority of the Electoral College.**”⁵⁷¹ [Emphasis added]

None of the above quotations about 11 or 12 states “controlling” the national popular vote reflects political reality.

It is the *current* state-by-state winner-take-all system—*not* the national popular vote approach—that would theoretically permit the 11 most populous states to control the outcome of presidential elections.

Under the *current* winner-take-all system, a candidate could win the Presidency by winning only 50.01% of the popular vote in the 11 biggest states. That is, under the *current* system, a President could be elected with about a quarter of the nationwide popular vote.

⁵⁶⁷ Von Spakovsky, Hans A. Protecting Electoral College from popular vote. *Washington Times*, October 26, 2011.

⁵⁶⁸ McConnell, Mitch. The Electoral College and National Popular Vote Plan. December 7, 2011. Washington, DC.

⁵⁶⁹ Note that Gillespie’s statement that the 11 biggest states possessed 56% of the nation’s population was correct according to the 2000 census, but not according to the 2010 census. Hence, criticisms of this genre are couched in terms of both 11 and 12 states.

⁵⁷⁰ Gillespie, Ed. National Popular Vote compact won’t be popular, or democratic. *Washington Examiner*. January 30, 2012.

⁵⁷¹ Letter dated June 29, 2011.

Opponents of a nationwide vote for President complain that if 100% of the voters of the 11 biggest states were to vote for one candidate, they could elect a President—while ignoring the fact that 50.01% of the voters of these same 11 states could elect a President *today* under the *current* state-by-state winner-take-all system.

That is, 26% of the nation's voters could elect a President under the *current system*.

Moreover, getting 50.01% in 11 states is a far more likely scenario than getting 100% of the vote from these 11 states.

Curiously, the current system permits even fewer than 26% of the voters to elect a President. According to calculations (shown in table 9.31) made by MIT Professor Alexander S. Belenky using actual voter turnout data, an Electoral-College majority theoretically could have been won, under the *current* winner-take-all system, with between 16% and 22% of the national popular vote in the 15 elections between 1948 and 2004.⁵⁷²

Table 9.31 SMALLEST PERCENTAGE OF VOTERS WHO THEORETICALLY COULD HAVE ELECTED A PRESIDENT UNDER THE CURRENT SYSTEM

YEAR	PERCENTAGE
1948	16.072%
1952	17.547%
1956	17.455%
1960	17.544%
1964	18.875%
1968	19.97%
1972	20.101%
1976	21.202%
1980	21.348%
1984	21.53%
1988	21.506%
1992	21.944%
1996	22.103%
2000	21.107%
2004	21.666%

The implausibility of the hypothetical scenario in which one candidate receives 100% of the popular vote from the 12 biggest states is demonstrated by the fact that *no* big state delivered more than 63% of its popular vote (that is, five out of eight votes) to *any* candidate in the 2000, 2004, 2008, or 2012 presidential elections.

Table 9.32 shows the percentage of the popular vote won by the winner of the 12 biggest states between 2000 and 2012.

In fact, many of the winning percentages in table 9.32 are *near 50%* because many of the 12 biggest states (e.g., Ohio, Florida, Virginia, Pennsylvania, Michigan, and North Carolina) were battleground states in one or more elections shown in the table.

The 12 biggest states are not, of course, all Democratic bastions. In both 2000 and 2004, for example, the 12 biggest states divided 6–6 between the political parties (with

⁵⁷² Belenky, Alexander S. 2008. A 0-1 knapsack model for evaluating the possible Electoral College performance in two-party U.S. presidential elections. *Mathematical and Computer Modelling*. Volume 48. Pages 665–676.

Table 9.32 POPULAR-VOTE PERCENTAGE WON BY THE WINNER OF THE 12 BIGGEST STATES 2000–2012

STATE	2000	2004	2008	2012
California	53%	54%	61%	60%
Texas	59%	61%	56%	57%
New York	60%	58%	63%	63%
Florida	49%	52%	51%	50%
Illinois	55%	55%	62%	57%
Pennsylvania	51%	51%	55%	52%
Ohio	50%	51%	52%	51%
Michigan	51%	51%	57%	54%
Georgia	55%	58%	52%	53%
New Jersey	56%	53%	57%	58%
North Carolina	56%	56%	49%	50%
Virginia	52%	54%	53%	51%

Texas, Florida, Ohio, North Carolina, Georgia, and Virginia voting for George W. Bush in both years).

The popular vote in the 12 biggest states split 54%–46% in 2012 and split 50.2%–49.8% in 2004.

In short, no candidate could win 100% of the popular vote in the 12 biggest states (or, indeed, any percentage close to 100%).

The relatively close campaigns of 2004 and 2012 convey a far more realistic picture of presidential politics than any contrived scenario.

The winner’s two-party popular-vote percentage was almost identical in these two re-election campaigns:

- 51.2% for Bush in 2004,⁵⁷³ and
- 51.96% for Obama in 2012.⁵⁷⁴

The two elections were mirror images of one another in terms of the popular-vote margin generated by the 12 biggest states and the 39 smallest jurisdictions:

- In 2004, Bush fought Kerry to a near-tie in the popular vote in the 12 biggest states (50.2% to 49.8%), and Bush’s margin from the 39 smallest jurisdictions was roughly equal to his nationwide margin (3,012,171 votes).
- In 2012, Obama fought Romney to a near-tie in the popular vote in the 39 smallest jurisdictions (51% to 49%), and Obama’s margin from the 12 biggest states was roughly equal to his nationwide margin (4,966,945).

In 2004, the voters in the 39 smallest jurisdictions did not “control the outcome of the presidential election” in terms of the national popular vote. Every vote from every state—not just those 39 states—contributed to producing Bush’s nationwide popular

⁵⁷³In 2004, Bush received 62,040,610 votes nationwide and Kerry received 59,028,439 votes. Bush’s nationwide margin of victory was 3,012,171 votes. Bush received 51.2% of these 121,069,049 votes.

⁵⁷⁴In 2012, Obama received 65,897,727 votes nationwide and Romney received 60,930,782 votes. Obama’s nationwide margin of victory was 4,966,945 votes. Obama received 51.96% of these 126,828,509 votes.

vote total. The voters in the 39 smallest jurisdictions were not any more important or “controlling” than the voters of the 12 biggest states.

Similarly, in 2012, the voters in the 12 biggest states did not “control the outcome of the presidential election” in terms of the national popular vote. Every vote from every state contributed to producing Obama’s nationwide popular vote total. The voters in the 12 biggest states were not any more important or “controlling” than the voters of the 39 smallest jurisdictions.

2004—Bush Ties in the 12 Biggest States

In 2004, the 69,323,699 votes cast in the 12 biggest states divided almost equally:

- 34,784,178 votes were for Kerry, and
- 34,539,521 votes were for Bush.

Kerry’s slender 244,657-vote margin of victory in the 12 biggest states was about *one-third of one percent* of the 69,323,699 votes cast in those states (and about one-fifth of one percent of the votes cast nationwide).

Kerry received 50.2% of the popular vote from the 12 biggest states, and Bush received 49.8%.

Having fought Kerry to a near-tie in the 12 biggest states, Bush then won the 39 smallest jurisdictions by a margin of 3,256,828 votes (out of 51,745,350 votes cast in those states), thereby ending up with a margin of victory of 3,012,171 in the national popular vote.

Table 9.33 shows the popular vote for Senator John Kerry and President George W. Bush in the 2004 election in the 12 biggest states. Column 4 shows Bush’s percentage of the two-party vote. Columns 5 and 6 show the Republican and Democratic margins, respectively, for each state. Columns 7 and 8 show the Republican and Democratic electoral votes, respectively, for each state.

Table 9.33 RESULTS OF THE 2004 ELECTION IN THE 12 BIGGEST STATES

STATE	BUSH	KERRY	R PERCENT	R MARGIN	D MARGIN	R EV	D EV
California	5,509,826	6,745,485	45.0%	–	1,235,659	–	55
Texas	4,526,917	2,832,704	61.5%	1,694,213	–	34	–
New York	2,962,567	4,314,280	40.7%	–	1,351,713	–	31
Florida	3,964,522	3,583,544	52.5%	380,978	–	27	–
Illinois	2,345,946	2,891,550	44.8%	–	545,604	–	21
Pennsylvania	2,793,847	2,938,095	48.7%	–	144,248	–	21
Ohio	2,859,768	2,741,167	51.1%	118,601	–	20	–
Michigan	2,313,746	2,479,183	48.3%	–	165,437	–	17
Georgia	1,914,254	1,366,149	58.4%	548,105	–	15	–
New Jersey	1,670,003	1,911,430	46.6%	–	241,427	–	15
North Carolina	1,961,166	1,525,849	56.2%	435,317	–	15	–
Virginia	1,716,959	1,454,742	58.4%	262,217	–	13	–
Totals	34,539,521	34,784,178	49.8%	3,439,431	3,684,088	124	160

Table 9.34 shows the popular vote for President George W. Bush and Senator John Kerry in the 2004 election in the 39 smallest jurisdictions.

Table 9.34 RESULTS OF THE 2004 ELECTION IN THE 39 SMALLEST JURISDICTIONS

STATE	BUSH	KERRY	R PERCENT	R MARGIN	D MARGIN	R EV	D EV
Massachusetts	1,071,109	1,803,800	37.3%	–	732,691	–	12
Indiana	1,479,438	969,011	60.4%	510,427	–	11	–
Missouri	1,455,713	1,259,171	53.6%	196,542	–	11	–
Tennessee	1,384,375	1,036,477	57.2%	347,898	–	11	–
Washington	1,304,894	1,510,201	46.4%	–	205,307	–	11
Arizona	1,104,294	893,524	55.3%	210,770	–	10	–
Maryland	1,024,703	1,334,493	43.4%	–	309,790	–	10
Minnesota	1,346,695	1,445,014	48.2%	–	98,319	–	10
Wisconsin	1,478,120	1,489,504	49.8%	–	11,384	–	10
Alabama	1,176,394	693,933	62.9%	482,461	–	9	–
Colorado	1,101,255	1,001,732	52.4%	99,523	–	9	–
Louisiana	1,102,169	820,299	57.3%	281,870	–	9	–
Kentucky	1,069,439	712,733	60.0%	356,706	–	8	–
South Carolina	937,974	661,699	58.6%	276,275	–	8	–
Connecticut	693,826	857,488	44.7%	–	163,662	–	7
Iowa	751,957	741,898	50.3%	10,059	–	7	–
Oklahoma	959,792	503,966	65.6%	455,826	–	7	–
Oregon	866,831	943,163	47.9%	–	76,332	–	7
Arkansas	572,898	469,953	54.9%	102,945	–	6	–
Kansas	736,456	434,993	62.9%	301,463	–	6	–
Mississippi	684,981	458,094	59.9%	226,887	–	6	–
Nebraska	512,814	254,328	66.8%	258,486	–	5	–
Nevada	418,690	397,190	51.3%	21,500	–	5	–
New Mexico	376,930	370,942	50.4%	5,988	–	5	–
Utah	663,742	241,199	73.3%	422,543	–	5	–
West Virginia	423,778	326,541	56.5%	97,237	–	5	–
Hawaii	194,191	231,708	45.6%	–	37,517	–	4
Idaho	409,235	181,098	69.3%	228,137	–	4	–
Maine	330,201	396,842	45.4%	–	66,641	–	4
New Hampshire	331,237	340,511	49.3%	–	9,274	–	4
Rhode Island	169,046	259,760	39.4%	–	90,714	–	4
Alaska	190,889	111,025	63.2%	79,864	–	3	–
Delaware	171,660	200,152	46.2%	–	28,492	–	3
D. C.	21,256	202,970	9.5%	–	181,714	–	3
Montana	266,063	173,710	60.5%	92,353	–	3	–
North Dakota	196,651	111,052	63.9%	85,599	–	3	–
South Dakota	232,584	149,244	60.9%	83,340	–	3	–
Vermont	121,180	184,067	39.7%	–	62,887	–	3
Wyoming	167,629	70,776	70.3%	96,853	–	3	–
Total	27,501,089	24,244,261	53.1%			162	92

2012—Obama Ties in the 39 Smallest Jurisdictions

In 2012, the 54,209,884 votes cast in the 39 smallest jurisdictions divided almost equally:

- 26,578,682 votes were for Obama, and
- 27,631,202 were for Romney.

Romney's 1,052,520-vote margin in the 39 smallest jurisdictions give him a slender 51%–49% win from the 54,209,884 votes cast in those states.

Having fought Romney to a near-tie in the 39 smallest jurisdictions, Obama then

Table 9.35 RESULTS OF THE 2012 ELECTION IN THE 39 SMALLEST JURISDICTIONS.

STATE	ROMNEY	OBAMA	R PERCENT	R MARGIN	D MARGIN	R EV	D EV
Washington	1,290,670	1,755,396	42.4%	—	464,726	—	12
Arizona	1,233,654	1,025,232	54.6%	208,422	—	11	—
Indiana	1,420,543	1,152,887	55.2%	267,656	—	11	—
Massachusetts	1,188,314	1,921,290	38.2%	—	732,976	—	11
Tennessee	1,462,330	960,709	60.4%	501,621	—	11	—
Maryland	971,869	1,677,844	36.7%	—	705,975	—	10
Minnesota	1,320,225	1,546,167	46.1%	—	225,942	—	10
Missouri	1,482,440	1,223,796	54.8%	258,644	—	10	—
Wisconsin	1,410,966	1,620,985	46.5%	—	210,019	—	10
Alabama	1,255,925	795,696	61.2%	460,229	—	9	—
Colorado	1,185,050	1,322,998	47.2%	—	137,948	—	9
South Carolina	1,071,645	865,941	55.3%	205,704	—	9	—
Kentucky	1,087,190	679,370	61.5%	407,820	—	8	—
Louisiana	1,152,262	809,141	58.7%	343,121	—	8	—
Connecticut	634,892	905,083	41.2%	—	270,191	—	7
Oklahoma	891,325	443,547	66.8%	447,778	—	7	—
Oregon	754,175	970,488	43.7%	—	216,313	—	7
Arkansas	647,744	394,409	62.2%	253,335	—	6	—
Iowa	730,617	822,544	47.0%	—	91,927	—	6
Kansas	692,634	440,726	61.1%	251,908	—	6	—
Mississippi	710,746	562,949	55.8%	147,797	—	6	—
Nevada	463,567	531,373	46.6%	—	67,806	—	6
Utah	740,600	251,813	74.6%	488,787	—	6	—
Nebraska	475,064	302,081	61.1%	172,983	—	5	—
New Mexico	335,788	415,335	44.7%	—	79,547	—	5
West Virginia	417,584	238,230	63.7%	179,354	—	5	—
Hawaii	121,015	306,658	28.3%	—	185,643	—	4
Idaho	420,911	212,787	66.4%	208,124	—	4	—
Maine	292,276	401,306	42.1%	—	109,030	—	4
New Hampshire	329,918	369,561	47.2%	—	39,643	—	4
Rhode Island	157,204	279,677	36.0%	—	122,473	—	4
Alaska	164,676	122,640	57.3%	42,036	—	3	—
Delaware	165,484	242,584	40.6%	—	77,100	—	3
D.C.	21,381	267,070	7.4%	—	245,689	—	3
Montana	267,928	201,839	57.0%	66,089	—	3	—
North Dakota	188,320	124,966	60.1%	63,354	—	3	—
South Dakota	210,610	145,039	59.2%	65,571	—	3	—
Vermont	92,698	199,239	31.8%	—	106,541	—	3
Wyoming	170,962	69,286	71.2%	101,676	—	3	—
Total	27,631,202	26,578,682	51.0%			137	118

won the 12 biggest states by a margin of 6,019,465 votes (out of 72,618,625 votes cast in those states), thereby ending up with a margin of victory of 4,966,945 in the national popular vote.

Table 9.35 shows the popular vote for Governor Mitt Romney and President Barack Obama in the 2012 election in the 39 smallest jurisdictions.

Table 9.36 shows the popular vote for Governor Mitt Romney and President Barack Obama in the 2012 election in the 12 biggest states.

Table 9.36 RESULTS OF THE 2012 ELECTION IN THE 12 BIGGEST STATES

STATE	ROMNEY	OBAMA	R PERCENT	R MARGIN	D MARGIN	R EV	D EV
Virginia	1,822,522	1,971,820	48.0%	–	149,298	–	13
New Jersey	1,478,088	2,122,786	41.0%	–	644,698	–	14
North Carolina	2,270,395	2,178,391	51.0%	92,004	–	15	–
Georgia	2,078,688	1,773,827	54.0%	304,861	–	16	–
Michigan	2,115,256	2,564,569	45.2%	–	449,313	–	16
Ohio	2,661,407	2,827,621	48.5%	–	166,214	–	18
Illinois	2,135,216	3,019,512	41.4%	–	884,296	–	20
Pennsylvania	2,680,434	2,990,274	47.3%	–	309,840	–	20
Florida	4,162,341	4,235,965	49.6%	–	73,624	–	29
New York	2,485,432	4,471,871	35.7%	–	1,986,439	–	29
Texas	4,569,843	3,308,124	58.0%	1,261,719	–	38	–
California	4,839,958	7,854,285	38.1%	–	3,014,327	–	55
Total	33,299,580	39,319,045	45.9%			69	214

Appendix HH presents the 2012 two-party presidential vote for all 50 states and the District of Columbia in alphabetical order.⁵⁷⁵ See table 9.45 for the presidential vote for Barack Obama (D), Mitt Romney (R), Gary Johnson (Libertarian), Jill Stein (Green), and the other 22 minor-party and independent candidates who were on the ballot in 2012 in at least one state.

Erroneous Statements about Big States May Possibly Be the Result of Misunderstanding the Way that the National Popular Vote Compact Operates

The four statements quoted at the beginning of this section are so far removed from what actually happens in the real world that we should mention the following possibility. *It is possible that all four statements quoted at the beginning of this section are based on a total misunderstanding of how the National Popular Vote compact would operate.*

⁵⁷⁵ The 2012 election returns shown in table 9.35, table 9.36, table 9.45, and appendix HH were obtained from the National Archives and Record Administration (NARA) web site at <http://www.archives.gov/federal-register/electoral-college/2012/popular-vote.html>. The NARA web site presents the number of votes shown on each state's Certificate of Ascertainment. There are two differences between our tables and that on the NARA web site. First, the NARA web site presents votes *by party*, whereas our table is based on votes *by candidate*. This difference in treatment creates a difference in the case of New York (which uses fusion voting). The NARA web site (as of January 4, 2013) showed the 141,056 votes that the Obama-Biden slate received on the Working Families Party line (and contained in New York's Certificate of Ascertainment) as minor-party votes in column 6 of their table, instead of showing these votes as Obama-Biden votes in column 2 of their table. Similarly, the web site shows the 256,171 votes that the Romney-Ryan slate received on the Conservative Party line as minor-party votes in column 6, instead of showing these votes as Romney-Ryan votes in column 3. Our table puts these Obama-Biden votes and Romney-Ryan votes in columns 2 and 3, respectively, in conformity with the practice of the New York State Board of Elections. Thus, our table shows (in column 6) only 8,652 votes for minor-party candidates in New York. See section 2.10 for additional details on fusion in New York and figure 2.11 for an example of a presidential ballot in New York. Secondly, our table reflects the adjustment (certified on December 31, 2012) to New York state's vote totals resulting from the fact that an executive order issued on the evening before Election Day allowed voters in counties affected by Hurricane Sandy to cast a provisional ballot at *any* polling place in the state. A total of 400,629 additional ballots (over 300,000 in New York City alone) were counted as a result of this executive order.

The National Popular Vote compact would take effect when enacted by states possessing a majority of the electoral votes (270 of 538).

The assertion that the National Popular Vote compact would

“give a handful of populous states a controlling majority of the Electoral College”

could conceivably be true *if* the National Popular Vote compact were written so that it counted *only* the popular votes of the states belonging to the compact. *If* that were the case (and it is not) *and if* one makes the additional implausible assumption that the compact consisted only of the 12 biggest states, the four statements would be true. However, the National Popular Vote compact would not operate that way even if only the 12 biggest states belonged to the compact.

The National Popular Vote compact would add up the votes cast in *all* 50 states and the District of Columbia to determine the national popular-vote winner *regardless of whether a state is a member of the compact*. Under the National Popular Vote compact, every vote in *all* 50 states would be counted in arriving at the national popular vote total for each candidate. Under the National Popular Vote compact, there would be nothing special about a vote cast in the member states (or in the 12 biggest states) in comparison to votes cast anywhere else. Every vote would be equal throughout the United States under the National Popular Vote compact.

Note also that the National Popular Vote compact has not been enacted primarily by big states. As of 2012, the compact has been enacted by nine jurisdictions, including three small jurisdictions (Hawaii, Vermont, and the District of Columbia), three medium-sized states (Maryland, Massachusetts, and Washington state), and three of the 12 biggest states (California, Illinois, and New Jersey).

Role of Big Cities

Many of the critics of a nationwide popular vote for President who argue that the 12 biggest states would control a nationwide election for President also claim that big cities, such as Los Angeles, would control a nationwide election.

Big cities, such as Los Angeles, do not even control California elections, as evidenced by the historical fact that Republicans Ronald Reagan, George Deukmejian, Pete Wilson, and Arnold Schwarzenegger were all elected Governor without ever carrying Los Angeles (or San Francisco, San Jose, Oakland, or most of the other big cities in the state). If Los Angeles cannot control statewide elections in its own state, it can hardly control a nationwide election.

While is certainly true that most of the biggest cities in the country vote Democratic, smaller cities and towns, exurbs, rural areas, and many suburbs usually vote Republican.

If big cities controlled the outcome of elections, every Governor and every U.S. Senator would be a Democrat in every state with a significant city. There are, of course, examples from every state with a significant city, of Republicans winning races for Governor and U.S. Senator without ever carrying the state’s biggest city.

Table 9.37 POPULATION OF THE 50 BIGGEST U.S. CITIES

RANK	CITY	2010 POPULATION	RANK	CITY	2010 POPULATION
1	New York	8,175,133	26	Nashville	601,222
2	Los Angeles	3,792,621	27	Louisville	597,337
3	Chicago	2,695,598	28	Milwaukee	594,833
4	Houston	2,099,451	29	Portland	583,776
5	Philadelphia	1,526,006	30	Oklahoma City	579,999
6	Phoenix	1,445,632	31	Las Vegas	583,756
7	San Antonio	1,327,407	32	Albuquerque	545,852
8	San Diego	1,307,402	33	Tucson	520,116
9	Dallas	1,197,816	34	Fresno	494,665
10	San Jose	945,942	35	Sacramento	466,488
11	Jacksonville	821,784	36	Long Beach	462,257
12	Indianapolis	820,445	37	Kansas City	459,787
13	Austin	790,390	38	Mesa	439,041
14	San Francisco	805,235	39	Virginia Beach	437,994
15	Columbus	787,033	40	Atlanta	420,003
16	Fort Worth	741,206	41	Colorado Springs	416,427
17	Charlotte	731,424	42	Raleigh	403,892
18	Detroit	713,777	43	Omaha	408,958
19	El Paso	649,121	44	Miami	399,457
20	Memphis	646,889	45	Tulsa	391,906
21	Boston	617,594	46	Oakland	390,724
22	Seattle	608,660	47	Cleveland	396,815
23	Denver	600,158	48	Minneapolis	382,578
24	Baltimore	620,961	49	Wichita	382,368
25	Washington	601,723	50	Arlington, Texas	365,438
Total				46,795,097	

The origins of the myth about big cities may stem from the incorrect belief that big cities are bigger than they actually are, and that big cities account for a greater fraction of the nation's population than they actually do.

A look at our country's actual demographics contradicts these misconceptions concerning big cities.

Table 9.37 shows the population of the nation's 50 biggest cities according to the 2010 census.

The combined population of the nation's five biggest cities (New York, Los Angeles, Chicago, Houston, and Philadelphia) constitutes only 6% of the nation's population of 308,745,538 (based on the 2010 census).

The combined population of the 20 biggest cities constitutes only 10% of the nation's population. To put this group of 20 cities in perspective, Memphis is the nation's 20th biggest city. Memphis had a population of 646,889 in 2010.

The combined population of the 50 biggest cities constitutes only 15% of the nation's population. To put this group of 50 cities in perspective, Arlington, Texas, is the nation's 50th biggest city (and had a population of 365,438 in 2010).

To put it another way, 85% of the population of the United States lives in places with a population of less than 365,000 (the population of Arlington, Texas).

Moreover, the population of the nation's 50 biggest cities is declining. In 2000, the 50 biggest cities together accounted for 19% of the nation's population (compared to 15% in 2010).

Even if one makes the far-fetched assumption that a candidate could win 100% of the votes in the nation's 50 biggest cities, that candidate would win only 15% of the national popular vote.

In a nationwide vote for President, a vote cast in a big city would be no more (or less) valuable or controlling than a vote cast in a suburb, an exurb, a small town, or a rural area.

When every vote is equal and the winner is the candidate who receives the most popular votes, candidates know that they need to solicit voters throughout their entire constituency in order to win.

Perhaps the most convincing evidence for the fact that big cities do not control elections comes from looking at the way that presidential races are actually run today.

Inside a battleground state in a presidential election *today*, every vote is equal, and the winner is the candidate who receives the most popular votes.

When presidential candidates campaign to win the electoral votes of a closely divided battleground state, they campaign throughout the state. The big cities do not receive all the attention—much less control the outcome. Cleveland and Miami have certainly not received all the attention when presidential candidates have campaigned in the closely divided battleground states of Ohio and Florida. Moreover, Cleveland and Miami manifestly do not control the statewide outcomes in Ohio and Florida, as evidenced by the outcome of the 2000 and 2004 presidential elections in those states. The Democrats carried both Cleveland and Miami in 2000 and 2004, but the Republicans carried both states. In fact, Senator John Kerry won the five biggest cities in Ohio in 2004, but he did not win the state.

In summary, under the National Popular Vote compact, every vote would be equal throughout the United States. Votes cast in all 50 states and the District of Columbia would be added together to determine the national popular vote winner. A vote cast in a big city or state would be no more, or less, valuable or “controlling” than a vote cast anywhere else.

9.31.7. MYTH: Candidates would concentrate on Democratic-leaning metropolitan markets because of lower advertising costs.

QUICK ANSWER:

- The cost per impression of television advertising (by far the costliest component of presidential campaigns) is generally higher—not lower—in major metropolitan media markets.

MORE DETAILED ANSWER:

John Samples of the Cato Institute has stated:

“NPV will encourage presidential campaigns to focus their efforts in **dense media markets where costs per vote are lowest**. . . .

“In general, because of the relative costs of attracting votes, the NPV proposal seems likely at the margin to **attract candidate attention to populous states**.”⁵⁷⁶ [Emphasis added]

Claremont College Professor Michael Uhlmann stated in a January 20, 2012, debate at the Sutherland Institute in Salt Lake City:

“Under the National Popular Vote system, necessarily, there’s going to be tilting toward where the greater masses of votes are contained—in the larger cities and the immediate suburbs. That’s where the votes are. **That’s where they can be reached the most cheaply. That’s where the maximum bang for the media buck gets paid**. I think that’s the likely tendency.”⁵⁷⁷ [Emphasis added]

The arguments made by both Samples and Uhlmann are contrary to the facts.

Television advertising (by far the costliest component of presidential campaigns) is generally *higher* on a per-impression basis in the larger media markets than in smaller markets.

Based on 488 quotations from television stations in media markets of various sizes for 30-second prime-time television ads for the weeks of October 15 and 22, 2012, compiled by Ainsley-Shea (a Minneapolis public relations firm) in July 2012, the average cost per impression was:

- 4.235 cents for the 1st–5th markets,
- 4.099 cents for the 26th–30th markets, and
- 3.892 cents for the 101st–105th markets.

The details of television advertising costs in the 1st, 26th, and 101st largest media markets further illustrate the conclusion that television advertising is generally more expensive in the larger media markets than in smaller markets.

Table 9.38 shows the cost of a 30-second prime-time television slot in New York City—the nation’s No. 1 media market. Columns 1, 2, and 3 show the station, the time of day (all P.M.), and the program name, respectively. Columns 4, 5, and 6 show the

⁵⁷⁶ Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008.

⁵⁷⁷ The debate at the Sutherland Institute on January 20, 2012, in Salt Lake City involved Dr. John R. Koza, Chair of National Popular Vote, Claremont College Professor Michael Uhlmann, and Trent England (a lobbyist opposing the National Popular Vote compact and Vice-President of the Evergreen Freedom Foundation of Olympia, Washington). The event was moderated by Sutherland President Paul T. Mero.

**Table 9.38 TELEVISION ADS IN NEW YORK CITY—THE NATION'S NO. 1 MEDIA MARKET—
AVERAGED 5.190 CENTS PER IMPRESSION.**

STATION	TIME	PROGRAM	RATING	SHARE	GROSS RATING POINTS	COST	COST PER 1000
WABC	M 10-11	Castle	4.2	13.0%	8.4	\$60,027	\$46.58
WABC	Tu 9-10	Happy Endings	7.4	16.0%	14.8	\$70,032	\$31.06
WABC	W 10-11	Nashville	4.4	10.2%	8.8	\$70,032	\$51.55
WABC	Th 9-10	Grey's Anatomy	5.1	11.1%	10.2	\$100,045	\$63.94
WABC	F 8-9	Shark Tank	1.4	4.0%	2.8	\$36,016	\$81.45
WABC	Sa 8-11	ABC College Football	1	3.8%	2	\$24,011	\$74.53
WABC	Su 7-8	America's Funniest Home Videos	1.3	4.4%	2.6	\$20,009	\$49.26
WNBC	M 8-10	The Voice	1.3	3.6%	2.6	\$80,036	\$203.05
WNBC	Tu 10-11	Parenthood	2.8	6.4%	5.6	\$45,020	\$52.45
WNBC	W 9-10	Law & Order SVU	3.4	7.5%	6.8	\$60,027	\$57.14
WNBC	Th 10-11	Rock Center	2.6	6.1%	5.2	\$30,014	\$37.50
WNBC	F 10-11	Dateline FR-NBC	2	5.0%	4	\$25,011	\$41.67
WNBC	Sa 9-10	Dateline	1	3.6%	2	\$15,007	\$49.02
WNBC	Su 8:15-11:30	NFL Regular Season Football	6.8	20.1%	13.6	\$100,045	\$47.98
WCBS	M 8-9	How I met your mother/Partners	4.1	12.0%	8.2	\$60,027	\$47.85
WCBS	Tu 10-11	Vegas	4.9	11.1%	9.8	\$50,023	\$33.47
WCBS	W 8-9	Survivors	3.6	8.8%	7.2	\$50,023	\$45.37
WCBS	Th 8-9	BIG BANG-CBS/RLS-ENGMNT-CBS	5.6	13.3%	11.2	\$80,036	\$46.78
WCBS	F 8-9	CSI:NY	3.3	9.2%	6.6	\$30,014	\$29.41
WCBS	Sa 9-10	Average	2.2	7.9%	4.4	\$13,006	\$19.40
WCBS	Su 10-11	The Mentalist	3.2	9.7%	6.4	\$60,027	\$61.60
WPIX	M 8-10	90210/Gossip Girl	0.8	2.2%	1.6	\$28,013	\$115.70
WPIX	Tu 8-10	Hart of Dixie/Emily Owens	1.1	2.5%	2.2	\$28,013	\$81.87
WPIX	W 8-10	Arrow/Supernatural	0.7	1.7%	1.4	\$28,013	\$127.27
WPIX	Th 8-10	Vampire Diaries/Beauty	2.4	5.4%	4.8	\$28,013	\$38.25
WPIX	F 8-10	Top Model/Nikita	0.8	2.2%	1.6	\$17,008	\$66.93
WPIX	Sa 8-10	Friends	0.2	0.9%	0.4	\$17,008	\$223.68
WPIX	Su 8-10	Seinfeld	0.3	0.9%	0.6	\$17,008	\$173.47
Total					155.8	\$1,241,558	\$51.90

rating,⁵⁷⁸ share, and gross rating points (GRP), respectively, for adults age 18 and older. Column 7 shows the cost of the slot. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the media market's population of 15,334,000). The average cost for New York City was \$51.90 per 1,000 impressions—5.190 cents per impression.

The similarly computed cost of a 30-second prime-time television slot in Los Angeles—the nation's No. 2 media market—averaged \$56.53 per 1,000 impressions—5.653 cents per impression.

⁵⁷⁸The Nielsen "Live+3" ratings track both live airings and DVR playback (through 3:00 a.m.). Based on November 2011 DMA.

Table 9.39 TELEVISION ADS IN INDIANAPOLIS—THE NATION'S NO. 26 MEDIA MARKET—AVERAGED 3.980 CENTS PER IMPRESSION.

STATION	TIME	PROGRAM	RATING	SHARE	GROSS RATING POINTS	COST	COST PER 1000
WRTV	M 8-10	Dancing with the Stars	8.5	15.6%	17	\$16,007	\$44.94
WRTV	Tu 10-11	Private Practice	6	12.6%	12	\$16,007	\$63.49
WRTV	W 10-11	Nashville	5.5	12.6%	11	\$16,007	\$69.57
WRTV	Th 9-10	Grey's Anatomy	6.8	12.4%	13.6	\$20,009	\$70.42
WRTV	F 9-10	Primetime	2	4.4%	4	\$10,005	\$119.05
WRTV	Sa 8-11	Saturday Movie	2.7	7.1%	5.4	\$4,802	\$42.86
WRTV	Su 7-8	America's Funniest Home Videos	2.2	4.8%	4.4	\$12,005	\$130.43
WTHR	M 10-11	Revolution	3.2	7.1%	6.4	\$6,003	\$44.78
WTHR	Tu 10-11	Parenthood-NBC	4	8.4%	8	\$8,004	\$47.62
WTHR	W 9-10	Law & Order	6	12.1%	12	\$7,003	\$27.78
WTHR	Th 9-10	Office/Parks & Recreation	4.4	8.1%	8.8	\$8,004	\$43.48
WTHR	F 10-11	Dateline FR-NBC	2.9	7.2%	5.8	\$4,002	\$33.33
WTHR	Sa 8-9	NBC Encores	2.3	6.4%	4.6	\$2,401	\$25.00
WISH	M 10-11	Hawaii 5-0-CBS	6.2	13.9%	12.4	\$5,002	\$19.08
WISH	Tu 9-10	NCIS:LA-CBS	9	17.7%	18	\$8,004	421.28
WISH	W 10-11	CSI	5.8	13.1%	11.6	\$6,003	\$25.00
WISH	Th 9-10	PERSON-INT-CBS	6	11.0%	12	\$10,005	\$39.68
WISH	F 8-9	CSI:NY	4.2	10.9%	8.4	\$3,201	\$18.18
WISH	Sa 10-11	48 Hours	4.5	12.0%	9	\$2,001	\$10.64
WISH	Su 9-10	The Good Wife	7	11.7%	14	\$7,003	\$23.81
WTTV+S2	M-Su 8-11	Average	1.2	2.6%	16.8	\$7,003	\$19.23
Total					215.2	\$178,480	39.80

Table 9.39 shows the cost of a 30-second prime-time television slot in Indianapolis—the nation's No. 26 media market. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the market's population of 2,094,000). The average cost for Indianapolis was \$39.80 per 1,000 impressions—3.980 cents per impression.

Table 9.40 shows the cost of a 30-second prime-time television slot in the nation's No. 101 media market—Fort Smith, Fayetteville, Springdale, and Rogers, Arkansas. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the market's population of 573,000). The average cost for this market was \$30.84 per 1,000 impressions—3.084 cents per impression.

An NPR story entitled “Ads Slice Up Swing States With Growing Precision” reported on presidential campaigning in Colorado's small media markets:

“Republicans outnumber Democrats in El Paso County more than 2 to 1. Barack Obama lost this part of Colorado to John McCain by 19 points in 2008.

“It's not a matter of just winning; it's winning by how much,” says Rich Beeson, a fifth-generation Coloradan and political director for the Romney campaign.

Table 9.40 TELEVISION ADS IN THE FORT SMITH, FAYETTEVILLE, SPRINGDALE, AND ROGERS, ARKANSAS MARKET—THE NATION’S NO. 101 MEDIA MARKET—AVERAGED 3.084 CENTS PER IMPRESSION.

STATION	TIME	PROGRAM	RATING	SHARE	GROSS RATING POINTS	COST	COST PER 1000
KHBS+S2	M 9–10	Castle	8.7	19.7%	17.4	\$2,401	\$24.00
KHBS+S2	Tu 9–10	Private Practice	6.4	14.9%	12.8	\$2,401	\$32.43
KHBS+S2	W 9–10	Nashville	5.7	15.2%	11.4	\$2,601	\$39.39
KHBS+S2	Th 8–9	Grey’s Anatomy	5.6	12.0%	11.2	\$3,602	\$56.25
KHBS+S2	F 8–9	Shark Tank	2.3	6.1%	4.6	\$700	\$26.92
	Su 6–7	America’s Funniest Home Videos	3.8	10.7%	7.6	\$1,201	\$27.27
KNWA	M 9–10	ROCK-WLLMS-NBC	1.4	3.2%	2.8	\$1,921	\$120.00
KNWA	Tu 9–10	Parenthood-NBC	2.5	5.8%	5	\$3,602	\$128.57
KNWA	W 9–10	AVG. ALL WKS	1.5	4.1%	3	\$1,501	\$83.33
KNWA	Th 9–10	PRIME SUSP-NBC	1.2	2.9%	2.4	\$1,201	\$85.71
KNWA	F 8–9	GRIMM-NBC	3.9	10.1%	7.8	\$1,501	\$34.09
KFSM	M 7–8	HW I-MOTHR-CBS/2BROKE GRL-CBS	8.4	18.3%	16.8	\$1,601	\$16.67
KFSM	Tu 7–8	NCIS-CBS	14	31.6%	28	\$2,401	\$15.00
KFSM	W 8–9	Criminal Minds	5.5	14.2%	11	\$1,801	\$28.13
KFSM	Th 8–9	PERSON-INT-CBS	9.5	20.4%	19	\$1,901	\$17.59
KFSM	F 7–8	CSI	5.5	17.1%	11	\$1,201	\$18.75
KFSM	Sa 9–10	48 Hour Mystery	4.5	12.7%	9	\$1,000	\$19.23
KFSM	Su 9–10	The Mentalist	6.5	15.8%	13	\$1,901	\$25.68
Total					193.8	\$34,435	\$30.84

“Presidential campaigns know exactly the margin of victory or defeat that they have to hit in each town in order to carry an entire state. Democratic media strategist Tad Devine says campaigns set extremely specific goals based on hard data. . . .

“Although no one suggests that President Obama will win Colorado Springs, whether he loses it by 15 or 25 points could determine whether he carries Colorado.

“Beeson of the Romney campaign says smaller cities are vital to this chess game, especially since they’re cheaper to advertise in.

“A lot of secondary markets are very key to the overall map, whether it’s a Charlottesville in Virginia or a Colorado Springs in Colorado,’ he says. ‘You can’t ever cede the ground to anyone.’”⁵⁷⁹ [Emphasis added]

Soliciting every available vote is a strategic necessity when the winner of an election is the candidate who receives the most popular votes.

⁵⁷⁹ Shapiro, Ari. Ads slice up swing states with growing precision. *NPR*. September 24, 2012. <http://www.npr.org/2012/09/24/161616073/ads-slice-up-swing-states-with-growing-precision>.

9.31.8. MYTH: Only citizens impact the allocation of electoral votes under the current system.

QUICK ANSWER:

- Even though they cannot vote for President, non-citizens impact the allocation of electoral votes. The U.S. Constitution requires that the census count all “persons”—including non-citizens—for the purpose of apportioning electoral votes among the states.
- Under the current method of electing the President, *legal* voters in states that acquired additional electoral votes (because of the disproportionate presence of non-citizens in their states) deliver additional electoral votes to their candidate. Voters in states that lost electoral votes have correspondingly less influence.
- Five states with disproportionately large numbers of non-citizens (relative to other states) acquired additional electoral votes as a result of the 2010 census, while 10 states each lost one electoral vote.
- Overall, the Democrats have a net 10 electoral-vote advantage in the 2012, 2016, and 2020 elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.
- The National Popular Vote compact would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens in certain states.

MORE DETAILED ANSWER:

Under federal law, non-citizens cannot vote in presidential elections. Nonetheless, non-citizens significantly impact presidential elections because they affect the allocation of electoral votes among the states.

As Professor George C. Edwards III has pointed out:

“Representation in the House is based on the decennial census, which counts all residents—whether citizens or not. . . . States . . . where non-citizens compose a larger percentage of the population receive more electoral votes than they would if electoral votes were allocated on the basis of the number of a state’s citizens.”⁵⁸⁰

The U.S. Constitution requires that the census be used to determine each state’s number of seats in the U.S. House of Representatives. Each state receives a number of electoral votes equal to the state’s number of U.S. Representatives plus two (representing the state’s two U.S. Senators).

⁵⁸⁰ Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Page 46.

The Constitution specifies that the census count all “persons,” thereby including non-citizens living in the United States in the count:

“Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free **Persons**, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”^{581,582} [Emphasis added]

The Census Bureau uses a mathematical formula (specified by a federal statute adopted in 1941) known as the “method of equal proportions” to apportion seats in the U.S. House of Representatives automatically among the states.⁵⁸³

A state having a disproportionately large number of non-citizens (relative to other states) acquires additional U.S. House seats and, hence, additional electoral votes.

Because of the winner-take-all rule, *legal* voters in a state that acquired additional electoral votes by virtue of the disproportionate presence of non-citizens deliver an enlarged bloc of electoral votes to the candidate receiving the most popular votes in their state. That is, the influence of the *legal* voters is increased because of the presence of non-citizens.

Similarly, legal voters in a state that lost electoral votes deliver a diminished bloc of electoral votes.

The apportionment of the U.S. House and Electoral College resulting from the 2010 census governs the 2012, 2016, and 2020 elections.

Professor Leonard Steinhorn of American University has computed the effect of non-citizens on presidential elections. He plugged American Community Survey data on the number of citizens and non-citizens in each state in 2010 into the statutory formula to apportion U.S. House seat among the states.⁵⁸⁴

In an article entitled “Without Voting, Noncitizens Could Swing the Election for Obama,” Steinhorn found that non-citizens affected the number of electoral votes possessed by 15 states.

Five states gained between one and five electoral votes, and 10 states each lost one electoral vote because of non-citizens.

⁵⁸¹ U.S. Constitution. Article I, section 2, clause 3. The provisions concerning indentured servants, “Indians not taxed,” and slaves (“other persons”) are not applicable today.

⁵⁸² No doubt, the reason why the Constitution specified that the census would count “persons,” instead of trying to count eligible voters, was that the states had complicated and widely varying criteria for voter eligibility in 1787. In most states, eligibility depended on property, wealth, or income. Moreover, the requirements for voting often differed for the lower versus upper house of the state legislature.

⁵⁸³ The mathematical formula is presented at <https://www.census.gov/population/apportionment/about/computing.html>. The history of methods used to apportion seats in the U.S. House of Representatives is discussed at <https://www.census.gov/population/apportionment/about/history.html>. The U.S. Supreme Court upheld the constitutionality of the “method of equal proportions” in 1992 in *Department of Commerce v. Montana* (112 S.Ct. 1415) and *Franklin v. Massachusetts* (112 S.Ct. 2767).

⁵⁸⁴ Steinhorn, Leonard. Without voting, noncitizens could swing the election for Obama. *Washington Post*. October 5, 2012.

Overall, the Democrats have a net 10 electoral-vote advantage in the 2012, 2016, and 2020 elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.

Democratic non-battleground states gained 7 electoral votes:

- +5 for California
- +1 for New York
- +1 for Washington state.

Republican non-battleground states lost 3 electoral votes:

- +2 for Texas.
- -1 for Indiana
- -1 for Missouri
- -1 for Louisiana
- -1 for Montana
- -1 for Oklahoma.

Six Battleground states were affected:

- +1 Florida
- -1 for Iowa
- -1 for Michigan
- -1 for North Carolina
- -1 for Ohio
- -1 for Pennsylvania.

Battleground states can, by definition, go either way, and therefore do not constitute a built-in advantage to either party.

Excluding non-citizens from the calculation used to apportion seats in the U.S. House of Representatives would require a federal constitutional amendment.

The National Popular Vote compact would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens in certain states. Nationwide voting for President would equalize the vote of every legal voter in the country by guaranteeing the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

9.31.9. MYTH: The Republican Party has a lock on the Electoral College.

QUICK ANSWER:

- An argument became prevalent during the 1980s that the Republican Party had a permanent “lock” on the Electoral College because numerous states had repeatedly voted Republican for President between 1968 and 1988.
- Current political data do not support the notion of the existence of an “electoral lock” today in favor of the Republican Party.

- Neither party has a lock on the Electoral College because the United States is, politically, an evenly divided country in which the cumulative nationwide vote for the two parties from the start of the modern political era in 1932 through 2008 has been virtually tied.
- To the extent that this kind of “electoral lock” argument has a small element of validity, if the Electoral College map of 2012 were to persist, the electoral map would, if anything, be slightly unfavorable to the Republican Party. Of the 32 states that voted for the same party in all six presidential elections between 1992 and 2012, 19 states (possessing 242 electoral votes) voted Democratic in all six presidential elections, and 13 states (possessing 102 electoral votes) voted Republican in all six presidential elections. If the 2016 presidential election is conducted under the state-by-state winner-take-all rule and is reasonably close, it is likely that all (or almost all) of the 32 states that have voted for the same party in the past six presidential elections will continue to support that same party.

MORE DETAILED ANSWER:

An argument became prevalent during the 1980s that the Republican Party had a permanent “lock” on the Electoral College because a large number of states had repeatedly voted Republican for President between 1968 and 1988.

The notion of a “lock” arose from the fact that Republicans won five of the six presidential elections during this period, and that Republicans won landslide victories in 1972 and 1984.

In fact, neither party has a lock on the Electoral College because the United States is, politically, an evenly divided country in which the cumulative nationwide vote for the two parties from the start of the modern political era in 1932 through 2008 (table 9.25) has been virtually tied:

- 746,260,766 total votes for the Democrats and
- 745,502,654 total votes for the Republicans.

The Republican Party won five of the six presidential elections between 1972 and 1984. The reason for this result was that more voters (often in landslide numbers) voted for the Republican nominee during that period—not because of the mechanics of the Electoral College.

In any event, the Republican Party does not have any such “electoral lock” today.

To the extent that this kind of “electoral lock” argument has a small element of validity, if the Electoral College map of 2012 were to persist, the electoral map would, if anything, be slightly unfavorable to the Republican Party.

Table 9.41 shows that 32 states that voted for the same party in all six presidential elections between 1992 and 2012. These 32 states possess about two-thirds (64%) of the 538 votes in the Electoral College. Of these 32 states, 19 states (possessing 242 electoral votes after the 2010 census) voted Democratic in all six presidential elec-

Table 9.41 THE 32 STATES THAT VOTED FOR THE SAME PARTY IN THE SIX PRESIDENTIAL ELECTIONS BETWEEN 1992 AND 2012

DEM 6 TIMES	DEM 5 TIMES	DEM 4 TIMES	DEM 3 TIMES	DEM 2 TIMES	DEM 1 TIME	DEM 0 TIMES
CA (55)	IA (6)	NV (6)	CO (9)	AR (6)	AZ (11)	AL (9)
CT (7)	NH (4)	OH (18)	FL (29)	KY (8)	GA(16)	AK (3)
DE (3)	NM (5)			LA (8)	IN (11)	ID (4)
D.C. (3)				MO (10)	MT (3)	KS (6)
HI (4)				TN (11)	NC (15)	MS (6)
IL (20)				VA (13)		NE (5)
MA (11)				WV (5)		ND (3)
ME (4)						OK (7)
MD (10)						SC (9)
MI (16)						SD (3)
MN (10)						TX (38)
NJ (14)						UT (6)
NY (29)						WY (3)
OR (7)						
PA (20)						
RI (4)						
VT (3)						
WA (12)						
WI (10)						
242 EV	15 EV	24 EV	38EV	61 EV	56 EV	102 EV

tions between 1992 and 2012, and 13 states (possessing 102 electoral votes after the 2010 census) voted Republican in the six elections. The table is organized in terms of number of elections (from zero to six) in which a state voted Democratic. The number of electoral votes shown in the table are those applicable to the 2012 election.

Table 9.41 reflects one aspect of the current polarization of American politics. One possible cause of this polarization may be the tendency, discussed in Bill Bishop's book *The Big Sort*, of like-minded Americans to cluster together geographically.⁵⁸⁵

Regardless of the causes behind the behavior shown in table 9.41, if the 2016 presidential election is conducted under the state-by-state winner-take-all rule and is reasonably close, it is likely that most of the 32 states that have voted consistently for the same party in the past six presidential elections would continue to support that same party.⁵⁸⁶

In any event, table 9.41 certainly does not support the notion of the existence today of an "electoral lock" in favor of the Republican Party.

Table 9.42 shows a simulation of the 2012 presidential election produced by applying a tie-producing uniform shift to actual election returns (as shown in table 9.35, table 9.36, table 9.45, and appendix HH). In 2012, Governor Romney received

⁵⁸⁵ Bishop, Bill. 2008. *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart*. Boston, MA: Houghton Mifflin Harcourt.

⁵⁸⁶ Nine of the states in table 9.41 that voted Democratic once or twice between 1992 and 2012 did so during the Clinton years. Since then, these nine states have voted Republican in presidential elections consistently between 2000 and 2012. These nine states are Arkansas, Kentucky, Louisiana, Missouri, Tennessee, West Virginia, Arizona, Georgia, and Montana. Thus, there are 41 states that have voted for the same party between 2000 and 2012.

Table 9.42 SIMULATED TIE-PRODUCING UNIFORM SHIFT OF 2012 ELECTION DATA

STATE	ROMNEY	OBAMA	R-PERCENT	R- MARGIN	D-MARGIN	R-EV	D-EV
D.C.	27,029	261,422	9.37%	—	234,392	—	3
HI	129,389	298,284	30.25%	—	168,894	—	4
VT	98,415	193,522	33.71%	—	95,108	—	3
NY	2,621,665	4,335,638	37.68%	—	1,713,972	—	29
RI	165,759	271,122	37.94%	—	105,364	—	4
MD	1,023,754	1,625,959	38.64%	—	602,205	—	10
CA	5,088,528	7,605,715	40.09%	—	2,517,186	—	55
MA	1,249,204	1,860,400	40.17%	—	611,196	—	11
DE	173,475	234,593	42.51%	—	61,119	—	3
NJ	1,548,598	2,052,276	43.01%	—	503,678	—	14
CT	665,047	874,928	43.19%	—	209,881	—	7
IL	2,236,152	2,918,576	43.38%	—	682,423	—	20
ME	305,857	387,725	44.10%	—	81,867	—	4
WA	1,350,316	1,695,750	44.33%	—	345,434	—	12
OR	787,946	936,717	45.69%	—	148,771	—	7
NM	350,496	400,627	46.66%	—	50,131	—	5
MI	2,206,893	2,472,932	47.16%	—	266,038	—	16
MN	1,376,353	1,490,039	48.02%	—	113,686	—	10
WI	1,470,336	1,561,615	48.49%	—	91,280	—	10
NV	483,049	511,891	48.55%	—	28,841	—	6
IA	761,030	792,131	49.00%	—	31,101	—	6
NH	343,615	355,864	49.12%	—	12,250	—	4
CO	1,234,161	1,273,887	49.21%	—	39,726	—	9
PA	2,791,474	2,879,234	49.23%	—	87,760	—	20
VA	1,896,820	1,897,522	49.99%	—	701	—	13
OH	2,768,890	2,720,138	50.44%	48,751	—	18	—
FL	4,326,791	4,071,515	51.52%	255,276	—	29	—
NC	2,357,508	2,091,278	52.99%	266,230	—	15	—
GA	2,154,125	1,698,390	55.91%	455,736	—	16	—
AZ	1,277,886	981,000	56.57%	296,886	—	11	—
MO	1,535,432	1,170,804	56.74%	364,627	—	10	—
IN	1,470,934	1,102,496	57.16%	368,438	—	11	—
SC	1,109,586	828,000	57.27%	281,585	—	9	—
MS	735,687	538,008	57.76%	197,678	—	6	—
MT	277,127	192,640	58.99%	84,486	—	3	—
AK	170,302	117,014	59.27%	53,288	—	3	—
TX	4,724,104	3,153,863	59.97%	1,570,241	—	38	—
LA	1,190,669	770,734	60.70%	419,935	—	8	—
SD	217,574	138,075	61.18%	79,499	—	3	—
ND	194,455	118,831	62.07%	75,623	—	3	—
TN	1,509,776	913,263	62.31%	596,514	—	11	—
KS	714,827	418,533	63.07%	296,293	—	6	—
NE	490,282	286,863	63.09%	203,418	—	5	—
AL	1,296,098	755,523	63.17%	540,576	—	9	—
KY	1,121,782	644,778	63.50%	477,003	—	8	—
AR	668,151	374,002	64.11%	294,149	—	6	—
WV	430,426	225,388	65.63%	205,037	—	5	—
ID	433,320	200,378	68.38%	232,941	—	4	—
OK	917,464	417,408	68.73%	500,055	—	7	—
WY	175,666	64,582	73.12%	111,085	—	3	—
UT	760,033	232,380	76.58%	527,653	—	6	—
Total	63,414,254	63,414,255				253	285

48.0418657% of the two-party national popular vote—a shortfall of 1.9581343%. Column 2 shows the simulated figures for Romney obtained by applying a uniform upward adjustment of 1.9581343% to Romney’s actual vote in each state (and a corresponding downward adjustment to Obama’s actual vote in each state), thereby producing a virtual tie in the national popular vote (63,414,254 to 63,414,255). Column 4 shows Romney’s percentage of the two-party vote using this method of simulation. Columns 5 and 6 show the Republican and Democratic margins, respectively, for each state using this method of simulation. Columns 7 and 8 show the Republican and Democratic electoral votes, respectively, for each state using this method of simulation. The table is sorted according to the simulated Republican percentage in column 4.

The result of the tie-producing uniform shift shown in table 9.42 is that President Obama loses Florida (29 electoral votes) and Ohio (18 electoral votes), but still ends up with a 285–253 lead in the Electoral College. Thus, even if Romney had received enough additional voter support to create a tie in the national popular vote (preserving each candidate’s relative profile in each state), Obama would still have ended up with a lead of 28 electoral votes using this method of simulation.

Table 9.42 also shows that Obama’s lead in Virginia (13 electoral votes) shrinks to an eminently recountable 701 votes (1,897,522 to 1,896,820) using this method of simulation. Even if Romney had won Virginia, Obama would still have had a 272–266 lead in the Electoral College.

In a second simulation (shown in table 9.43), Romney’s actual results are adjusted uniformly upward by 2.732% in each state (with Obama’s vote receiving a corresponding downward adjustment in each state). This adjustment would give Romney a lead of 1,962,965 votes nationwide (64,395,737 to 62,432,772). This adjustment is just sufficient to move both Virginia and Pennsylvania (by 8 votes) into Romney’s column, thus giving Romney a winning 286–252 margin in the Electoral College. The table is sorted according to the simulated Republican percentage in column 4.

In other words, it takes a national popular vote lead of almost two million votes to yield a simulated win for Romney in the Electoral College using this method of simulation.

If Romney’s simulated lead were to be increased slightly beyond the 1,962,965-vote nationwide lead shown in table 9.43, Colorado (nine electoral votes), New Hampshire (four electoral votes), Iowa (six electoral votes), and Nevada (six electoral votes) would move into the Republican column.

Of course, no future election will exactly replicate the state-by-state percentage contour of the two major parties in 2012. President Obama cannot run for another term, and Governor Romney will almost certainly not be a candidate in 2016. Candidates with different personalities and records will compete on the basis of different issues in a political environment consisting of a different history of immediate past events and changed demographics.

Nonetheless, the simulations in table 9.42 and table 9.43 certainly do not support the notion of the existence today of an “electoral lock” in favor of the Republican Party.

Table 9.43 SIMULATED UNIFORM SHIFT PRODUCING A 1,962,965-VOTE NATIONWIDE LEAD FOR ROMNEY

STATE	ROMNEY	OBAMA	R-PERCENT	R- MARGIN	D-MARGIN	R-EV	D-EV
D.C.	29,261	259,190	10.14%	—	229,928	—	3
HI	132,699	294,974	31.03%	—	162,275	—	4
VT	100,674	191,263	34.48%	—	90,590	—	3
NY	2,675,506	4,281,797	38.46%	—	1,606,292	—	29
RI	169,140	267,741	38.72%	—	98,602	—	4
MD	1,044,259	1,605,454	39.41%	—	561,195	—	10
CA	5,186,765	7,507,478	40.86%	—	2,320,714	—	55
MA	1,273,268	1,836,336	40.95%	—	563,067	—	11
DE	176,632	231,436	43.29%	—	54,803	—	3
NJ	1,576,464	2,024,410	43.78%	—	447,946	—	14
CT	676,964	863,011	43.96%	—	186,047	—	7
IL	2,276,043	2,878,685	44.15%	—	602,642	—	20
ME	311,225	382,357	44.87%	—	71,133	—	4
WA	1,373,889	1,672,177	45.10%	—	298,289	—	12
OR	801,293	923,370	46.46%	—	122,077	—	7
NM	356,309	394,814	47.44%	—	38,506	—	5
MI	2,243,109	2,436,716	47.93%	—	193,607	—	16
MN	1,398,535	1,467,857	48.79%	—	69,322	—	10
WI	1,493,799	1,538,152	49.27%	—	44,353	—	10
NV	490,749	504,191	49.32%	—	13,442	—	6
IA	773,049	780,112	49.77%	—	7,062	—	6
NH	349,028	350,451	49.90%	—	1,423	—	4
CO	1,253,570	1,254,478	49.98%	—	908	—	9
PA	2,835,358	2,835,350	50.00%	7	—	20	—
VA	1,926,183	1,868,159	50.76%	58,025	—	13	—
OH	2,811,367	2,677,661	51.22%	133,706	—	18	—
FL	4,391,783	4,006,523	52.29%	385,259	—	29	—
NC	2,391,936	2,056,850	53.77%	335,086	—	15	—
GA	2,183,939	1,668,576	56.69%	515,362	—	16	—
AZ	1,295,367	963,519	57.35%	331,848	—	11	—
MO	1,556,374	1,149,862	57.51%	406,513	—	10	—
IN	1,490,849	1,082,581	57.93%	408,268	—	11	—
SC	1,124,580	813,006	58.04%	311,574	—	9	—
MS	745,543	528,152	58.53%	217,392	—	6	—
MT	280,762	189,005	59.77%	91,757	—	3	—
AK	172,525	114,791	60.05%	57,735	—	3	—
TX	4,785,069	3,092,898	60.74%	1,692,171	—	38	—
LA	1,205,848	755,555	61.48%	450,292	—	8	—
SD	220,326	135,323	61.95%	85,004	—	3	—
ND	196,879	116,407	62.84%	80,472	—	3	—
TN	1,528,527	894,512	63.08%	634,016	—	11	—
KS	723,597	409,763	63.85%	313,835	—	6	—
NE	496,296	280,849	63.86%	215,446	—	5	—
AL	1,311,975	739,646	63.95%	572,330	—	9	—
KY	1,135,452	631,108	64.27%	504,345	—	8	—
AR	676,216	365,937	64.89%	310,278	—	6	—
WV	435,501	220,313	66.41%	215,188	—	5	—
ID	438,224	195,474	69.15%	242,749	—	4	—
OK	927,794	407,078	69.50%	520,715	—	7	—
WY	177,526	62,722	73.89%	114,803	—	3	—
UT	767,713	224,700	77.36%	543,012	—	6	—
Total	64,395,737	62,432,772				286	252

9.31.10. MYTH: The rural states would lose their advantage in the Electoral College under a national popular vote.

QUICK ANSWER:

- The facts are that the current state-by-state winner-take-all method of awarding electoral votes diminishes the influence of rural states because rural states are generally not battleground states.

MORE DETAILED ANSWER:

The mythology that the current state-by-state winner-take-all method of awarding electoral votes is advantageous to rural states is not supported by the facts.

Tara Ross, an opponent of the National Popular Vote plan, writes:

“NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in small states.”⁵⁸⁷ [Emphasis added]

Hans von Spakovsky has stated:

“The NPV scheme would . . . diminish the influence of smaller states and rural areas of the country.”⁵⁸⁸

The opposite is the case.

Political influence in the Electoral College is based on whether the state is a closely divided battleground state. The current state-by-state winner-take-all method of awarding electoral votes does not enhance the influence of rural states, because most rural states are not battleground states.

Table 9.44 shows, for each state, the rural population (column 2 using the 2000 definition found in the *Statistical Abstract of the United States*), the state’s total population (column 3), the rural percentage (column 2 divided by column 3), and the rural index (obtained by dividing the state’s rural percentage by the overall national rural percentage of 20.11%). An index above 100 indicates that the state is more rural than the nation as a whole, whereas an index below 100 indicates that the state is less rural. Thirty-three states have an index above 100 (meaning that more than 20.11% of their population is rural), whereas 18 have an index below 100 (that is, they are less rural than the nation as a whole).

As can be seen from table 9.44, the 10 most rural states are:

- Vermont (60.61% rural),
- Maine (57.86% rural),
- West Virginia (53.75% rural),

⁵⁸⁷ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

⁵⁸⁸ Von Spakovsky, Hans. *Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme*. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

Table 9.44 RURAL POPULATION OF THE UNITED STATES

STATE	RURAL POPULATION	TOTAL POPULATION	RURAL PERCENT	RURAL INDEX
Vermont	376,379	621,000	60.61%	301
Maine	762,045	1,317,000	57.86%	288
West Virginia	975,564	1,815,000	53.75%	267
Mississippi	1,457,307	2,903,000	50.20%	250
South Dakota	363,417	771,000	47.14%	234
Arkansas	1,269,221	2,753,000	46.10%	229
Montana	414,317	927,000	44.69%	222
North Dakota	283,242	634,000	44.68%	222
Alabama	1,981,427	4,530,000	43.74%	218
Kentucky	1,787,969	4,146,000	43.13%	214
New Hampshire	503,451	1,300,000	38.73%	193
Iowa	1,138,892	2,954,000	38.55%	192
South Carolina	1,584,888	4,198,000	37.75%	188
North Carolina	3,199,831	8,541,000	37.46%	186
Tennessee	2,069,265	5,901,000	35.07%	174
Wyoming	172,438	507,000	34.01%	169
Oklahoma	1,196,091	3,524,000	33.94%	169
Alaska	215,675	655,000	32.93%	164
Idaho	434,456	1,393,000	31.19%	155
Wisconsin	1,700,032	5,509,000	30.86%	153
Missouri	1,711,769	5,755,000	29.74%	148
Nebraska	517,538	1,747,000	29.62%	147
Indiana	1,776,474	6,238,000	28.48%	142
Kansas	767,749	2,736,000	28.06%	140
Minnesota	1,429,420	5,101,000	28.02%	139
Louisiana	1,223,311	4,516,000	27.09%	135
Georgia	2,322,290	8,829,000	26.30%	131
Virginia	1,908,560	7,460,000	25.58%	127
Michigan	2,518,987	10,113,000	24.91%	124
New Mexico	455,545	1,903,000	23.94%	119
Pennsylvania	2,816,953	12,406,000	22.71%	113
Ohio	2,570,811	11,459,000	22.43%	112
Oregon	727,255	3,595,000	20.23%	101
Delaware	155,842	830,000	18.78%	93
Washington	1,063,015	6,204,000	17.13%	85
Texas	3,647,539	22,490,000	16.22%	81
Colorado	668,076	4,601,000	14.52%	72
Maryland	737,818	5,558,000	13.27%	66
New York	2,373,875	19,227,000	12.35%	61
Connecticut	417,506	3,504,000	11.92%	59
Illinois	1,509,773	12,714,000	11.87%	59
Utah	262,825	2,389,000	11.00%	55
Arizona	607,097	5,744,000	10.57%	53
Florida	1,712,358	17,397,000	9.84%	49
Rhode Island	95,173	1,081,000	8.80%	44
Massachusetts	547,730	6,417,000	8.54%	42
Hawaii	103,312	1,263,000	8.18%	41
Nevada	169,611	2,335,000	7.26%	36
New Jersey	475,263	8,699,000	5.46%	27
California	1,881,985	35,894,000	5.24%	26
D.C.	0	554,000	0.00%	0
Total	59,061,367	293,658,000	20.11%	100

- Mississippi (50.20% rural),
- South Dakota (47.14% rural),
- Arkansas (46.10% rural),
- Montana (44.69% rural),
- North Dakota (44.68% rural),
- Alabama (43.74% rural), and
- Kentucky (43.13% rural).

None of the 10 most rural states is a closely divided battleground state. The battleground states that receive attention in presidential campaigns are generally not rural states.

In contrast, under the National Popular Vote compact, votes cast in rural states would all become politically relevant.

9.31.11. MYTH: A national popular vote would be a guarantee of corruption because every ballot box in every state would become a chance to steal the Presidency.

QUICK ANSWER:

- Under the *current* system of electing the President, every vote in every precinct matters *inside every* battleground state. If it were true that an election in which the winner is the candidate who receives the most popular votes is “a guarantee of corruption,” then we should see today a wealth of evidence of rampant fraud in presidential elections *inside every* battleground state. Similarly, we should see evidence of rampant fraud today in every gubernatorial election in every state.
- Executing electoral fraud without detection requires a situation in which a very small number of people can have a very large impact.
- Under the current state-by-state winner-take-all system, there are huge incentives for fraud and mischief, because a small number of people in a battleground state can affect enough popular votes to swing all of that state’s electoral votes.
- In 2004, President George W. Bush had a nationwide lead of 3,012,171 popular votes. However, if 59,393 Bush voters in Ohio had shifted to Senator John Kerry, Kerry would have carried Ohio and thus become President. It would be far easier for potential fraudsters to manufacture 59,393 votes in Ohio than to manufacture 3,012,171 million votes (51 times more votes) nationwide. Moreover, it would be far more difficult to conceal fraud involving three million votes.
- In 2012, a shift of 214,390 popular votes in four states (Florida, Ohio, Virginia, and New Hampshire) would have elected Governor Romney as President,

despite President Obama's nationwide lead of almost five million votes. It would be far easier for potential fraudsters to manufacture 214,390 votes in four states than to manufacture five million votes nationwide (23 times more votes). Moreover, it would be far more difficult to conceal fraud involving five million votes.

- There were seven closely divided battleground states possessing 102 electoral votes that President Obama carried and that had Republican Attorneys General in November 2008. President Obama received 95 more electoral votes than the 270 electoral votes necessary for election. Where were the prosecutions for election fraud in these states in the period immediately following the November 2008 election?

MORE DETAILED ANSWER:

The 2012 Republican National Platform states that electing the President by a national popular vote would be

“a guarantee of corruption as every ballot box in every state would become a chance to steal the Presidency.”⁵⁸⁹

Under the *current* system of electing the President, *every* vote in *every* ballot box matters inside *every* closely divided battleground state and therefore today represents “a chance to steal the Presidency.”

If an election in which the winner is the candidate who receives the most popular votes is “a guarantee of corruption,” then we should see voluminous evidence today of rampant corruption *inside* every battleground state in every presidential election and, in particular, the elections of 2000, 2004, 2008, and 2012.

Similarly, every vote in every precinct matters in gubernatorial elections today in all 50 states. If conducting a popular-vote election is “a guarantee of corruption,” then we should see evidence today of rampant fraud in every gubernatorial election in *all* 50 states.

Executing electoral fraud without detection requires a situation in which a very small number of people can have a very large impact. Under the current state-by-state winner-take-all system, there is a huge payoff for fraud and mischief in the closely divided battleground states, because a small number of people in a battleground state can use a small number of popular votes to flip 100% of that state's electoral votes.

Under the current state-by-state winner-take-all system, those who wish to cheat know exactly where they need to go in order to potentially sway the national outcome (namely the battleground states).

In 2012, a shift of 214,390 popular votes in four states (Florida, Ohio, Virginia, and

⁵⁸⁹ 2012 Republican National Platform adopted in Tampa, Florida, on August 28, 2012.

New Hampshire) would have elected Governor Romney as President, despite President Obama's nationwide lead of 4,966,945 votes.⁵⁹⁰ It would be far easier for potential fraudsters to manufacture 214,390 votes in four states than to manufacture five million votes nationwide (23 times more votes). Moreover, it would be far more difficult to conceal fraud involving five million votes.

In 2004, President George W. Bush had a nationwide lead of 3,012,171 popular votes. However, if 59,393 Bush voters in Ohio had shifted to Senator John Kerry, Kerry would have carried Ohio and thus become President. It would be far easier for potential fraudsters to manufacture 59,393 votes in Ohio than to manufacture 3,012,171 million votes (51 times more votes) nationwide. Moreover, it would be far more difficult to conceal fraud involving three million votes.

In 2000, a significant number of electoral votes were determined by a relatively small number of popular votes:

- Florida—537 votes,
- Iowa—4,144 votes,
- New Hampshire—7,211 votes,
- New Mexico—366 votes,
- Oregon—6,765 votes, and
- Wisconsin—5,708 votes.

None of these blocks of votes was large in comparison to the nationwide margin of 537,179 in the national popular vote in 2000.

In the 1950s and 1960s, accusations of voter fraud by both political parties were commonplace in numerous states. In the 1960 presidential election, a switch of 4,430 votes in Illinois and a simultaneous switch of 4,782 votes in South Carolina would have denied Kennedy a majority of the electoral votes. Four thousand votes in two states would not have been decisive in 1960 in terms of changing the outcome if the outcome had been based on the national popular vote. John F. Kennedy led Richard M. Nixon by 118,574 popular votes nationwide. The potential switch of 4,430 or 4,782 votes was only relevant in 1960 because of the state-by-state winner-take-all rule.

In short, the outcome of a presidential election is less likely to be affected by fraud with a single large nationwide pool of votes than under the current state-by-state winner-take-all system.

As former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote in an article entitled “Should Every Vote Count?”

⁵⁹⁰The four states involved are Florida (29 electoral votes), Ohio (18), New Hampshire (4), and Virginia (13). They cumulatively possess 64 electoral votes. A shift of 64 electoral votes would have given Mitt Romney the 270 electoral votes needed for election. See appendix HH for the two-party results of the 2012 election. Table 9.45 presents the presidential vote for Barack Obama (Democrat), Mitt Romney (Republican), Gary Johnson (Libertarian), Jill Stein (Green), and the other 22 minor-party and independent candidates who were on the ballot in 2012 in at least one state.

“The issue of voter fraud . . . won’t entirely go away with the National Popular Vote plan, but it is harder to mobilize massive voter fraud on the national level without getting caught, than it is to do so in a few key states. Voter fraud is already a problem. The National Popular Vote makes it a smaller one.”⁵⁹¹

U.S. Senator Birch Bayh (D–Indiana) summed up the concerns about possible fraud in a 1979 Senate speech by saying:

“Fraud is an ever present possibility in the electoral college system, even if it rarely has become a proven reality. With the electoral college, relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of the unit rule or winner take all rule. Under the present system, fraudulent popular votes are much more likely to have a great impact by swinging enough blocs of electoral votes to reverse the election. A like number of fraudulent popular votes under direct election would likely have little effect on the national vote totals.

“I have said repeatedly in previous debates that there is no way in which anyone would want to excuse fraud. We have to do everything we can to find it, to punish those who participate in it; but **one of the things we can do to limit fraud is to limit the benefits to be gained by fraud.**

“Under a direct popular vote system, one fraudulent vote wins one vote in the return. In the electoral college system, one fraudulent vote could mean 45 electoral votes, 28 electoral votes.

“So the incentive to participate in ‘a little bit of fraud,’ if I may use that phrase advisedly, can have the impact of turning a whole electoral block, a whole State operating under the unit rule. Therefore, so the incentive to participate in fraud is significantly greater than it would be under the direct popular vote system.”⁵⁹² [Emphasis added]

At any given time, there are about two dozen Republican and about two dozen Democratic state Attorneys General. Specifically, there were 26 Republican state Attorneys General and 24 Democratic Attorneys General in November 2012. There are also, at any given time, roughly two thousand Republican county prosecuting attorneys and roughly a thousand Democratic county prosecuting attorneys.

If conducting an election in which the winner is the candidate receiving the most popular votes is “a guarantee of corruption,” then we should have seen a voluminous

⁵⁹¹ Tancredo, Tom. Should every vote count? November 11, 2011. <http://www.wnd.com/index.php?pageId=366929>.

⁵⁹² *Congressional Record*. March 14, 1979. Page 5000.

number of prosecutions for election fraud in presidential elections in battleground states (and in gubernatorial elections in all 50 states).

Where are the prosecutions?

In November 2008, there were Republican Attorneys General in seven closely divided battleground states that Barack Obama carried. These states possessed more electoral votes (102) than Obama's 95-vote margin of victory in the Electoral College in 2008:

- Colorado (9 electoral votes),
- Florida (27),
- Michigan (18),
- New Hampshire (4),
- Pennsylvania (21),
- Virginia (13), and
- Wisconsin (10).

Were these seven Republican Attorneys General derelict in the period immediately following the November 2008 election in fulfilling their legal duty to prosecute crime in their own states?

Are these seven Republican Attorneys General also guilty of not promoting the interests of their own political party in attempting to prosecute cases of election fraud that would, at the minimum, embarrass (if not convict) members of the Democratic Party?

If it were actually true that an election in which the winner is the candidate receiving the most popular votes is

“a guarantee of corruption as every ballot box in every state would become a chance to steal the Presidency,”⁵⁹³

then we should surely have seen a voluminous number of prosecutions involving the tens of thousands of ballot boxes in these seven outcome-determining states in the period immediately following the 2008 election.

In November 2012, there were Republican Attorneys General in most of the battleground states that determined the outcome of the 2012 presidential election:

- Florida—29 electoral votes,⁵⁹⁴
- Ohio—18 electoral votes,
- Virginia—13 electoral votes,
- Wisconsin—10 electoral votes,
- Colorado—9 electoral votes,
- Pennsylvania—20 electoral votes, and
- Michigan—16 electoral votes.

⁵⁹³ 2012 Republican National Platform adopted in Tampa, Florida, on August 28, 2012.

⁵⁹⁴ The number of electoral votes shown here are those applicable to the 2012 presidential election.

These seven battleground states with Republican Attorneys General together possessed 115 electoral Votes. President Obama won each of these battleground states by *low-single-digit* margins. In 2012, President Obama received only 64 more than the 270 electoral votes necessary for election.

As of the time of this writing, there have been no reports of prosecutions involving the tens of thousands of ballot boxes in these seven outcome-determining states in the 2012 presidential election.

If it is conceded that fraud is not rampant today in presidential elections in the battleground states (or gubernatorial elections in all 50 states), then why would one suddenly expect a massive outbreak of criminal activity in the 40 or so states that are currently politically irrelevant in the presidential election if the National Popular Vote compact were to become operative?

9.31.12. MYTH: Fraud is minimized under the current system because it is hard to predict where stolen votes will matter.

QUICK ANSWER:

- It is *not* hard to predict where stolen votes will matter under the current state-by-state winner-take-all system of electing the President. Stolen votes matter in the closely divided battleground states.

MORE DETAILED ANSWER:

Tara Ross, an opponent of the National Popular Vote plan, made the following comment about fraud under the current state-by-state winner-take-all system of electing the President:

“Fraud is minimized because it is hard to predict where stolen votes will matter.”⁵⁹⁵

Contrary to what Ross asserts, there is no difficulty in determining where stolen votes will matter—they matter in the closely divided battleground states.

The battleground states are well-known to anyone who follows politics. For example, in a July 2012 article describing his “3-2-1 strategy,” Karl Rove identified six states that he believed would probably decide the 2012 election.⁵⁹⁶ Most political observers agreed with Rove’s list of states.

Five and a half months before Election Day in 2012, Mitt Romney acknowledged the small number of battleground states during a fund-raising dinner in Boca Raton, Florida. In the May 17, 2012, *Mother Jones* video, Romney said:

“All the money will be spent in 10 states.”

⁵⁹⁵ Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

⁵⁹⁶ Rove, Karl. Romney’s roads to the White House: A 3-2-1 strategy can get him to the magic 270 electoral votes. *Wall Street Journal*. May 23, 2012.

The 2012 Obama campaign, of course, operated on a similar basis. In October 2000, the *New York Times* reported:

“The parties and the presidential candidates are concentrating their campaigns in Florida in these last, tense days before the election on the cities and towns along Interstate 4.

“The nearly three million voters who live more or less along the mad-deningly overcrowded, 100-mile-long highway that bisects the state from Daytona Beach on the Atlantic Coast to the Tampa Bay on the Gulf of Mexico are the swing voters in this, the largest of the swing states.

“They may be getting more attention these days than any other voters in the country as the candidates compete for Florida’s 25 electoral votes.

“‘This state is the key to this election,’ Vice President Al Gore declared at a rally in Orlando earlier this month, ‘and Central Florida is the key to this state.’”⁵⁹⁷ [Emphasis added]

Under the current state-by-state winner-take-all system, those who wish to cheat know exactly where they need to go in order to potentially sway the national outcome. In 2000, for example, a significant number of electoral votes were determined by a small handful of popular votes:

- Florida—537 votes,
- Iowa—4,144 votes,
- New Hampshire—7,211 votes,
- New Mexico—366 votes,
- Oregon—6,765 votes, and
- Wisconsin—5,708 votes.

Under a National Popular Vote, the amount of fraud that would have to be perpetrated to impact the outcome of an election would be so massive that it could not go unnoticed.

9.31.13. MYTH: The 2000 election illustrates the Republican Party’s structural advantage under the current state-by-state winner-take-all system.

QUICK ANSWER:

- The Republicans won the 2000 presidential election because of George W. Bush’s 537-vote margin in Florida—not because of any built-in Republican structural advantage conferred by the state-by-state winner-take-all rule.

⁵⁹⁷ Rosenbaum, David E. The 2000 campaign: The Battlegrounds: Florida interstate’s heavy campaign traffic. *New York Times*. October 25, 2000.

- It is impossible to say whether Al Gore would have been elected President in 2000 under the National Popular Vote system, because the campaign would have been conducted very differently.

MORE DETAILED ANSWER:

It is sometimes argued that the Republican victory in the 2000 election is evidence that the Republican Party has a built-in *structural* advantage under the current state-by-state winner-take-all system.

George W. Bush won Florida by a margin of 537 popular votes out of 5,963,110 votes cast.

When an election is decided by a margin of 537 votes out of 5,963,110, numerous factors (large and small) necessarily affected the outcome.

We select two relatively minor and *politically neutral* factors to make the point that Bush's 537-vote margin in Florida can be explained by entirely accidental factors operating locally in Florida—not any built-in Republican structural advantage conferred by the state-by-state winner-take-all rule.

A 2007 study in *The Journal of Politics* analyzed the effect of the weather on election outcomes:

“Using GIS interpolations, we employ meteorological data drawn from over 22,000 U.S. weather stations to provide election day estimates of rain and snow for each U.S. county. We find that, when compared to normal conditions, rain significantly reduces voter participation by a rate of just less than 1% per inch, while an inch of snowfall decreases turnout by almost .5%. Poor weather is also shown to benefit the Republican party's vote share. . . .

“The results of the zero precipitation scenarios reveal only two instances in which a perfectly dry election day would have changed an Electoral College outcome. **Dry elections would have led Bill Clinton to win North Carolina in 1992 and Al Gore to win Florida in 2000.** This latter change in the allocation of Florida's electors would have swung the incredibly close 2000 election in Gore's favor. Of course, the converse is that a rainier day would have increased George W. Bush's margin and may have reduced the importance of issues with the butterfly ballot, overvotes, etc.”⁵⁹⁸ [Emphasis added]

A *Democratic* election administrator in one county designed a ballot that presented the candidates' names in a confusing arrangement (the so-called “butterfly

⁵⁹⁸Brad T. Gomez, Brad T.; Hansford, Thomas G.; and Krause, George A. 2007. The Republicans should pray for rain: weather, turnout, and voting in U.S. Presidential Elections. *The Journal of Politics*. Volume 69, number 3. August 2007. Pages 649–663.

ballot”). The ballot’s confusing arrangement resulted in third-party candidate Pat Buchanan receiving thousands of votes that were, as Buchanan acknowledged, almost certainly intended for Al Gore. A paper in the *American Political Science Review* agreed with Buchanan’s assessment and concluded that this action by a *Democratic* election administrator was alone sufficient to cause Gore to lose Florida.

“The butterfly ballot used in Palm Beach County, Florida, in the 2000 presidential election caused more than 2,000 Democratic voters to vote by mistake for Reform candidate Pat Buchanan, a number larger than George W. Bush’s certified margin of victory in Florida. . . .

“Multiple methods and several kinds of data [were used] to rule out alternative explanations for the votes Buchanan received in Palm Beach County. . . .

“In Palm Beach County, Buchanan’s proportion of the vote on election-day ballots is four times larger than his proportion on absentee (non-butterfly) ballots, but Buchanan’s proportion does not differ significantly between election-day and absentee ballots in any other Florida county.

“Unlike other Reform candidates in Palm Beach County, Buchanan tended to receive election-day votes in Democratic precincts and from individuals who voted for the Democratic U.S. Senate candidate.”

“Among 3,053 U.S. counties where Buchanan was on the ballot, Palm Beach County has the most anomalous excess of votes for him.”⁵⁹⁹

Immediately prior to Election Day in 2000, neither Republicans nor anyone else thought that there was any structural advantage working in favor of the Republican Party because of the state-by-state winner-take-all rule. In the week before Election Day in 2000, most polls indicated that George W. Bush was poised to win the national popular vote—but not necessarily the electoral vote. Indeed, the Bush campaign was planning for just that eventuality. As the *New York Daily News* reported on Wednesday November 2, 2000, “Bush [is] set to fight an Electoral College loss.”

“Quietly, some of George W. Bush’s advisers are preparing for the ultimate ‘what if’ scenario: What happens if Bush wins the popular vote for President, but loses the White House because Al Gore won the majority of electoral votes? . . .”

“‘The one thing we don’t do is roll over,’ says a Bush aide. ‘We fight.’

⁵⁹⁹ Wand, Jonathan N.; Shotts, Kenneth W.; Sekhon, Jasjeet S.; Mebane, Walter R.; Herron, Michael C.; and Brady, Henry E. The butterfly did it: The aberrant vote for Buchanan in Palm Beach County, Florida. *American Political Science Review*. Volume 95. Number 1. December 2001. sekhon.berkeley.edu/elections/election2000/butterfly.review.pdf.

“How? The core of the emerging Bush strategy assumes a popular uprising, stoked by the Bushies themselves, of course.

“In league with the campaign—which is preparing talking points about the Electoral College’s essential unfairness—a massive talk-radio operation would be encouraged. ‘We’d have ads, too,’ says a Bush aide, ‘and I think you can count on the media to fuel the thing big-time. Even papers that supported Gore might turn against him because the will of the people will have been thwarted.’

“Local business leaders will be urged to lobby their customers, the clergy will be asked to speak up for the popular will and Team Bush will enlist as many Democrats as possible to scream as loud as they can. ‘You think ‘Democrats for Democracy’ would be a catchy term for them?’ asks a Bush adviser.

“The universe of people who would be targeted by this insurrection is small—the 538 currently anonymous folks called electors, people chosen by the campaigns and their state party organizations as a reward for their service over the years. . . .

“Enough of the electors could theoretically switch to Bush if they wanted to—if there was sufficient pressure on them to ratify the popular verdict.”⁶⁰⁰

9.31.14. MYTH: Al Gore would have been elected President under a national popular vote in 2000.

QUICK ANSWER:

- It is impossible to say whether Al Gore would have been elected President in 2000 under the National Popular Vote system, because the campaign would have been conducted very differently.
- Soliciting every available vote is a strategic necessity when the winner of an election is the candidate who receives the most popular votes.

MORE DETAILED ANSWER:

There is no way to say whether Al Gore would have become President had the 2000 campaign been conducted under the National Popular Vote plan.

The 2000 campaign would have been conducted very differently if the candidates had gone into the election under a different electoral system.

⁶⁰⁰ Kramer, Michael. Bush set to fight an electoral college loss: They’re not only thinking the unthinkable, They’re planning for it. *New York Daily News*. November 1, 2000. http://articles.nydailynews.com/2000-11-01/news/18145743_1_electoral-votes-popular-vote-bush-aide.

The pattern of candidate travel and advertising would have been entirely different under a national popular vote because candidates would have solicited votes in every state—not just 15.

Candidates certainly would not have ignored 35 or so states during the campaign. Candidates would not have concentrated their efforts so heavily on Florida. Candidates would certainly not have ignored Ohio (as they did in the 2000 campaign).

The issues discussed in the 2000 campaign would have been different because the candidates would have had to appeal to more than just the battleground-state voters.

9.32. MYTH THAT MAJOR PARTIES WILL BE TAKEN OFF THE BALLOT BECAUSE OF NATIONAL POPULAR VOTE

9.32.1. MYTH: Major parties will be taken off the ballot because of National Popular Vote.

QUICK ANSWER:

- The fact that the *major* political parties are usually unable to keep *minor* parties off the ballot in presidential elections indicates that it would be very difficult for one major party to keep the other major party off the ballot in any state.
- The public would not tolerate having only one presidential candidate on the ballot even in states where one political party is dominant.
- The Equal Protection Clause and the Guarantee Clause of the Constitution provide a strong legal basis for thwarting any attempt to create a one-party state.

MORE DETAILED ANSWER:

On September 13, 2012, the Kansas State Objections Board (consisting of Republican Secretary of State Kris Kobach and two other Republican statewide officeholders) considered a motion to keep Democrat Barack Obama off the presidential ballot in Kansas.

The *New York Times* reported that the motion was abandoned a day later as a result of “a wave of angry backlash.”⁶⁰¹

The Board’s short-lived effort to turn Kansas into a one-party state immediately generated speculation on an elections blog that the National Popular Vote plan would result in major political parties being thrown off the ballot in states dominated by the other political party, thereby preventing the removed party from getting any substantial number of votes in the state.

On one blog, Valarauko said:

⁶⁰¹ Eligon, John. Kansas ballot challenge over Obama’s birth is ended. *New York Times*. September 14, 2012.

“A state dominated by one party could try to use NPV to rig a presidential election, by setting ballot qualification requirements that would be very tough for the other party to meet (e.g., Massachusetts could grant general election Presidential ballot status automatically only to parties that have >20% of the registered voters, and impose a huge signature-gathering requirement for ballot status on any that don’t), thus knocking the other party’s votes in that state to 0.”⁶⁰²

Creation of a one-party state as a result of the National Popular Vote plan should not be a realistic concern for several reasons.

First, *major* political parties frequently use sharp-elbowed tactics to try to keep *minor* parties off the ballot; however, these efforts generally fail. For example, in October 2012, the Pennsylvania Republican Party tried to keep Libertarian presidential nominee Gary Johnson (a former Republican governor of New Mexico) off the presidential ballot in Pennsylvania.

“The Pennsylvania Republican Party chairman . . . said he was not about to give Mr. Johnson an easy opening to play a Nader to Mr. Romney’s Gore in Pennsylvania this year.”⁶⁰³

Despite Pennsylvania Republican Party efforts, Johnson appeared on the 2012 ballot in Pennsylvania (and in a total of 48 states).

Similarly, despite vigorous opposition from the Democratic Party, Ralph Nader (who received 2.7% of the vote in 2000) got onto the ballot in 47 states and the District of Columbia in his race for President.

John Anderson (who received 7% of the national popular vote in 1980) was on the ballot in all 50 states.

Ross Perot (who received 19% of the national popular vote in 1992) was on the ballot in all 50 states in both 1992 and 1996.

In summary, third-party presidential candidates who had substantial support (such as John Anderson in 1980 and Ross Perot in 1992 and 1996) got on the ballot in all 50 states, and third-party candidates with low-single-digit support succeeded in getting onto the ballot in almost every state (e.g., 47 or 48).

The lack of success by *major* political parties in keeping *minor* parties off the ballot indicates that it would be even less likely that a major party could be taken off the ballot in any state.

Second, the immediate and harsh public reaction to the Republican challenge to Obama in Kansas in 2012 is a reminder of the fact that the public (even in a state that

⁶⁰² Valarauko. October 20, 2012. <http://www.volokh.com/2012/10/30/the-popular-vote-and-presidential-legitimacy/>

⁶⁰³ Rutenberg, Jim. Spoiler alert! G.O.P. fighting Libertarian’s spot on the ballot. *New York Times*. October 15, 2012.

votes heavily Republican) would not tolerate the creation of a one-party state in the United States.

Despite the impression created by the bloggers, there is political diversity and competition in both Kansas and Massachusetts. Kansas had Democratic governors from 2003–2011 (Kathleen Sibelius from 2003–2009 and Mark Parkinson from 2009–2011), and Massachusetts had Republican governors from 1991–2007 (most recently Mitt Romney from 2003–2007).

Third, the Equal Protection Clause of the 14th Amendment to the U.S. Constitution provides a strong legal basis for challenging any attempt to create a one-party state.

“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

Fourth, the Guarantee Clause of the U.S. Constitution provides an additional legal basis for challenging any attempt to create a one-party state.

“The United States shall guarantee to every State in this Union a Republican Form of Government.”⁶⁰⁴

In summary, speculation that the National Popular Vote would create one-party enclaves is a parlor game having no connection to real-world political reality, the legal environment in which American elections are conducted, or the sense of fairness demanded by the American people.

9.33. MYTH ABOUT TYRANNY OF THE MAJORITY

9.33.1. MYTH: The state-by-state winner-take-all rule prevents tyranny of the majority

QUICK ANSWER:

- Winner-take-all statutes enable a mere *plurality* of voters in each state to control 100% of a state’s electoral vote, thereby extinguishing the voice of the remainder of the state’s voters. The state-by-state winner-take-all rule does not prevent a “tyranny of the majority” but instead *is an example of it*. As Missouri Senator Thomas Hart Benton said in 1824, “This is . . . a case . . . of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.”
- It is impossible to discern any specific threat of “tyranny of the majority” that was posed by the first-place candidates in the four elections in which the Electoral College elected the second-place candidate to the Presidency (1824, 1876, 1888, and 2000).

⁶⁰⁴U.S. Constitution. Article IV, section 4, clause 1.

- Under the American system of government, protection against a “tyranny of the majority” comes from specific protections of individual rights contained in the original Constitution and the Bill of Rights; the “checks and balances” provided by dividing government into three branches (legislative, executive, and judicial); the existence of an independent judiciary; and the fact that the United States is a “compound republic” in which governmental power is divided between two distinct levels of government—state and national.

MORE DETAILED ANSWER:

Hans von Spakovsky has written:

“The U.S. election system addresses the Founders’ fears of a ‘tyranny of the majority,’ a topic frequently discussed in the Federalist Papers. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George.”⁶⁰⁵

State winner-take-all statutes enable a mere *plurality* of voters in each state to control 100% of a state’s electoral vote, thereby extinguishing the voice of all the other voters in a state.

Suppressing the voice of a state’s minority is, by definition, an example of “tyranny of the majority.” The state-by-state winner-take-all rule does not prevent a “tyranny of the majority” but instead *is an example of it*.

In 1824, Missouri Senator Thomas Hart Benton said the following about the winner-take-all rule in a Senate speech:

“The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State. . . .**The rights of minorities are violated** because a majority of one will carry the vote of the whole State. . . . **This is . . . a case . . . of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.**”⁶⁰⁶ [Emphasis added]

The winner-take-all rule treats all the voters who did not vote for the first-place candidate *as if* they had voted for the first-place candidate.

In 2012, 56,256,178 (44%) of the 128,954,498 voters had their vote diverted by the winner-take-all rule to a candidate they opposed (namely, their state’s first-place candidate).

⁶⁰⁵ Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.

⁶⁰⁶ 41 *Annals of Congress* 169–170. 1824.

Table 9.45 shows the number of voters who opposed the candidate who received the most votes in each separate state in 2012.⁶⁰⁷ Columns 2 through 5 show the number of votes cast in each state in 2012 for Barack Obama (Democrat), Mitt Romney (Republican), Gary Johnson (Libertarian), and Jill Stein (Green). Column 6 presents the number of votes received by the other 22 minor-party and independent candidates that were on the ballot in 2012 in at least one state (and write-in candidates). Column 7 shows the total vote for each state.

Column 8 of table 9.45 shows the number of voters who did not vote for the candidate who received the most votes in each state. Taking Alabama as an example, former Massachusetts Governor Romney received the most popular votes in the state (1,255,925 out of a total of 2,074,338 votes). However, a total of 818,413 other voters in Alabama did not favor Romney, but instead voted for President Obama, former New Mexico Governor Gary Johnson, Dr. Jill Stein, or one of the other minor-party candidates. Nonetheless, the winner-take-all rule diverted the 818,413 votes cast for Obama, Johnson, Stein, and other minor-party candidates and treated them as if they had been cast for Mitt Romney.

The candidate receiving the most popular votes nationwide did not win the Presidency in four of our nation's 57 presidential elections.

If the winner-take-all rule protects the nation against a “tyranny of the majority,” it is appropriate to inquire as to what specific threat of “tyranny” was posed by the first-place candidate in the four elections in which the Electoral College elected the second-place candidate (1824, 1876, 1888, and 2000)?

What “tyranny” did the winner-take-all rule prevent by not giving the White House to the candidate receiving the most popular votes nationwide in 1888 (Grover Cleveland) and instead installing the second-place candidate (Benjamin Harrison)?⁶⁰⁸

If Andrew Jackson presented the threat of “tyranny” in 1824 (when the Electoral

⁶⁰⁷The 2012 election returns shown in table 9.35, table 9.36, table 9.45, and appendix HH were obtained from the National Archives and Record Administration (NARA) web site at <http://www.archives.gov/federal-register/electoral-college/2012/popular-vote.html>. The NARA web site presents the number of votes shown on each state's Certificate of Ascertainment. There are two differences between our tables and that on the NARA web site. First, the NARA web site presents votes *by party*, whereas our table is based on votes *by candidate*. This difference in treatment creates a difference in the case of New York (which uses fusion voting). The NARA web site (as of January 4, 2013) showed the 141,056 votes that the Obama-Biden slate received on the Working Families Party line (and contained in New York's Certificate of Ascertainment) as minor-party votes in column 6 of their table, instead of showing these votes as Obama-Biden votes in column 2 of their table. Similarly, the web site shows the 256,171 votes that the Romney-Ryan slate received on the Conservative Party line as minor-party votes in column 6, instead of showing these votes as Romney-Ryan votes in column 3. Our table puts these Obama-Biden votes and Romney-Ryan votes in columns 2 and 3, respectively, in conformity with the practice of the New York State Board of Elections. Thus, our table shows (in column 6) only 8,652 votes for minor-party candidates in New York. See section 2.10 for additional details on fusion in New York and figure 2.11 for an example of a presidential ballot in New York. Secondly, our table reflects the adjustment (certified on December 31, 2012) to New York state's vote totals resulting from the fact that an executive order issued on the evening before Election Day allowed voters in counties affected by Hurricane Sandy to cast a provisional ballot at *any* polling place in the state. A total of 400,629 additional ballots (over 300,000 in New York City alone) were counted as a result of this executive order.

⁶⁰⁸See the discussion of the 1888 election in section 9.8.3.

Table 9.45 VOTES DIVERTED BY THE WINNER-TAKE-ALL RULE IN 2012.

STATE	OBAMA	ROMNEY	JOHNSON	STEIN	OTHERS	TOTAL	DIVERTED
AL	795,696	1,255,925	12,328	3,397	6,992	2,074,338	818,413
AK	122,640	164,676	7,392	2,917	—	297,625	132,949
AZ	1,025,232	1,233,654	32,100	7,816	452	2,299,254	1,065,600
AR	394,409	647,744	16,276	9,305	1,734	1,069,468	421,724
CA	7,854,285	4,839,958	143,221	85,638	115,455	13,038,557	5,184,272
CO	1,322,998	1,185,050	35,540	7,508	18,121	2,569,217	1,246,219
CT	905,083	634,892	12,580	863	5,542	1,558,960	653,877
DE	242,584	165,484	3,882	1,940	31	413,921	171,337
D.C.	267,070	21,381	2,083	2,458	772	293,764	26,694
FL	4,235,965	4,162,341	44,681	8,933	19,281	8,471,201	4,235,236
GA	1,773,827	2,078,688	45,324	—	—	3,897,839	1,819,151
HI	306,658	121,015	3,840	3,184	—	434,697	128,039
ID	212,787	420,911	9,453	4,402	4,721	652,274	231,363
IL	3,019,512	2,135,216	56,229	30,222	—	5,241,179	2,221,667
IN	1,152,887	1,420,543	50,111	625	368	2,624,534	1,203,991
IA	822,544	730,617	12,926	3,769	4,882	1,574,738	752,194
KS	440,726	692,634	20,456	—	5,017	1,158,833	466,199
KY	679,370	1,087,190	17,063	6,337	7,252	1,797,212	710,022
LA	809,141	1,152,262	18,157	6,978	7,527	1,994,065	841,803
ME	401,306	292,276	9,352	8,119	—	711,053	309,747
MD	1,677,844	971,869	30,195	17,110	1,521	2,698,539	1,020,695
MA	1,921,290	1,188,314	30,920	20,691	—	3,161,215	1,239,925
MI	2,564,569	2,115,256	7,774	21,897	21,465	4,730,961	2,166,392
MN	1,546,167	1,320,225	35,098	13,023	11,515	2,926,028	1,379,861
MS	562,949	710,746	6,676	1,588	3,625	1,285,584	574,838
MO	1,223,796	1,482,440	43,151	—	7,936	2,757,323	1,274,883
MT	201,839	267,928	14,165	—	—	483,932	216,004
NE	302,081	475,064	11,109	—	2,408	790,662	315,598
NV	531,373	463,567	10,968	—	3,240	1,009,148	477,775
NH	369,561	329,918	8,212	—	708	708,399	338,838
NJ	2,122,786	1,478,088	21,035	9,886	6,704	3,638,499	1,515,713
NM	415,335	335,788	27,787	2,691	2,156	783,757	368,422
NY	4,471,871	2,485,432	47,092	39,856	8,652	7,052,903	2,581,032
NC	2,178,391	2,270,395	44,515	—	619	4,493,920	2,223,525
ND	124,966	188,320	5,238	1,362	3,046	322,932	134,612
OH	2,827,621	2,661,407	49,493	18,574	23,736	5,580,831	2,753,210
OK	443,547	891,325	—	—	—	1,334,872	443,547
OR	970,488	754,175	24,089	19,427	7,816	1,775,995	805,507
PA	2,990,274	2,680,434	49,441	21,341	—	5,741,490	2,751,216
RI	279,677	157,204	4,388	2,421	2,359	446,049	166,372
SC	865,941	1,071,645	16,321	5,446	4,765	1,964,118	892,473
SD	145,039	210,610	5,795	—	2,371	363,815	153,205
TN	960,709	1,462,330	18,623	6,515	8,661	2,456,838	994,508
TX	3,308,124	4,569,843	88,580	24,657	2,647	7,993,851	3,424,008
UT	251,813	740,600	12,572	3,817	8,206	1,017,008	276,408
VT	199,239	92,698	3,487	—	3,866	299,290	100,051
VA	1,971,820	1,822,522	31,216	8,627	13,058	3,847,243	1,875,423
WA	1,755,396	1,290,670	42,202	20,928	16,320	3,125,516	1,370,120
WV	238,230	417,584	6,114	4,593	4,035	670,556	252,972
WI	1,620,985	1,410,966	20,439	7,665	11,379	3,071,434	1,450,449
WY	69,286	170,962	5,326	—	3,487	249,061	78,099
Total	65,897,727	60,930,782	1,275,015	466,526	384,448	128,954,498	56,256,178

College denied him the Presidency), why did Jackson not present an equal threat in 1828 and 1832 (when he *was* elected by the Electoral College)?

Under the American system of government, protection against a “tyranny of the majority” primarily comes from the numerous protections of individual rights contained in the Bill of Rights as well as numerous specific clauses of the original constitution, including, but not limited to, the prohibition of *ex post facto* laws, prohibition of bills of attainder (i.e., legislative acts that impose criminal penalties on named individuals), and prohibition on religious tests for office.

The “checks and balances” provided by dividing government into three branches (legislative, executive, and judicial) provides additional protection against a “tyranny of the majority.” In particular, the existence of an independent judiciary provides significant protection against “tyranny of the majority.”

Additional protection comes from the fact that the United States is a “compound republic” in which governmental power is divided between two distinct levels of government—state and national. James Madison explains the concept of a “compound republic” in *Federalist No. 51*.

“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”⁶⁰⁹ [Emphasis added]

9.34. MYTH ABOUT POLITICALLY-MOTIVATED MID-YEAR ENACTMENT

9.34.1. MYTH: The Texas legislature might enact the National Popular Vote compact based on a mid-year poll indicating that its favored candidate is poised to win the popular vote in November—but not the electoral vote.

QUICK ANSWER:

- The National Popular Vote compact governs the conduct of a particular presidential election only if it has been enacted (and in effect) in states possessing 270 electoral votes on July 20 of a presidential election year.
- It is virtually impossible to predict whether a candidate is going to win the national popular vote—but not the electoral vote—immediately before Election Day, much less as early as July 20 of a presidential election year.
- Elections in which the candidate winning the electoral vote did not win the nationwide popular vote have occurred when the winning margin is small (e.g., the ½% margin in 2000). These small winning margins are well *inside*

⁶⁰⁹ Publius. The structure of the government must furnish the proper checks and balances between the different departments. *Independent Journal*. February 6, 1788. *Federalist No. 51*.

the margin of error of most political polls (which is typically plus or minus 3% or 4%).

- A decision to enact the National Popular Vote compact would have to be made considerably earlier in the year than July 20. Winning approval of a new state law in a given state is a multi-step process in which each step is subject to numerous time-consuming delays. Moreover, most state constitutions provide for a significant delay between the time of the Governor’s signature and the effective date of a newly enacted law.

MORE DETAILED ANSWER:

David Gringer has propounded a hypothetical scenario in which the Texas legislature might “perniciously” gain partisan advantage by enacting the National Popular Vote compact on the basis of a mid-year poll indicating that its favored presidential candidate is poised to win the popular vote—but not the electoral vote—in an upcoming presidential election.

“Until now, this Note has assumed that states are not acting perniciously in considering the NPV. . . . This Note [now] poses a hypothetical scenario in which a state moves to the NPV to achieve partisan advantage, not to remove the inequities of the electoral college or to increase its influence in the presidential election process.

“As the 2020 elections approach, the Republicans who control the Texas Legislature are getting nervous. The Latino population has grown from 28.6% of the overall state population in 2006 to 37.6%. This growth has led the state’s politics to trend Democratic. Republicans need not worry about losing their majority in the state legislature, however, because that legislature enacted an extreme partisan gerrymander during the 2010 redistricting.

“Unfortunately for the Republicans, early polling shows likely Democratic nominee New York Governor Eliot Spitzer with a substantial lead in Texas over the soon-to-be Republican nominee South Dakota Senator John Thune. If the Democratic nominee carries Texas in the general election, he will have a ‘lock’ on the electoral college, as Democrats still dominate the Eastern seaboard, California, and Illinois.

“At the behest of Republican Party leaders, the state legislature passes a bill awarding its electoral votes to the winner of the national popular vote. The Republican Governor of Texas signs the bill into law.”

“With the addition of Texas, enough states now participate for the NPV to take effect.”⁶¹⁰

⁶¹⁰ Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008. Pages 219–220.

Gringer certainly makes a plausible case that demographic changes might cause Texas (with its 38 electoral votes) to become Democratic by 2020. He also makes a plausible case that a future Republican presidential candidate would probably find it difficult to assemble a majority in the Electoral College if the Republicans could not rely on Texas' formidable bloc of 38 electoral votes.

Gringer's hypothetical scenario about a state activating the National Popular Vote compact in mid-July for partisan advantage is, however, implausible for several reasons.

First, the National Popular Vote compact cannot be brought into effect at the spur of the moment. The compact governs the conduct of a particular presidential election only if it has been enacted (and, importantly, has taken effect) in states possessing 270 electoral votes on July 20 of the presidential election year.

Second, Gringer's hypothetical scenario is based on the existence of mid-year polling that is sufficiently persuasive to cause a state legislature and Governor to make a significant political decision before July 20 of the presidential election year.

It is virtually impossible to predict whether a particular presidential candidate is going to win the national popular vote—but not the electoral vote—immediately before Election Day, much less as early as July 20 of a presidential election year.

This point was illustrated in the week before Election Day in 2000, when most polls indicated that George W. Bush was poised to win the national popular vote—but not the electoral vote. Indeed, the Bush campaign was planning for just that eventuality.

As the *New York Daily News* reported on Wednesday November 2, 2000, in an article entitled “Bush [is] set to fight an Electoral College loss:”

“Quietly, some of George W. Bush's advisers are preparing for the ultimate ‘what if’ scenario: What happens if Bush wins the popular vote for President, but loses the White House because Al Gore won the majority of electoral votes? . . .”

“‘The one thing we don't do is roll over,’ says a Bush aide. ‘We fight.’

“How? The core of the emerging Bush strategy assumes a popular uprising, stoked by the Bushies themselves, of course.

“In league with the campaign—which is preparing talking points about the Electoral College's essential unfairness—a massive talk-radio operation would be encouraged. ‘We'd have ads, too,’ says a Bush aide, ‘and I think you can count on the media to fuel the thing big-time. Even papers that supported Gore might turn against him because the will of the people will have been thwarted.’

“Local business leaders will be urged to lobby their customers, the clergy will be asked to speak up for the popular will and Team Bush will enlist as many Democrats as possible to scream as loud as they can. ‘You think

‘Democrats for Democracy’ would be a catchy term for them?’ asks a Bush adviser.

“The universe of people who would be targeted by this insurrection is small—the 538 currently anonymous folks called electors, people chosen by the campaigns and their state party organizations as a reward for their service over the years. . . .

“Enough of the electors could theoretically switch to Bush if they wanted to—if there was sufficient pressure on them to ratify the popular verdict.”⁶¹¹

Nate Cohn wrote in 2012:

“There is a high evidentiary burden for demonstrating that any candidate holds a structural advantage in the Electoral College. The Electoral College almost always follows the popular vote, and **even when the popular vote winner fails to secure the necessary electoral votes, it isn’t necessarily apparent in advance**. Heading into Election Night 2000, the fear was Gore winning the Electoral College and Bush winning the popular vote. The exact opposite happened only a few hours later. In an extremely close national election, deviations of only a few percentage points in the closest few states can complicate even the best gamed electoral scenarios.”⁶¹²

[Emphasis added]

Third, presidential elections in which one candidate wins the popular vote—but not the electoral vote—are necessarily *close elections*. Tilden’s 3% margin in 1876 was the largest difference in the national popular vote among the nation’s four “wrong winner” elections (table 1.22). In 2000, the difference in the national popular vote between the two candidates was ½% (about a half million votes nationwide). Modest winning margins such as 3% are *inside* the margin of error of political polls.

An article on July 24, 2012 (four days after July 20), by Nate Silver in the *New York Times*, entitled “State and National Polls Tell Different Tales About State of Campaign”⁶¹³ reinforces the point. Silver pointed out that the *Real Clear Politics* average of national polls at the time gave President Obama a nationwide lead of 1.3%. However, at the same moment, Obama led by a mean of 3.5% in the *Real Clear Politics* averages for 10 battleground states (Ohio, Virginia, Florida, Pennsylvania, Colorado, Iowa, Nevada, Michigan, New Hampshire, and Wisconsin) that were considered (at the

⁶¹¹ Kramer, Michael. Bush set to fight an electoral college loss: They’re not only thinking the unthinkable, They’re planning for it. *New York Daily News*. November 1, 2000. http://articles.nydailynews.com/2000-11-01/news/18145743_1_electoral-votes-popular-vote-bush-aide.

⁶¹² Cohn, Nate. 2012. No, we don’t have evidence of an Obama advantage in the Electoral College. *The New Republic*. June 27, 2012.

⁶¹³ Silver, Nate. State and national polls tell different tales about state of campaign. FiveThirtyEight column in *New York Times*. July 24, 2012.

time) to be most likely to determine the outcome of the 2012 election. Both the 1.3% margin and the 3.5% margin were *inside* the margin of error for most political polls (typically plus or minus 3% or 4%). It seems implausible that mid-year polls in 2020 showing 1.3% and 3.5% margins similar to the just-mentioned July 2012 polling would be sufficiently persuasive to cause Texas Republicans to “perniciously” enact the National Popular Vote compact.

Fourth, even if political polls had *no* margin of error, they merely reflect public opinion at the time they are taken. Many things can happen between July 20 and Election Day in November.

July 20 is three and a half months before the November presidential election. That date is well before the national nominating conventions of the major political parties, and it is well before the date when a party’s (non-incumbent) vice-presidential choice is typically announced. The impression created by a party’s national convention (particularly the keynote speech, nominating speeches, acceptance speeches, and the absence of divisive intra-party fighting), the choice of the vice-presidential candidate, the debates, the day-to-day conduct of the campaign are examples of the numerous post-July-20 events can significantly impact the eventual outcome in November.

In August 1988, Michael Dukakis led George H.W. Bush by 18% in national polls; however, Bush won on Election Day by an 8% national margin.

A June 1992 nationwide poll taken immediately before the Democratic National Convention showed that Bill Clinton had 25% support (with Perot having 39% support and incumbent President George H.W. Bush having 31%).⁶¹⁴ However, Bill Clinton took the lead immediately after his convention and retained the lead all the way to Election Day.

Fifth, as a practical matter of state legislative scheduling, a decision to enact the National Popular Vote compact would have to be made considerably earlier in the year than July 20. Winning approval of a new state law in a given state is a multi-step process in which each step is subject to numerous time-consuming delays.

The ninth clause of Article III of the compact provides:

“This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, **in effect** in states cumulatively possessing a majority of the electoral votes.” [Emphasis added]

A new state law can be “in effect” by July 20 only if it has previously been

- approved by both houses of the state legislature,
- acquired the Governor’s signature (or been passed by overriding the Governor’s veto), and
- taken effect in accordance with the state’s constitution schedule specifying when state laws take effect.

⁶¹⁴The 1992 poll was cited in Stanley, Timothy. Why Romney is stronger than he seems. *CNN Election Center*. April 10, 2012.

Although procedures exist in each state legislature to accelerate the progress of a bill, these exceptional procedures can generally only be invoked by super-majorities. Given that the premise of Gringer’s hypothetical scenario is that partisan advantage is a “pernicious” partisan motivation for the enactment of the National Popular Vote compact, the minority party in the legislature would oppose such efforts. In fact, the minority party would vigorously employ the numerous tools at its disposal to slow or block the bill. Taking the specific case of Texas mentioned in Gringer’s article, Texas is one of four states with a two-thirds quorum in the legislature. Texas Republicans did not have a two-thirds majority in either chamber of the Texas legislature as of November 2012. Section 9.11.1 provides additional details on the difficulties associated with trying to pass legislation over the determined opposition of a legislature’s minority.

Moreover, even if a new state law could be *instantly* enacted, most state constitutions provide for a significant delay between the time of the Governor’s signature and the effective date of the newly enacted law (e.g., 60, 90, 120 days, in many cases, longer). The information in table 9.12 and the accompanying discussion in section 9.11.1 indicate that Gringer’s hypothesized partisan maneuver would have to be executed *many months before* July 20 in most states.

In Texas, for example, new laws take effect 90 days after enactment. Thus, the National Popular Vote compact would have to be enacted by April 20, 2020, in order to be “in effect” by July 20, 2020. This 90-day delay can only be waived by a two-thirds vote of both houses of the legislature.

Sixth, there is an additional reason why Gringer’s hypothetical scenario could not be executed in Texas even by a date as early as April 20, 2020. The Texas legislature only meets for a few months in *odd-numbered* years for passing general bills. Gringer’s hypothetical scenario could be executed in Texas during the spring of 2019—that is, 18 months before the November 2020 presidential election. However, if the bill were not passed in the regular session in the odd-numbered year (2019), a special session would have to be called to consider the bill. If a special session were called in the even-numbered year (that is, 2020) for the purpose of passing an elections bill that is perceived to be of immediate partisan advantage to the Republican Party, Texas Democrats would fiercely oppose that bill. Given the two-thirds quorum in the Texas legislature, it would be impossible to pass the bill in the spring of 2020 or, indeed, any time after the legislature’s regular session in the odd-numbered year (2019).

If this partisan maneuver were contemplated in a state possessing fewer electoral votes than Texas, the question would arise as to whether that state could alone make the difference.

Others have suggested an even less plausible hypothetical scenario, namely that a politically motivated state legislature might repeal the compact before July 20 of a presidential-election year based on mid-year polls indicating that its favored presidential candidate is poised to win the electoral vote—but not the popular vote. This hypothetical scenario is implausible for all the same reasons mentioned in connection with Gringer’s hypothetical scenario involving Texas.

9.35. MYTH THAT NATIONAL POPULAR VOTE IS UNPOPULAR

9.35.1. MYTH: National Popular Vote is being imposed without the consent of the majority of Americans.

QUICK ANSWER:

- The National Popular Vote compact would go into effect when enacted by states possessing a majority of the votes in the Electoral College.
- The compact thus represents a majority of Americans using the metric established in the Constitution for representing the people in presidential elections, namely the Electoral College.
- Numerous polls conducted by different polling organizations over a number of years, using a variety of different wordings of questions, all report high levels of support for a national popular vote.

MORE DETAILED ANSWER:

Hans von Spakovsky has stated:

“National Popular Vote Inc., . . . one of California’s lesser-known advocacy organizations, want[s] to ‘scratch off’ the Electoral College—**without getting the consent of the majority of Americans.**”⁶¹⁵ [Emphasis added]

The National Popular Vote compact would go into effect when enacted by states possessing a majority of the votes in the Electoral College.

The compact would thus represent a majority of Americans using the very metric established in the Constitution for representing the people in presidential elections, namely the Electoral College.

Public opinion has supported nationwide popular election of the President for over six decades by overwhelming margins. Section 7.1 presents numerous polls conducted over a number of years by many different polling organizations, using a variety of different wordings of questions, and all of them report high levels of support for a national popular vote.

Recent state-level polls show a high level of public support for a national popular vote in battleground states, small states, Southern states, border states, and elsewhere.⁶¹⁶

⁶¹⁵ Von Spakovsky, Hans A. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

⁶¹⁶ Detailed reports on the polls, including the cross-tabs, are available on the web site of National Popular Vote at <http://www.nationalpopularvote.com/pages/polls.php>.

- Alaska–70%,
- Arizona–67%,
- Arkansas–80%,
- California–70%,
- Colorado–68%,
- Connecticut–74%,
- Delaware–75%,
- District of Columbia–76%,
- Florida–78%,
- Kentucky–80%,
- Idaho–77%,
- Iowa–75%,
- Maine–77%,
- Massachusetts–73%,
- Michigan–73%,
- Minnesota 75%,
- Mississippi–77%,
- Missouri–70%,
- Montana–72%,
- Nebraska–67%,
- Nevada–72%,
- New Hampshire–69%,
- New Mexico–76%,
- New York–79%,
- North Carolina–74%,
- Ohio–70%,
- Oklahoma–81%,
- Oregon–76%,
- Pennsylvania–78%,
- Rhode Island–74%,
- South Carolina–71%,
- South Dakota–75%,
- Tennessee–83%,
- Utah–70%,
- Vermont–75%,
- Virginia–74%,
- Washington–77%,
- West Virginia–81%,
- Wisconsin–71%, and
- Wyoming–69%.

9.36. MYTH ABOUT THE WEATHER

9.36.1. MYTH: The state-by-state winner-take-all rule minimizes the effects of hurricanes and bad weather.

QUICK ANSWER:

- Under the current state-by-state winner-take-all rule, a small difference in turnout (caused by bad weather or any other factor) in one part of a closely divided battleground state can potentially switch the electoral-vote outcome in that state (and hence the national outcome of the presidential election). In contrast, a localized reduction in turnout is unlikely to materially affect the outcome of a nationwide vote for President.
- Bad weather regularly affects the outcome of elections—both state and federal. A study of past weather conditions indicates that bad weather reversed the statewide outcome for President in Florida in 2000 (and hence the national outcome).
- Neither the National Popular Vote compact nor the winner-take-all rule can do anything about the weather; however, a national popular vote for President

would reduce the likelihood that bad weather could reverse the outcome of a presidential election.

MORE DETAILED ANSWER:

It is often said that everybody talks about the weather, but nobody does anything about it. Neither the National Popular Vote compact nor the winner-take-all rule can do anything about the weather. However, a national popular vote would reduce the likelihood that bad weather could actually change the overall outcome of a presidential election.

Thaddeus Dobracki has stated that the current state-by-state winner-take-all method of electing the President:

“negates the effect of exceptionally high or low turn-out in a state by giving the state a fix[ed] number of electors. For example, if bad weather, such as a hurricane, were to hit North Carolina, then instead of losing influence because of a low turnout, that state would still get its normal allocation of Electoral College votes.”⁶¹⁷

The state-by-state winner-take-all rule does indeed ensure that a state affected by turnout-depressing weather (such as a hurricane) will nonetheless cast its *full number* of electoral votes in the Electoral College. However, the winner-take-all rule can result in those electoral votes being cast in a way that is unrepresentative of normal voter sentiment in the state.

Under the current state-by-state winner-take-all rule, a small difference in turnout (caused by bad weather or any other factor) in one part of a closely divided battleground state can potentially reverse the electoral-vote outcome in that state (and hence the national outcome of the presidential election). In contrast, a localized reduction in turnout is unlikely to materially affect the outcome of a nationwide vote for President.

Bad weather regularly affects the outcome of both state and federal elections.

John F. Kennedy might have received a far larger majority of the popular vote in the then-battleground states of Illinois and Michigan had the weather been better in Detroit and Chicago on Election Day in 1960. Theodore White wrote in *The Making of the President 1968*:

“The weather was clear all across Massachusetts and New England, perfect for voting as far as the crest of the Alleghenies. But from Michigan through Illinois and the Northern Plains states it was cloudy: **rain in Detroit and Chicago**, light snow falling in some states on the approaches of the Rockies.”⁶¹⁸ [Emphasis added]

⁶¹⁷Dobracki, Thaddeus. *The Morning Call*. September 21, 2012. <http://discussions.mcall.com/20/allnews/mc-electoral-college-madonna-young-yv-20120920/10?page=2>.

⁶¹⁸White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 7.

Table 9.46. VOTE OF NORTH CAROLINA IN 17 COASTAL COUNTIES IN 2008

COASTAL COUNTY	MCCAIN	OBAMA	REPUBLICAN MARGIN	DEMOCRATIC MARGIN
Currituck	7,234	3,737	3,497	–
Camden	3,140	1,597	1,543	–
Pasquotank	7,778	10,272	–	2,494
Perquimans	3,678	2,772	906	–
Chowan	3,773	3,688	85	–
Bertie	3,376	6,365	–	2,989
Washington	2,670	3,748	–	1,078
Tyrrell	960	933	27	–
Dare	9,745	8,074	1,671	–
Hyde	1,212	1,241	–	29
Beaufort	13,460	9,454	4,006	–
Pamlico	3,823	2,838	985	–
Carteret	23,131	11,130	12,001	–
Onslow	30,278	19,499	10,779	–
Pender	13,618	9,907	3,711	–
New Hanover	50,544	49,145	1,399	–
Brunswick	30,753	21,331	9,422	–
Total	209,173	165,731	50,032	6,590

Similarly, bad weather in upstate New York, downstate Illinois, western Michigan, and southern Ohio frequently affects which candidate carries the state in a federal or state election.

A turnout-depressing weather event on North Carolina’s hurricane-prone coast would adversely affect the Republican Party under the winner-take-all rule if it occurred on Election Day. North Carolina was a closely divided battleground state in 2008 and 2012. The disposition of all of North Carolina’s electoral votes was decided in 2008 by President Obama’s statewide plurality of only 14,177.

Table 9.46 shows that 14 of the 17 counties on North Carolina’s Atlantic coast voted heavily Republican in the 2008 presidential election. As can be seen from the table, John McCain built up a net 43,433-vote margin from the state’s 17 coastal counties. Thus, a hurricane hitting North Carolina’s coast (causing disruption and evacuations) could easily shift the state’s potentially critical 15 electoral votes from one party to the other (potentially resulting in the state’s electoral votes being cast in a way that is unrepresentative of voter sentiment in the state).

There was considerable speculation that Hurricane Sandy (which made landfall in Pennsylvania a week before the November 6, 2012, presidential election) might reduce voter turnout in the heavily Democratic city of Philadelphia (in the eastern part of the state). In contrast, the Republican central part of the state (often called the “T” area) is much farther from the Atlantic Ocean. Lower turnout in Philadelphia had the potential of flipping the statewide plurality from Democrat Barack Obama to Republican Mitt Romney (and thereby flipping the state’s 20 potentially critical electoral votes).

Such an outcome would not have been reflective of normal voter sentiment in Pennsylvania as indicated by virtually every statewide poll before Election Day in 2012⁶¹⁹ and the fact that the Democrats have carried Pennsylvania in every presidential election since 1992.

In a state such as Florida, the political effect of a hurricane would depend on the location of the hurricane's landfall.

Tampa is in Hillsborough County on the state's west coast. Tampa was the site of the 2012 Republican National Convention. That convention was, in fact, disrupted by a hurricane (Issac) that only minimally impacted Florida's southeastern coast. In the November 2000 presidential election, George W. Bush received 180,794 votes in Hillsborough County to Al Gore's 169,576 votes—giving Bush a county-wide margin of 11,218 votes. In 2000, Bush won Florida by 537 votes out of 5,963,110 votes. If a hurricane had even slightly depressed turnout in Hillsborough County on Election Day in November 2000, 100% of Florida's electoral votes would have gone to Al Gore (giving Al Gore all of Florida's 25 electoral votes and making him President).

Conversely, if bad weather were to depress turnout in heavily Democratic counties (such as Miami-Dade, Broward, and Palm Beach) in southeastern Florida, the Republicans would benefit.

There is evidence that the weather has affected the outcome of presidential elections under the current state-by-state winner-take-all system. For example, an article entitled "The Weather and the Election" from the Oklahoma Weather Lab at the University of Oklahoma commented on a 2007 county-by-county study of the weather in the *Journal of Politics*:

"Gomez et al. collected meteorological data recorded at weather stations across the lower 48 United States for presidential election days between 1948 and 2000, and interpolated these data to get rain and snowfall totals for each election day for each county in the entire nation. They then compared the rain and snowfall data with voter turnout for each county, and performed statistical regressions to determine whether or not rain and snow (bad weather) had a negative impact on voter turnout.

"What they found was that **each inch of rain experienced on election day drove down voter turnout by an average of just under 1%**, while each inch of snow knocked 0.5% off turnout. Though the effect of snow is less on a 'per inch' basis, since multiple-inch snowfall totals are far more common than multiple-inch rainfall events, we can conclude that **snow is likely to have a bigger negative impact on voter turnout.**

⁶¹⁹ See the tabulation of statewide polls found at the web site using the Gott-Colley median method of analyzing poll statistics at <http://www.colleyrankings.com/election2012/>.

“Furthermore, Gomez et al. noted that when bad weather did suppress voter turnout, it tended to do so in favor of the Republican candidate, to the tune of around 2.5% for each inch of rainfall above normal. In fact, when they simulated the 14 presidential elections between 1948 and 2000 with sunny conditions nationwide, they found two instances in which **bad weather likely changed the electoral college outcome—once in North Carolina in 1992, and once in Florida in 2000. The latter change is particularly notable, as it would have resulted in Al Gore rather than George Bush winning the presidential election that year.**”^{620,621}
[Emphasis added]

Fortunately, hurricane Sandy did not hit the northeast on Election Day. Instead, it arrived a week before Election Day. This is a reminder that a convergence of unlikely events would be needed to materially affect a presidential election, namely the unlikely event of a major hurricane combined with the unlikely event of a major hurricane on Election Day.

What can be said about hurricane Sandy is that it probably impacted the 2012 presidential election in terms of its effect on political discourse in the week prior to Election Day. As former Mississippi Governor Haley Barbour (R) said:

“The hurricane is what broke Romney’s momentum. I don’t think there’s any question about it. Any day that the news media is not talking about jobs and the economy, taxes and spending, deficit and debt, ‘ObamaCare’ and energy, is a good day for Barack Obama.”⁶²²

Note that the potential effects of bad weather on elections are decreasing from year to year because of the increasing use of mail-in voting, absentee voting, and early voting. In 2012, 100% of the voting was done by mail in Washington state and Oregon. In numerous states, a substantial fraction of a state’s vote now comes from absentee voting and early voting. In California, for example, 51% of the vote in the November 2012 presidential election was cast by mail.

Nonetheless, the fact that a hurricane (such as Sandy) could hit on Election Day is a reminder that weather can, and does, affect the outcome of elections.

⁶²⁰The weather and the election. 2008. Oklahoma Weather Lab at the University of Oklahoma. <http://hoot.metr.ou.edu/archive/story&docId=21>. See also <http://www.thorntonweather.com/blog/local-news/will-the-weather-determine-the-next-president/>. See section 9.31.13 for a quotation from the Gomez article from the August 2007 issue of *Journal of Politics*.

⁶²¹Brad T. Gomez, Brad T.; Hansford, Thomas G.; and Krause, George A. 2007. The Republicans should pray for rain: weather, turnout, and voting in U.S. Presidential Elections. *The Journal of Politics*. Volume 69, number 3. August 2007. Pages 649–663.

⁶²²Herb, Jeremy. Former Gov. Barbour: Hurricane Sandy broke Romney’s momentum. *The Hill*. November 4, 2012.

9.37. MYTH ABOUT OUT-OF-STATE PRESIDENTIAL ELECTORS

9.37.1. MYTH: The National Popular Vote compact will result in out-of-state presidential electors.

QUICK ANSWER:

- The possibility of out-of-staters serving as presidential electors is based on the unlikely scenario that a third-party candidate wins the most popular votes nationwide without being on the ballot in all 50 states combined with the politically preposterous prediction that a third-party President-Elect would gratuitously offend people in some state by appointing non-resident presidential electors.
- If anyone considers the hypothesized scenario to be a significant potential problem, the states have ample constitutional authority to prevent it by simply establishing residency requirements for their presidential electors.
- Even if the hypothesized scenario were to occur, the National Popular Vote compact would nonetheless have delivered precisely its advertised result namely, the election of the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

MORE DETAILED ANSWER:

Tara Ross discussed a hypothetical third-party candidacy of Texas Congressman Ron Paul when the Vermont legislature was debating the National Popular Vote bill:

“Vermont probably did not nominate a slate of electors for Paul because he was not on its ballot. NPV’s compact offers a solution, but it is doubtful that voters in Vermont will like it. Paul would be entitled to personally appoint the three electors who will represent Vermont in the Electoral College vote. In all likelihood, he would select Texans to represent Vermont.”⁶²³

Ross is referring to a back-up provision in the National Popular Vote compact that provides a procedure to fill a vacancy in the unlikely situation that a particular political party in a particular state fails to nominate the exact number of presidential electors to which it is entitled in a particular state.

The seventh clause of Article III of the compact provides:

“If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state’s number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential

⁶²³ Written testimony submitted by Tara Ross to the Vermont Committee on Government Operations. February 9, 2011.

electors for that state and that state’s presidential elector certifying official shall certify the appointment of such nominees.”

This back-up procedure is modeled after the method of nominating presidential electors that is routinely used today in Pennsylvania in all elections. Under Section 2878 of the Pennsylvania election code, each presidential nominee directly nominates the presidential electors who will run in association with the nominee’s presidential slate in Pennsylvania. Section 6.3.2 contains a more detailed discussion of this provision.

It is, of course, unlikely that a third-party presidential candidate (such as Ron Paul) could win the national popular vote without being on the ballot in all 50 states. Serious candidates for President qualify for the ballot in all 50 states. Ross Perot was on the ballot in all 50 states in both 1992 and 1996. John Anderson was on the ballot in all 50 states in 1980. The Libertarian Party got its presidential nominee on the ballot in all 50 states in 1980, 1992, and 1996. Lenora Fulani, the nominee of the New Alliance Party, was on ballot in all 50 states in 1988. Ralph Nader (who received only about ½% of the national popular vote in 2008) was on the ballot in 45 states.

It is especially unlikely that a third-party candidate would fail to get the 1,000 signatures required to get on the ballot in Vermont (which, like most small states, has especially low requirements for ballot access).

In the unlikely event that a third-party candidate wins the Presidency without being on the ballot in all 50 states, that President-Elect would not want to begin his Presidency by gratuitously offending Vermont by appointing Texans as his choices for the position of presidential elector in Vermont. President-Elect Ron Paul could—and certainly would—find three supporters in Vermont to serve as his presidential electors in Vermont.

There is historical evidence about how real-world politicians would behave in this situation. Under existing law in Pennsylvania, *every* presidential candidate, in *every* election, directly chooses *every* presidential elector in Pennsylvania. Needless to say, no presidential candidate has ever chosen a Texan or any other out-of-state person for the position of presidential elector in Pennsylvania. Indeed, it would be politically preposterous for a presidential candidate to insult Pennsylvania gratuitously by naming out-of-staters for the ceremonial position of presidential elector. It would be even more preposterous for someone who had just won the national popular vote (and was about to become President and face the task of unifying the country) to insult a state gratuitously.

Moreover, if a state were to become concerned about the possibility of out-of-state presidential electors, it could simply enact legislation providing residency requirements for its presidential electors.

Finally, it should be noted that the sole job of a presidential elector—under both the current system and the National Popular Vote compact—is to appear in the state capital in mid-December and spend about 15 minutes casting his vote for the candidate for whom everyone expects him or her to vote. Even in the unlikely event that a third-

party candidate were to win the national popular vote, were to do so without being on the ballot in every state, and then were to make politically offensive appointments to the ceremonial position of presidential elector, the practical result would still be that the National Popular Vote compact would have delivered precisely its advertised result, namely the election of the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

9.38. MYTH ABOUT THE FRENCH PRESIDENTIAL ELECTION SYSTEM

9.38.1. MYTH: National Popular Vote seeks to import the flawed French presidential election system into the United States.

QUICK ANSWER:

- The National Popular Vote compact would not import France’s presidential election system into the United States.
- The 2002 French presidential election forced voters to choose between two right-wing candidates in the general election because the left-wing candidates were eliminated in France’s “top two” multi-party primary.
- The existing American system for nominating presidential candidates does not have the flaws of the French system, and, in any case, the National Popular Vote compact would not affect the nominating process.

MORE DETAILED ANSWER:

Professor Norman R. Williams of Willamette University incorrectly equates the National Popular Vote compact with France’s flawed “top two” multi-party primary system for nominating presidential candidates.

“The French President is elected on a nationwide popular vote of the sort that the NPVC seeks to introduce in the U.S.”⁶²⁴

Williams goes on to criticize the 2002 French presidential election.

The French presidential election system starts with a *multi-party* primary in which candidates *from different parties* are forced to compete directly against each other for a spot in the final general election. The “top two” candidates from the primary then compete against each other in the general election.

In 2002, the primary in France included two prominent right-wing candidates, namely the conservative Gaullist Mayor of Paris Jacques Chirac and the ultra-conservative Jean-Marie Le Pen. The primary also included a multiplicity of prominent left-wing candidates of whom the most popular was Prime Minister Lionel Jospin.

⁶²⁴ Williams, Norman R. Reforming the Electoral College: Federalism, majoritarianism, and the perils of sub-constitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 204.

In previous French presidential elections conducted under the Fifth Republic's constitution (adopted in 1958), one right-wing candidate and one left-wing candidate had always emerged from this multi-party "top two" primary system. Accordingly, it was widely expected that the conservative Chirac and leftist Jospin would run against one another in the 2002 general election.

However, because an unusually large number of left-wing candidates entered the primary (including a Green, an independent socialist, a Trotskyist, and others), the left-wing vote in the primary was fragmented while the conservative vote was divided only two ways. In the primary, the conservative Chirac received 5.6 million votes; the ultra-conservative Le Pen received 4.8 million votes; and leftist Jospin trailed with 4.6 million votes. That is, the "top two" candidates were both conservatives.

The result was a general election in which voters were forced to choose between conservative Chirac and an ultra-conservative Le Pen. Left-wing voters (who would certainly have enthusiastically voted for Jospin over Chirac) were forced to vote for one of the two conservatives. Chirac won with 82% of the vote in the general election.

Williams (and virtually every other observer) has justifiably criticized the French presidential election system for denying the voters any real choice in the 2002 general election.

However, contrary to the impression created by Williams, the National Popular Vote compact would not import the egregiously flawed features of the French multi-party primary system into the United States.

First, the existing American system of nominating presidential candidates is not a "top two" *multi-party* primary such as used in France.

Second, the National Popular Vote compact would not affect the existing American system of nominating presidential candidates.

Under the existing system for nominating presidential candidates in the United States, one Democratic nominee emerges after competing with other Democrats in primaries (and caucuses), and one Republican candidate emerges after competing with fellow Republicans. Third-party nominees are similarly nominated in competitive processes in which they compete with other members of their own party for their own party's nomination.

Then, after the nominating process is over, the eventual Democratic nominee competes in the November general election against the eventual Republican nominee (and any third-party nominees). Under the existing system for nominating presidential candidates in the United States, there is no possibility that the voters would face a choice such as that faced by French voters in 2002 (namely two Republicans but no Democrat or no third-party alternatives in the November general election).

Note that Louisiana has long used a "top two" multi-party system that is virtually identical to the French system (the so-called "jungle" primary). Washington state and California recently adopted the "top two" approach for their state elections. The "top two" multi-party primary system regularly produces situations similar to the

2002 French presidential elections. For example, the June 2012 primary in California's newly created 31st congressional district included two prominent Republicans (Congressman Gary G. Miller and outgoing State Senate Republican leader Bob Dutton) and multiple Democrats (including San Bernardino Council member Pete Aguilar). Because of the fragmentation of the Democratic vote, the two Republicans emerged from the "top two" primary as the district's candidates for the November 2012 general election (with Aguilar running third with 23% of the vote). Even though the district is heavily Democratic, the district's voters were forced to choose between two Republicans (but no Democrats and no third-party candidates) in the November general election.

Also note that the multiplicity of political parties in France existed before the 1958 Constitution (as opposed to being created by it). Prior to 1958, France had a parliamentary system in which the Prime Minister was selected by parliament. The 1958 Constitution created a President elected in a nationwide popular election. The 1958 Constitution attempted to accommodate the country's pre-existing multiplicity of parties by adopting the "top two" multi-party primary.

In summary, the National Popular Vote compact would not import France's presidential election system into the United States. Instead, it applies the method long used to fill almost every other public office in the United States to the election of the President.

9.39. MYTHS ABOUT UNINTENDED CONSEQUENCES

9.39.1. MYTH: There could be unintended consequences of a nationwide vote for President.

QUICK ANSWER:

- Change can have unintended and unexpected *desirable* consequences just as easily as it can have undesirable consequences.
- The consequences of inaction are known and *undesirable* in the case of the current system of electing the President.
- When the states switched to direct popular election of Governors in the late 18th and early 19th centuries, there were no significant unintended or unexpected undesirable consequences.
- If some undesirable unexpected consequence materializes, or some adjustment becomes advisable in the National Popular Vote compact, state legislation may be repealed or amended more easily than a federal constitutional amendment.

MORE DETAILED ANSWER:

One of the generic arguments against *any* proposed change is that there might be unintended or unexpected consequences.

The attractiveness of this generic argument is that opponents need not identify any specific consequence, and therefore no thoughtful discussion is possible.

Nonetheless, there are several responses to this generic argument:

- (1) Change can have unintended and unexpected *desirable* consequences just as easily as it can have undesirable consequences.
- (2) No significant unexpected undesirable consequences surfaced when an analogous action was taken in a closely related situation.
- (3) Reversing the proposed action would be relatively easy if there were significant unexpected undesirable consequences.
- (4) The consequence of inaction is that the known shortcomings of the existing system will not be corrected.

Concerning item (1), opponents do not specify what the consequences might be. Hence, we cannot ascertain whether these consequences are desirable or undesirable.

Concerning item (2), there certainly were no significant unexpected undesirable consequences when the states switched to direct popular election of their chief executives. In 1787, only Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont conducted popular elections for the office of Governor.⁶²⁵ During the late 18th and early 19th centuries, the states switched, one-by-one, to direct popular election of Governors. Today, 100% of the states elect their Governors by direct popular vote. After over 5,000 direct popular elections for Governor in over two centuries, no state has ever decided to eliminate its direct popular election for Governor, and there is virtually no editorial, academic, legislative, or public criticism of direct election of Governors.

Concerning item (3), the National Popular Vote compact is state legislation. If some undesirable unexpected consequence materializes or some adjustment becomes advisable, an interstate compact may be repealed or amended more easily than a federal constitutional amendment.

Concerning item (4), the consequences of inaction are known and undesirable.

- **Four out of five states and four out of five voters are ignored in Presidential Elections.** One of the consequences of the current winner-take-all rule (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most popular votes in each separate state) is that presidential candidates do not expend significant time, effort, or money in states in which they are comfortably ahead or hopelessly behind. Presidential candidates ignore such states because they do not receive additional or fewer electoral votes based on the size of the margin by which they win or lose a state (as discussed in section 1.2.1).
- **The Current System Does Not Reliably Reflect the Nationwide Popular Vote.** The state-by-state winner-take-all rule makes it possible for a candidate

⁶²⁵ Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Page xx.

to win the Presidency without winning the most popular votes nationwide. This has occurred in four of the nation's 57 presidential elections between 1789 and 2012—1 in 14 (as detailed in section 1.2.2). In the past six decades, there have been six presidential elections in which a shift of a relatively small number of votes in one or two states would have elected (and, of course, in 2000, did elect) a presidential candidate who lost the popular vote nationwide (as discussed in section 1.2.2).

- **Not Every Vote Is Equal.** The state-by-state winner-take-all rule creates variations of 1000-to-1 and more in the weight of a vote (as detailed in section 1.2.3).

9.40. MYTH ABOUT PERFECTION

9.40.1. MYTH: The National Popular Vote compact is not perfect.

QUICK ANSWER:

- The test of whether the National Popular Vote compact should be adopted is whether it is an improvement over the current system of electing the President—not whether it is perfect.

MORE DETAILED ANSWER:

The authors believe that their responses in this book to the numerous myths about the National Popular Vote compact establish that the compact would address the shortcomings of the current state-by-state winner-take-all method of awarding electoral votes, while handling conjectured adverse scenarios in a manner that is equal to, or superior to, the current system.

There is, however, no need to address the philosophical question as to whether the National Popular Vote compact is perfect. The test of whether the National Popular Vote compact should be adopted is whether it is a significant improvement over the current system of electing the President—not whether it is perfect. The authors of this book believe that they have made the case that the National Popular Vote compact is a significant improvement over the current system because it would remedy the current system's three major shortcomings, namely

- Four out of five states and four out of five voters are ignored in presidential campaigns under the current system (as discussed in section 1.2.1);
- The current system does not reliably reflect the nationwide popular vote (as discussed in section 1.2.2); and
- Every vote is not equal under the current system (as discussed in section 1.2.3).