9 | Answering Myths about the National Popular Vote Compact

The National Popular Vote Compact has been scrutinized in hundreds of public hearings, legislative debates, reports, op-eds, editorials, public meetings, interviews, academic publications, and internet discussions.

As will be seen in this chapter, a great many of the criticisms of the Compact are based on demonstrably incorrect statements about what is actually in the Compact, what is in existing federal and state law, and plain facts.

Many of the hypothetical scenarios attributed to the National Popular Vote Compact would, after being analyzed, be more consequential or more frequent under the current system than they would ever be in a nationwide election. Many of these scary scenarios would apply equally to the current system, and hence are not a basis for preferring the current system over the Compact.

Meanwhile, while opponents of the National Popular Vote Compact try to focus attention on the myths covered in this chapter, they never address—and cannot address—the manifest shortcomings of the current system of electing the President, namely that it does not:

- guarantee the Presidency to the candidate who gets the most votes nationwide,
- make every vote equal throughout the country, and
- give candidates a reason to solicit votes in all 50 states in every election.

This chapter provides our responses to 175 myths about the National Popular Vote Compact.

All 175 myths are listed in the Third Level Table of Contents on pages xix through xxviii at the front of this book. The sub-sections associated with each of the 175 myths are listed in the Fourth Level Table of Contents on pages xliii to lvii.

The 175 myths are organized into 45 major groups as follows:

- the U.S. Constitution (section 9.1)
- presidential candidates reaching out to all the states under the current system (section 9.2)
- small states (section 9.3)
- big states (section 9.4)
- big counties (section 9.5)
- big cities (section 9.6)
- big metropolitan areas (section 9.7)
- rural states and rural voters (section 9.8)
- absolute majorities and run-offs (section 9.9)
- the proliferation of candidates and a breakdown of the two-party system (section 9.10)

- extremist and regional candidates (section 9.11)
- mob rule, demagogues, and tyranny of the majority (section 9.12)
- campaigns (section 9.13)
- faithless presidential electors (section 9.14)
- presidential power and mandate (section 9.15)
- the Electoral College producing good Presidents. (section 9.16)
- non-citizen voting (section 9.17)
- voting by 17-year-olds (section 9.18)
- the operation of the Compact (section 9.19)
- replacing dead, disabled, or discredited presidential candidates (section 9.20)
- fraud (section 9.21)
- the National Popular Vote being unpopular (section 9.22)
- congressional consent (section 9.23)
- the District of Columbia (section 9.24)
- withdrawing from the Compact between Election Day and the Electoral College Meeting (section 9.25)
- candidates being kept off the ballot (section 9.26)
- ranked choice voting (section 9.27)
- STAR, range, and approval voting (section 9.28)
- election administration (section 9.29)
- vote counting (section 9.30)
- the Compact being thwarted by a single state official or state (section 9.31)
- adjudication of election disputes (section 9.32)
- adjudication of the constitutionality of the Compact (section 9.33)
- recounts (section 9.34)
- durability of the Compact (section 9.35)
- a systematic Republican or Democratic advantage in the Electoral College (section 9.36)
- state identity (section 9.37)
- myth about Hamilton favoring the current system (section 9.38)
- myth about states gaming the Compact (section 9.39)
- slavery (section 9.40)
- the Voting Rights Act (section 9.41)
- the World Series (section 9.42)
- origins and funding of the National Popular Vote campaign (section 9.43)
- proposals that are enacted by a single state or only a few states (section 9.44)
- unintended consequences (section 9.45)

The 175 myths are listed on the following pages.

THE 175 MYTHS IN CHAPTER 9

9.1. MYTHS ABOUT THE CONSTITUTION

9.1.1. MYTH: A federal constitutional amendment is necessary to change the way the President is elected.

QUICK ANSWER:

- Article II, section 1 of the U.S. Constitution says, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…." The U.S. Supreme Court has repeatedly characterized this power as an "exclusive" and "plenary" and "far-reaching" state power.
- The most salient feature of our nation's current method of electing the President—the winner-take-all method of awarding electoral votes—does not appear in the U.S. Constitution. It was never debated or voted upon at the 1787 Constitutional Convention. It was not mentioned in the *Federalist Papers*. Instead, the winner-take-all method exists only because it was enacted into *state* law by *state* legislatures using their authority under Article II, section 1 of the Constitution.
- 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). It was not until the eleventh presidential election (1828) that the winner-take-all method was used by even half the states. The Founders were dead before the winner-take-all rule became the predominant method of awarding electoral votes.
- Existing winner-take-all statutes may be changed in the same way they were enacted—that is, through each state's process for enacting and repealing state laws. A federal constitutional amendment is not necessary to repeal a state law and replace it with a different state law. For example, in 1969, Maine repealed its winner-take-all law and replaced it with the congressional-district method of awarding electoral votes. Nebraska did the same thing in 1991—a reminder that the method of awarding electoral votes is a state decision. In fact, in 2024, Nebraska's Governor urged his state legislature to change the state's congressional-district method of awarding electoral votes.
- The Constitution's grant of exclusive power to the states to decide how electoral votes are awarded was not a historical accident or mistake. It was intended as a check and balance on a sitting President who, in conjunction with a compliant Congress, might manipulate election rules to stay in office.
- The major shortcomings of the current system of electing the President stem from state winner-take-all laws that award all of a state's electoral votes to the candidate who receives the most popular votes within each separate state.

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 says:

> "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 first 17 words of this clause are the Constitution's delegation of power to the states empowering them to choose how to award their electoral votes.

The delegates to the 1787 Constitutional Convention debated various methods for electing the President on 22 separate days and held 30 separate votes on the topic.[1]

On four separate occasions, the Convention voted that Congress should choose the President. This method was natural and familiar to the Founders, because the Governors of eight of the 13 states were chosen by their state legislatures at the time.

However, election of the President by the legislative branch was inconsistent with the Founders' desire to create an executive branch that was independent of the legislative branch.

At one point, the delegates voted that the state legislatures would choose the President; however, the Convention reversed itself on that decision.

On another occasion, the delegates considered empowering state Governors to choose the President.

In its closing days, the Convention created a body of intermediate officials whose sole purpose would be to elect the President. These presidential electors (collectively called the "Electoral College") could not be members of Congress or hold any other federal office.

Even after creating this new body, the Convention could not agree on how the presidential electors would be chosen. Instead, the Convention ended up leaving several politically significant questions undecided, including:

- Should presidential electors be chosen by the people—analogous to the method of electing members of the U.S. House of Representatives?
- Should presidential electors be chosen by the state legislatures—analogous to the method (in the original Constitution) of appointing U.S. Senators?[2]
- Should presidential electors be chosen in some other way (e.g., by Governors)?

Unable to agree upon a method for selecting presidential electors—the Founding Fathers adopted the open-ended language in Article II. That is, they gave each state independent power to choose the method of selecting its members of the Electoral College.

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

---

[1] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 99–100.

[2] The 17th Amendment (ratified in 1913) provided for direct popular election of U.S. Senators.

- If a state legislature decides to allow its citizens to vote for presidential electors, Article II does not specify whether the electors would be elected (1) statewide, (2) by congressional district, (3) by county, (4) from single-elector districts, (5) in multi-elector districts, or (6) some other way.
- If the legislature decides against allowing its citizens to vote for presidential electors, the Constitution does not specify whether the presidential electors should be appointed (1) by the Governor and his cabinet, (2) by the Governor and the lower house of the state legislature, (3) by both houses of the legislature sitting together in a joint convention, (4) by both houses of the legislature using a concurrent resolution, or (5) some other way.

Indeed, six different methods of selecting presidential electors were used in the nation's first presidential election in 1789, and a total of twelve different methods were used by 1828 (as detailed in section 2.1).

The most salient feature of our nation's current method of electing the President—the winner-take-all method of awarding electoral votes—was never debated or voted upon at the Constitutional Convention. It does not appear in the U.S. Constitution. It was not mentioned in the *Federalist Papers*. It was not until the eleventh presidential election—four decades after the Constitutional Convention—that the winner-take-all method was used by even half the states. Indeed, the Founders had been dead for decades before the winner-take-all rule became the predominant method of awarding electoral votes.

Under the winner-take-all method of awarding electoral votes (also known as the "unit rule" or "general ticket"), a plurality of a state's voters are empowered to choose all of a state's presidential electors.[3]

When the Founding Fathers returned from the Constitutional Convention in Philadelphia to organize the nation's first presidential election in 1789, only three states (New Hampshire, Pennsylvania, and Maryland) chose to employ the winner-take-all method for selecting their presidential electors.

All three had repealed winner-take-all by 1800, and each later readopted it.

Today, Maine and Nebraska currently elect one presidential elector on a winner-take-all basis in each of the state's congressional districts (and the state's remaining two electors on a statewide winner-take-all basis).

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 power of the states to award their 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 method]** 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.

[3] In the version of the winner-take-all rule used by New Hampshire in the nation's first presidential election in 1789, an absolute majority of the state's voters was required to choose presidential electors.

> 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."[4] [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 Article II, section 1 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."[5] [Emphasis added]

In *Chiafalo v. Washington* in 2020, the U.S. Supreme Court wrote:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint."

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).[6,7]

The Constitution's grant of exclusive power to the states to decide how presidential elections are conducted was not a historical accident or mistake. The Founders had good reason to give the states the power to control the conduct of presidential elections.

---

[4] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

[5] *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

[6] 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."

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

State control over presidential elections thwarts the possibility of an over-reaching President, in conjunction with a compliant Congress, manipulating the rules governing the President's own re-election. This dispersal of power concerning presidential elections was intended to guard against the establishment of a self-perpetuating President. In particular, this dispersal of power to the states addressed the Founders' concern about the possible establishment of a monarchy in the United States.

More importantly, existing winner-take-all statutes did not come into being by means of an amendment to the U.S. Constitution. Instead, the winner-take-all method of awarding electoral votes was adopted piecemeal on a state-by-state basis. The winner-take-all method enabled a state's dominant political party to maximize its power by stifling the state's minority party. The existing winner-take-all system is entirely a matter of state law.

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—that is, through each state's process for enacting and repealing state laws.

Indeed, the winner-take-all method of awarding electoral votes has been adopted, repealed, and re-adopted by various states on numerous occasions over the years (section 2.1).

Massachusetts, for example, changed its method of awarding its electoral votes in every one of the first 10 presidential elections (section 2.8). None of these changes was implemented by means of an amendment to the U.S. Constitution. Each was enacted by the Massachusetts legislature using the U.S. Constitution's built-in method for changing the method of electing the President, namely Article II, section 1. That provision gives Massachusetts (and all the other states) exclusive and plenary power to choose the manner of awarding their electoral votes.

In summary, there is nothing in the U.S. Constitution that needs to be amended in order to change existing state winner-take-all statutes for awarding electoral votes, because state legislatures already have the power to make this change.

9.1.2. MYTH: The Founding Fathers designed the current system of electing the President.

QUICK ANSWER:

- The Founding Fathers at the 1787 Constitutional Convention did not debate, vote on, or endorse the most salient feature of our present-day system of electing the President, namely the winner-take-all method of awarding electoral votes.
- 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 dominant political party not to let the state's minority party get any of the state's electoral votes.
- The winner-take-all method of awarding electoral votes is not mentioned in the *Federalist Papers*.

- The winner-take-all method was used by only three states in the nation's first presidential election in 1789—all of which had repealed it by 1800.
- The Founding Fathers envisioned that the Electoral College would be a deliberative body. However, when political parties emerged at the time of the nation's first contested presidential election in 1796, presidential electors immediately became rubber stamps for each party's national nominees.
- The winner-take-all rule came into widespread use because of a domino effect initiated by its adoption by previous states.

MORE DETAILED ANSWER:

The Founding Fathers at the 1787 Constitutional Convention did not debate, vote on, or adopt 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 vote, in lockstep, for the candidate nominated by an extra-constitutional meeting (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 had 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 appoint-

ments) 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 contested 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 presidential elector who made it known that they would serve as willing rubber stamps for their party's nominee in the Electoral College.

As the Supreme Court observed in *McPherson v. Blacker* in 1892:

> "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."[8] [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.

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

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

Public reaction to Miles' 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 24,068 electoral votes cast for President in the nation's 59 presidential elections between 1789 and 2020, the vote of Samuel Miles for Thomas Jefferson in 1796 remains the

---

[8] *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

only instance when the elector may have believed, at the time he cast his vote, that his vote might possibly affect the national outcome.[9]

The expectation that presidential electors should faithfully support the candidates nominated by their party has persisted to this day.[10]

In *Ray v. Blair* in 1952, 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'"[11]

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 make it clear that the Founding Fathers never gave their imprimatur to the winner-take-all method.

9.1.3. MYTH: The traditional and appropriate way to change the method of electing the President is a constitutional amendment.

QUICK ANSWER:

- Many of the most salient characteristics of our nation's current system of electing the President (e.g., permitting the people to vote for President; the abolition of property, wealth, and income qualifications for voting; and the winner-take-all method of awarding electoral votes) are strictly a matter of state law.
- Except for the 12th Amendment, the subject matter of every federal constitutional amendment involving elections was first enacted in the form of

---

[9] 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 1872 presidential election when the losing Democratic candidate died after Election Day, but before the Electoral College met. For details, see section 2.12.

[10] 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.

[11] *Ray v. Blair*. 343 U.S. 214 at 232. 1952.

state legislation, including women's suffrage, black suffrage, the 18-year-old vote, and direct popular election of U.S. Senators.

- State action is the appropriate way to change the method of awarding electoral votes, because it is the mechanism that is explicitly built into the U.S. Constitution (Article II, section 1). Indeed, winner-take-all exists today only because of state laws—not because of any constitutional amendment. Accordingly, state winner-take-all laws may be repealed in the same manner as they were originally adopted, namely by changing state law.

MORE DETAILED ANSWER:

John Samples of the Cato Institute 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**."[12] [Emphasis added]

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.

Many of the most significant changes in the method of electing the President were implemented entirely at the state level—without a federal constitutional amendment—including:

- permitting the people to vote for President,
- abolition of property, wealth, and income qualifications for voting, and
- the winner-take-all method of awarding electoral votes.

Except for the 12th Amendment, the subject matter of every federal constitutional amendment involving elections was first enacted in the form of state legislation, including:

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

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.

This change has never been enshrined by any federal constitutional amendment.

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

---

[12] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1. https://www.cato.org/policy-analysis/critique-national-popular-vote

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

> "**The constitution does not provide that the appointment of [presidential] 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**."[13] [Emphasis added]

As the U.S. Supreme Court wrote in *Bush v. Gore* 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."[14] [Emphasis added]

The Founders were divided as to whether the people should be allowed to vote for President at the 1787 Constitutional Convention. Thus, the Constitution was silent concerning this question.

They remained divided when they returned to their states to implement the newly ratified Constitution.

In the nation's first presidential election in 1789, only six states (New Hampshire, Pennsylvania, Maryland, Delaware, Virginia, and Massachusetts) permitted the people to vote for presidential electors.[15]

In New Jersey, the Governor and his Council appointed the state's presidential electors in 1789.[16]

In three states (Connecticut, South Carolina, and Georgia), the state legislature appointed the presidential electors in 1789.[17] See section 2.2 for additional details on the nation's first presidential election in 1789.

The *Federalist Papers* recognized that the choice of method for appointing presidential electors was a state power, but never mentioned or advocated any particular method by which a state should appoint its presidential electors.

---

[13] *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

[14] *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

[15] New Hampshire, Pennsylvania, and Maryland used the winner-take-all method, whereas Virginia, Delaware, and Massachusetts used various types of districts to elect presidential electors.

[16] 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. Pages 29–31.

[17] Only 11 states had ratified the Constitution by the time of the first presidential election. New York (which had ratified the Constitution) did not participate in the first presidential election, because the legislature could not agree on a choice of method for selecting the state's presidential electors. North Carolina did not ratify the Constitution until November 21, 1789—eight months after George Washington was inaugurated on March 4, 1789. Rhode Island did not ratify until May 29, 1790.

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]

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

> **"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]

In permitting the people to vote for President, the states exercised their role, under Article II, section 1 of the U.S. Constitution, as the "laboratories of democracy."[18]

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.[19]

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.

Permitting the people to vote for President was not a violation of the U.S. Constitution but an exercise of a power that the Founding Fathers explicitly assigned to state legislatures in Article II, section 1 of 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 really think that permitting the people to vote for President without passing a federal constitutional amendment "undermine[s] the legitimacy of presidential elections"?

Abolition of Property, Wealth, and Income Qualifications for Voting

When the U.S. Constitution came into effect in 1789, 10 of the 13 states had property, wealth, and/or income qualifications for voting.

---

[18] 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."

[19] The last occasion when presidential electors were not chosen by a direct popular vote of the people was when the legislature of the newly admitted state of Colorado appointed the state's presidential electors in 1876.

The requirements varied from state to state and typically included factors such as ownership of a specific number of acres of land, ownership of other assets with a specific value, or specific amounts of income. In many states, there were more stringent requirements for voting for the upper house of the state legislature than for the lower house.

The requirements for voting were so stringent that in 1789, there were only about 100,000 eligible voters in a nation of about four million people.[20]

By 1855, only three of the 31 states had property qualifications for voting.[21]

In 1856, North Carolina became the last state to abolish property requirements to vote.

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

The elimination of property, wealth, and income qualifications was not accomplished by means of a federal constitutional amendment. This change was not improper, inappropriate, or unconstitutional. 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.

Does John Samples really think that eliminating property, wealth, and income requirements to vote without passing a federal constitutional amendment "undermine[s] the legitimacy of presidential elections"?

Women's suffrage

In several instances, a major reform initiated at the state level led to a subsequent federal constitutional amendment.

For example, women did not have the right to vote when the U.S. Constitution came into effect in 1789, except in New Jersey.[22]

Wyoming gave women the right to vote in 1869.

By the time Congress passed the 19th Amendment (50 years later), women already had the vote in 30 of the 48 states.

Congress passed the 19th Amendment in 1919 because:

- women were already voting in 30 states, and
- 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 their states—with or without the federal constitutional amendment.

---

[20] The 1790 census recorded 3,929,214 people.

[21] 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.

[22] In New Jersey, women who met a property-ownership requirement (which, in practice, usually meant only single women) could vote under the state's 1776 Constitution, but this right was rescinded in 1807. The 1776 New Jersey Constitution provided, in section IV, "That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote …." The state election law (of February 22, 1797) made it clear that this constitutional provision applied to women by saying, "That every voter shall openly, and in full view deliver his or her ballot (which shall be a single written ticket, containing the names of the person or persons for whom *he or she* votes) to the said judge, or either of the inspectors …."

The immediate effect of the 19th Amendment was to impose women's suffrage on the minority of 18 states that had not already adopted it at the state level.[23]

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.

Direct election of U.S. Senators

The direct election of U.S. Senators is another example of a major change that was initiated at the state level and later became enshrined in the Constitution.

The original U.S. Constitution was unambiguous 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."

In practice, candidates for the U.S. Senate in the 19th century campaigned in support of state legislative candidates who, if elected, would vote for them when the state legislature met to choose the state's U.S. Senator.

For example, the famous Lincoln-Douglas debates in 1858 were part of the campaigns by the Illinois Democratic Party and Republican Party aimed at electing state legislators who, in turn, would elect the state's U.S. Senator. The Democrats won the Illinois legislature and then promptly elected Douglas to the U.S. Senate.

Starting with the "Oregon Plan" in 1907, state legislatures responded to public pressure for direct popular elections for U.S. Senator by passing laws to establish statewide advisory votes for U.S. Senator. The state legislature would then dutifully rubber stamp the people's choice by formally electing the winner of the advisory election to the U.S. Senate.

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 under various forms of the "Oregon" plan.

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 Georgia, Kentucky, Alaska, Hawaii, and New Hampshire. Then, in 1971, the 26th Amendment to the U.S. Constitution extended the 18-year-old vote to all states.

---

[23] The amendment also served to extend women's suffrage to all offices in the states where women only had the right to vote for certain specified offices (e.g., just President, just local offices).

Black suffrage

In New York, free black men had the right to vote under the 1821 Constitution (but only if they also met a property-ownership requirement not required of other male citizens).[24]

In New Jersey, free black men could vote under the 1776 Constitution if they met a generally applicable property requirement, but this right was rescinded in 1807.[25]

Under Pennsylvania's 1790 constitution, African American males were citizens with the same legal rights as whites, including suffrage provided they paid the nominal tax required of all men twenty-one years old and older.[26] These rights were rescinded in 1838.

Free black men could vote in these states, and other states, at various times prior to the Civil War—sometimes in numbers sufficient to swing elections.[27]

After the Civil War, the 15th Amendment (ratified in 1870) gave black men the right to vote in all states (although, in practice, subsequent Jim Crow laws in many southern states severely limited this right until the Voting Rights Act of 1965).

The winner-take-all rule

Finally, the politically most important characteristic of our nation's current system of electing the President—the winner-take-all method of awarding electoral votes—was established by state statute—not a federal constitutional amendment.

John Samples has said that repealing the winner-take-all rule without a federal constitutional amendment would "undermine the legitimacy of presidential elections."

However, he fails to apply this criticism to the *original* adoption of the winner-take-all rule by the states.

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

---

[24] The 1821 New York Constitution, in Article II, section 1, provided, "but no man of colour, unless he shall have been for three years a citizen of this state, and for one year next preceding any election, shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon; and shall have been actually rated, and paid a tax thereon, shall be entitled to vote at any such election."

[25] The 1776 New Jersey Constitution provided, in section IV, "That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote …." The state election law (of February 22, 1797) made it clear that this constitutional provision applied to women by saying, "That every voter shall openly, and in full view deliver his or her ballot (which shall be a single written ticket, containing the names of the person or persons for whom he or she votes) to the said judge, or either of the inspectors …."

[26] The 1790 Pennsylvania Constitution, in Article III, section I, provided, "In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, that the sons of persons qualified as aforesaid, between the ages of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes."

[27] Gosse, Van. 2021. *The First Reconstruction: Black Politics in America from the Revolution to the Civil War*. Chapel Hill, NC: University of North Carolina Press.

created an open-ended system with built-in flexibility concerning the manner of electing the President.

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

> "This effort would represent **amendment-free constitutional reform, the way that most other changes have been made in the selection process since 1804**."[28] [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 to the states over the manner of electing Congress. In the case of congressional elections, the U.S. Constitution gives Congress the power to "make or alter" any state election law. In practice, Congress has exercised a light touch in this area over the years.

In contrast, Congress does not have comparable power over a state's decision concerning the manner of awarding its electoral votes. State power to choose the manner of electing its presidential electors is, as the U.S. Supreme Court has repeatedly stated, "exclusive" and "plenary" (i.e., complete).

9.1.4. MYTH: The Electoral College would be abolished by the National Popular Vote Compact.

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the Electoral College. Instead, it would change the method of choosing its members. The Compact would make the Electoral College reflect the choice of the voters in all 50 states and the District of Columbia.
- The National Popular Vote 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.

MORE DETAILED ANSWER:

The National Popular Vote Compact is state legislation—not a federal constitutional amendment.

---

[28] Pika, Joseph. Improving on a doubly indirect selection system. *Delaware On-Line*. September 16, 2008.

As such, it does not (indeed, could not) change—much less abolish—the structure of the Electoral College as specified in the U.S. Constitution.

Instead, the National Popular Vote Compact would change state laws that govern how the participating states choose their members of the Electoral College.

The National Popular Vote Compact makes use of the Constitution's built-in state-based power for changing the method of appointing presidential electors, namely Article II, section 1 of the U.S. Constitution:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[29] [Emphasis added]

Clause 3 of Article III of the National Popular Vote Compact specifies that the "manner" of appointment of presidential electors would be as follows:

> "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."

The National Popular Vote Compact would not abolish the Electoral College. In fact, it explicitly would use the Electoral College to achieve its intended purpose.

The Compact would reform the method of choosing members of the Electoral College so that a majority of the College would reflect the choice of the voters in all 50 states and the District of Columbia.

Because the Compact takes effect only when enacted by states possessing a majority of the electoral votes (i.e., 270 of 538), it guarantees that presidential electors nominated by the political party associated with the national popular vote winner will constitute a majority of the Electoral College.

9.1.5. MYTH: The vote against direct election of the President at the 1787 Constitutional Convention renders the Compact unconstitutional.

QUICK ANSWER:

- A majority of presidential electors in the nine presidential elections that gave us Presidents Washington, John Adams, Jefferson, Madison, and Monroe were chosen by methods that were specifically rejected by the Constitutional Convention, including popular election of presidential electors by district and appointment of presidential electors by state legislatures and Governors.
- The Founding Fathers' course of conduct after the Constitutional Convention and rulings of the U.S. Supreme Court both support the constitutionality (and appropriateness) of using methods of electing the President that were rejected at the Constitutional Convention.
- One of the methods that was specifically debated and rejected by the Constitutional Convention is in use today by Maine and Nebraska, namely

[29] U.S. Constitution. Article II, section 1, clause 2.

popular election of presidential electors by district. The U.S. Supreme Court explicitly upheld this method in *McPherson v. Blacker* in 1892.

- Another method that was specifically debated and rejected by the Constitutional Convention is appointment by state legislatures. The U.S. Supreme Court explicitly recognized that state legislatures may appoint presidential electors in *McPherson v. Blacker* in 1892 and *Bush v. Gore* in 2000.
- Moreover, the 1787 Convention voted on several occasions against any direct voter involvement in the choice of President—that is, a feature of the current system in every state today.
- Many of the members of the 1787 Constitutional Convention served as state legislators or Governors after ratification of the Constitution. We know of no instance when any state legislator, Governor, or member of Congress argued that it was inappropriate—much less unconstitutional—for a state to use a method of choosing presidential electors that had been rejected during the Constitutional Convention.
- The principle *of expressio unius est exclusio alterius* provides an additional reason why most of the rejected methods of electing the President (including a national popular vote) are constitutionally permissible today.

MORE DETAILED ANSWER:

The 1787 Constitutional Convention debated methods of choosing the President on 22 separate days and took 30 votes before arriving at the wording that actually appears in the U.S. Constitution.[30]

Six methods of electing the President were specifically *rejected* on one or more occasions during the 1787 Constitutional Convention:

- voters choosing presidential electors by districts
- state legislatures appointing presidential electors
- state legislatures choosing the President
- state Governors choosing the President
- nationwide popular election
- Congress choosing the President.

John Samples, an opponent of the National Popular Vote Compact, has argued that the Compact is unconstitutional because of a vote against a nationwide popular vote at the Constitutional Convention.

> "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 Framers chose an alternative to direct election, which is described in Article II, section 1 of the Constitution. Of course, that decision by the framers need not bind Americans for all time. The Constitution also

[30] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 99–100. In particular, see the table on page 100 listing various votes.

> permits overturning the decisions of the Framers through amendments to the Constitution. In contrast, NPV proposes that a group of states with a majority of electoral votes should have the power to **overturn the explicit decision of the Framers** against direct election. Since that power does not conform to the constitutional means of changing the original **decisions of the Framers**, NPV could not be a legitimate innovation."[31] [Emphasis added]

Note Samples' repeated use of the phrase "decisions of the Framers" as opposed to citing any actual provision of the Constitution that prohibits a nationwide election of the President.

The Founding Fathers' course of conduct after the Constitutional Convention and rulings of the U.S. Supreme Court support both the appropriateness and constitutionality of using a method of electing the President that was rejected by the Constitutional Convention.

In fact, over two-thirds of the presidential electors in the nation's first presidential election in 1789 were chosen by methods that were specifically rejected by the Constitutional Convention. Of the 69 presidential electors[32] who cast votes in the Electoral College in 1789:

- 36% were elected by district,[33]
- 28% were appointed by state legislatures,[34] and
- 9% were appointed by a state Governor and his Council.[35]

A majority of presidential electors who gave us the first five Presidents (George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe) were chosen by methods that were specifically rejected by the Constitutional Convention, namely popular election of presidential electors by district and appointment of presidential electors by state legislatures and Governors.

One of the methods that was rejected by the Constitutional Convention is employed today by Maine and Nebraska, namely popular election of presidential electors by district.

The U.S. Supreme Court has affirmed the constitutionality of two of the methods specifically rejected by the Constitutional Convention, namely election of presidential electors by district and appointment of presidential electors by state legislatures (as detailed below).

Let us review what actually happened during the Constitutional Convention and what the Constitution actually says.

---

[31] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Pages 8–9. https://www.cato.org/policy-analysis/critique-national-popular-vote

[32] Note that no presidential electors were chosen by North Carolina or Rhode Island (which had not yet ratified the Constitution) or by New York (where the legislature could not agree on a method of choosing the state's electors).

[33] Specifically, 25 presidential electors in 1789 were chosen from districts in Virginia (12 electoral votes), Massachusetts (10), and Delaware (three).

[34] A total of 19 presidential electors in 1789 were appointed by the state legislatures of Connecticut (seven electoral votes), South Carolina (seven), and Georgia (five).

[35] Six presidential electors were appointed by New Jersey.

Popular election of presidential electors by districts

On June 2, 1787, the Convention voted 8–2 against a motion by James Wilson of Pennsylvania specifying that the voters would elect presidential electors by district and that these electors would, in turn, elect the President. According to Madison's notes on the debates of the Constitutional Convention:

> "Mr. Wilson made the following motion … '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.'"[36] [Emphasis added]

Despite the Constitutional Convention's explicit rejection of the district method of choosing presidential electors on June 2, 1787,[37] Virginia, Massachusetts, and Delaware passed laws specifying that their voters would elect presidential electors by district in the nation's first presidential election in 1789.

Moreover, five additional states (Maryland, North Carolina, Kentucky, Illinois, and Maine) passed laws specifying that their voters would elect presidential electors by districts on one or more occasions in the first nine presidential elections between 1789 and 1820.

When Michigan passed a law calling for the election of presidential electors by districts in 1892, the U.S. Supreme Court specifically upheld that law in *McPherson v. Blacker*.[38]

Today, Maine and Nebraska employ the district-method that was specifically rejected by the 1787 Convention.

Many of the members of the 1787 Constitutional Convention served as state legislators, Governors, or members of Congress after ratification of the Constitution. We know of no instance when any state legislator, Governor, or member of Congress argued that it was inappropriate—much less illegitimate or unconstitutional—for a state to use the district method or any other method of choosing presidential electors that had been rejected by the Constitutional Convention.

---

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

[37] Despite the Convention's rejection of Wilson's motion that the President be elected by electors chosen by a vote of the people in districts, Alexander Hamilton tried to revive this approach on June 18, 1787. Hamilton advocated for "The supreme Executive authority of the United States to be vested in a Governour to be elected to serve during good behaviour—the election to be made by Electors chosen by the people in the Election Districts aforesaid." Thus, the district approach was rejected twice. *Madison Debates*. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. June 18, 1787. http://avalon.law.yale.edu/18th_century/debates_618.asp

[38] *McPherson v. Blacker*, 146 U.S. 1. 1892.

Appointment of presidential electors by state legislatures

On July 19, 1787, the Constitutional Convention voted 8–2 that the President should be "chosen by electors appointed, by the Legislatures of the States."[39] However, that method was later rejected by the Convention.[40]

Nonetheless, in the nation's first presidential election in 1789, the legislatures of Connecticut, South Carolina, and Georgia appointed their state's presidential electors.

In the nine presidential elections between 1789 and 1820, the legislatures of 17 states appointed their presidential electors on one or more occasions.[41]

Citing *McPherson v. Blacker*, the U.S. Supreme Court stated in *Bush v. Gore* in 2000:

> "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."[42] [Emphasis added]

Appointment of presidential electors by Governors

Madison's notes on the June 9, 1787, debates of the Constitutional Convention report that Elbridge Gerry[43] of Massachusetts made a motion that state Governors should elect the President.

> "Mr. Gerry, according to previous notice given by him, moved 'that **the National Executive should be elected by the Executives of the States**.'"[44]

Madison reported that Gerry argued in favor of his motion in order to make the President independent of Congress.

> "If the appointmt. should be made by the Natl. Legislature, it would **lessen that independence of the Executive** which ought to prevail, would give birth to intrigue and corruption between the Executive & Legislature previous to the election, and to partiality in the Executive afterwards to the friends who pro-

---

[39] *Madison Debates*. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. July 19, 1787. http://avalon.law.yale.edu/18th_century/debates_719.asp

[40] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 99–100.

[41] New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina, Georgia, New York, Rhode Island, North Carolina, Vermont, Kentucky, Louisiana, Indiana, Alabama, and Missouri. See table 2.1.

[42] *Bush v. Gore* in 2000. 531 U.S. 98 at 104.

[43] While Governor of Massachusetts in 1812, Gerry famously signed a highly partisan districting plan that gave rise to the term "gerrymander" because of the resemblance of one of its oddly shaped districts to a salamander. Gerry was elected Vice President in the 1812 presidential election.

[44] *Madison Debates*. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. June 9, 1787. http://avalon.law.yale.edu/18th_century/debates_609.asp

> moted him. Some other mode therefore appeared to him necessary."[45] [Emphasis added] [Spelling as per original]

Madison also reported that Gerry made the following arguments in favor of appointment of the President by state Governors:

> "He proposed that of appointing by the State Executives as most analogous to the principle observed in electing the other branches of the Natl. Govt.; the first branch being chosen by the people of the States, & the 2d. by the Legislatures of the States; he did not see any objection agst. letting the Executive be appointed by the Executives of the States. He supposed **the Executives would be most likely to select the fittest men**, and that it would be their interest to support the man of their own choice."[46] [Spelling as per original] [Emphasis added]

Nevertheless, on June 9, 1787, the Constitutional Convention voted against selection of the President by state Governors.

When the time came to implement the Constitution in the nation's first presidential election in 1789, the New Jersey legislature passed a law specifying that the state's presidential electors would be appointed by the Governor and his Council (section 2.1.1).

Moreover, in 1792, the newly admitted state of Vermont combined two methods that were specifically rejected by the Constitutional Convention. Vermont's presidential electors were chosen by a "Grand Committee" consisting of the Governor and his Council along with the membership of the state House of Representatives.[47]

Overall, a *majority* of presidential electors in the elections that gave us George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe (the first nine elections) were chosen by methods rejected by the Constitutional Convention.

Under standard principles of constitutional, statutory, and contractual interpretation, the rejected methods are constitutionally permissible today.

Five methods of electing the President were specifically *rejected* on one or more occasions during the 1787 Constitutional Convention:

- voters choosing presidential electors by districts
- state legislatures appointing presidential electors
- state Governors choosing the President
- nationwide popular election
- Congress choosing the President.

However, the Constitutional Convention took explicit action to prevent future use of *only one of the five rejected methods* of electing the President.

---

[45] *Madison Debates*. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. June 9, 1787. http://avalon.law.yale.edu/18th_century/debates_609.asp

[46] *Ibid*.

[47] 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. Note that Vermont had a unicameral legislature at the time.

The wording that actually ended up in the U.S. Constitution prevents states from passing laws that authorize their U.S. Representatives and U.S. Senators from acting as presidential electors.

Article II, section 1 of the Constitution provides:

> "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]

There is no parallel prohibition on using the other four methods of appointing presidential electors that were rejected by the Convention.

The existence of this explicit constraint is significant because of a standard principle of constitutional, statutory, and contractual interpretation—*expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"). See section 9.1.14 for additional discussion.

9.1.6. MYTH: Changing the distribution of influence envisioned by the Great Compromise renders the Compact unconstitutional.

QUICK ANSWER:

- The Great Compromise at the 1787 Constitutional Convention 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 distribution of political influence among the states in the Electoral College envisioned by the Great Compromise was upset in the 1820s and 1830s by the widespread adoption of the winner-take-all method of awarding electoral votes.
- Because of the winner-take-all method of awarding electoral votes, the numerical allocation of electoral votes among the states bears little relation to a state's clout in choosing the President. Under the winner-take-all rule, political influence in the Electoral College is based on whether a state is a closely divided battleground state.
- This argument aimed at the National Popular Vote Compact (if it were valid) would apply equally to the winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

In July 1787, the Constitutional Convention adopted the Great Compromise (also known as the "Connecticut Compromise" and "Sherman's Compromise").

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 U.S. Senate was structured on the basis of equal representation of the states (i.e., two Senators per state).

The delegates to the Constitutional Convention did not reach agreement on the method of electing the President until much later—September.[48]

When the Founders finally agreed that the President would be elected by an Electoral College, they allocated each state as many presidential electors as it had members in the two houses of Congress. That is, the composition of the Electoral College resembles a joint session of Congress, except that its members meet in their respective states rather than in one central place and except that members of Congress cannot be members of the Electoral College.

A posting to the *Election Law Blog* questioned the constitutionality of the National Popular Vote 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."[49] [Emphasis added]

In an article entitled "Guaranteeing a Federally Elected President," Kristin Feeley argued that the Compact is unconstitutional because:

> "States adopting NPV legislation **affect the influence of the remaining states** systematically. … [A] movement to a national popular vote **erases the advantage that small states** gain from the fact that the number of electors each state receives is its number of senators plus its number of representatives. Even if this advantage is minor, it is granted by the Constitution."[50] [Emphasis added]

The authors of this book would be delighted if it were true that the Constitution obligates each state to take care that its choice of method of awarding its electoral votes does not "affect the influence of the remaining states."

Indeed, if that were true, all existing state winner-take-all laws would be unconstitutional, because they dramatically affect the political clout of *other* states.

No doubt, the Founders expected that the Constitution's formula for allocating electoral votes would confer a certain amount of additional political influence on the less populous states by giving every state a bonus of two electoral votes corresponding to its two U.S. Senators.

---

[48] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition.

[49] In order to promote free-flowing debate, the rules of the *Election Law Blog* do not permit attribution.

[50] Feeley, Kristin. 2009. Guaranteeing a federally elected president. *Northwestern University Law Review*. Volume 103, Number 3. Page 1447. The sentence beginning "Even if" is Feeley's footnote 117, which is cited at this point.

Equally important, they expected that the Constitution's formula for allocating electoral votes would give the bigger states a larger amount of influence in presidential elections.

Terms such as "political advantage" and "balance of power" do not appear in the Constitution.

What does appear in the Constitution is a mechanical arrangement that allocates a certain number of presidential electors to each state and that gives each state the separate and independent power to choose a method of appointing those electors.

The Founding Fathers' expectations with respect to *both* small states and big states were never achieved by this mechanical arrangement.

Indeed, the "balance of power in choice of the President" was dramatically changed by the widespread enactment by the states of winner-take-all laws during the first four decades after ratification of the Constitution.

These winner-take-all laws were enacted by the states acting under their power under Article II, section 1 of the Constitution.

Enactment of a winner-take-all law by one state did not, of course, change any other state's nominal number of electoral votes; however, it did dramatically impact the political value of those electoral votes.

Once the winner-take-all rule became widespread, a state's "power in choice of the President" was primarily determined by whether the state was a closely divided battleground state—not by its number of electoral votes.

For example, notwithstanding the Constitution's allocation of electoral votes, almost all of the small states have no meaningful "power in choice of the President," because they are one-party states in presidential elections. Accordingly, presidential candidates consistently (and wisely) ignore them. Of course, the small states still retain the nominal number of electoral votes assigned to them by the Constitution, and their presidential electors go through the motions of dutifully voting in the Electoral College in mid-December. However, the political clout of the small states was extinguished by the widespread enactment of winner-take-all laws by *other* states.

The Founders' expectations concerning the big states were similarly frustrated. Numerous big states (e.g., California, New York, and Texas) have had virtually no "power in choice of the President," because of the winner-take-all laws of *other* states. These big states still nominally retain the number of electoral votes assigned to them by the Constitution, and their presidential electors still cast their assigned number of electoral votes in December.

The fact that "power in choice of the President" flows from a state's battleground status (rather than its number of electoral votes) can be seen by comparing states with an identical number of electoral votes.

New Hampshire and Idaho each have four electoral votes. In the six presidential elections between 2000 and 2020, New Hampshire received 69 general-election campaign events, because it was a closely divided battleground state during this period. Meanwhile, Idaho did not receive a single general-election campaign event between 2000 and 2020 (table 1.26). The Great Compromise gave both states four electoral votes. However, winner-take-all laws are what determine "power in choice of the President."

New York and Florida each had 29 electoral votes in 2020. Florida received 319 general-election campaign events (out of a national total of 1,164) in the six presidential elections between 2000 and 2020 (table 1.26). Florida received this large amount of attention (more than a quarter of the nationwide total) because it was a closely divided battleground state. Meanwhile, New York did not receive a single general-election campaign event between 2000 and 2020.

The "3/2 rule"

The winner-take-all method of awarding electoral votes does more than extinguish the political influence of non-battleground states—both big and small.

It also magnifies the importance of larger battleground states at the expense of smaller battleground states.

For example, Pennsylvania (with 20 electoral votes) and Wisconsin (with 10) were both battleground states in 2016. In fact, Trump's percentage of the two-party vote was virtually identical in the two states—50.4%.

However, Pennsylvania received 54 general-election campaign events, while Wisconsin received only 14. That is, even though Pennsylvania had merely twice as many electoral votes as Wisconsin, it received almost four times the attention.

In a 1974 paper, Steven Brams and Morton Davis analyzed the disproportionate attention conferred on larger states. Their analysis showed that the amount of attention that a state receives is *not* proportionate to its number of electoral votes. Instead, other things being equal, the larger state will receive disproportionately more attention in presidential elections under the winner-take-all method of awarding electoral votes. They presented both mathematical analysis and empirical data to support what they called the "3/2 rule."[51]

Specifically, the "3/2 rule" predicts that the difference in attention is roughly equal to the ratio of the number of electoral votes of the two states—raised to the 3/2 power.

For example, if one state has twice as many electoral votes as another, the "3/2 rule" predicts that larger state would receive approximately 2.8 times more attention than the smaller state.

Widespread adoption of the state-by-state winner-take-all method of awarding electoral votes did not change the wording of the Constitution concerning the allocation of electoral votes among the states. However, it dramatically changed "the balance of power in choice of the President."

Similarly, the National Popular Vote Compact does not change the Constitution's allocation of electoral votes among the states. However, the Compact would make *every* voter in *every* state equally important in *every* presidential election.[52]

---

[51] Brams, Steven J. and Davis, Morton D. 1974. The 3/2's Rule in Presidential Campaigning. *American Political Science Review*. Volume 68. Issue 1, March 1974. Pages 113–134. https://doi.org/10.2307/1959746

[52] Note that the Constitution's allocation of electoral votes to the states 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 alone would warrant in the process of determining when the Compact takes effect.

9.1.7. MYTH: The Equal Protection Clause of the 14th Amendment renders the Compact unconstitutional.

QUICK ANSWER:

- 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." All voters within the jurisdiction of each state are treated equally by the National Popular Vote Compact.
- The U.S. Constitution does not require that the election laws of all 50 states be identical. Because the Constitution gives the states control over elections, it virtually guarantees that election procedures will *not* be identical from state to state. Differences in election laws from state to state are inherent under the federalist system established by the U.S. Constitution.

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 P.M., while others (e.g., New York) keep their polls open until 9 P.M. Some states provide extensive opportunities for early voting, while other states have very limited early voting or none at all. Some states conduct their elections entirely by mail, while other states do not. Some states require photo identification at the polls, while others do not. Some states automatically and immediately permit previously incarcerated felons to vote after they serve their prison term, whereas others do not.

Professor Norman 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 statewide 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."[53] [Emphasis added]

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 Equal Protection Clause of the 14th Amendment states:

> "No state shall … deny to **any person within its jurisdiction** the equal protection of the laws"[54] [Emphasis added]

The *Bush v. Gore* case involved potentially different treatment of voters *within* Florida, namely voters in Palm Beach County versus voters in Miami-Dade County—both of which are *within* the jurisdiction of the state of Florida.

The Equal Protection Clause does not, however, prohibit a state from treating a person in another state differently from a "person within its jurisdiction."

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

Williams invokes the two words "equal protection" from the 14th Amendment without quoting the inconvenient wording of the actual constitutional provision.

Law professor Vikram David Amar responded to Williams' contention 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**."[55] [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."[56] [Emphasis added]

---

[53] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011.

[54] U.S. Constitution. 14th Amendment. Section 1.

[55] 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.

[56] 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.

In fact, the U.S. Supreme Court has rejected the claim that the Equal Protection Clause of the 14th Amendment applies to *interstate* differences in the appointment of presidential electors.

In *Williams v. Virginia State Board of Elections*, a three-judge 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 concerning the constitutionality of the winner-take-all method of awarding electoral votes.

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 New York's voters influenced the selection of 43 presidential electors, whereas Virginia voters influenced only 12.

As part of their case, the plaintiffs pointed out that a possible remedy for this inequality would be to choose presidential electors by equal-population districts. If the district method were used, voters in Virginia and New York would each influence the selection of an equal number of presidential electors. Thus, *interstate* equality would be achieved.

The three-judge 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**.'"[57] [Emphasis added] [Italics in original]

The three-judge 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]

In connection with "interstate inequality of voters," the federal court said:

> "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 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]

---

[57] *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 U.S. Supreme Court affirmed the decision of the three-judge federal court in a *per curiam* decision in 1969.[58]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has made an argument similar to Professor Williams' concerning interstate equal protection:

> "[The National Popular Vote Compact] 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 certainly 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."**[59] [Italics in original] [Emphasis added]

Michael Morley, an assistant professor of law at Florida State University College of Law, told the Maine Committee on Veterans and Legal Affairs on May 11, 2021:

> "**The compact violates the Constitution in several ways, but most basically the Equal Protection Clause**. In *Bush v Gore*, the Supreme Court held that a jurisdiction cannot afford arbitrary and disparate treatment to different voters participating in the same election. At least in some major respects, the same voting rules must apply to all members of the same electorate. Maine's rules for voting differ from those of other states, including its rules for voter registration, ranked choice voting, rules governing opportunities for voting, the conduct of voting like voter ID, and even the more technical rules for accepting or rejecting contested ballots.
>
> "The National Popular Vote Compact treats the entire nation as the relevant electorate for presidential elections, **combining everyone's votes together to determine the outcome. That violates the Equal Protection Clause** because those votes were cast and counted based on materially different rules." [Emphasis added]

---

[58] *Williams v. Virginia State Board of Elections*. 393 U.S. 320 (1969) (*per curiam*).

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

In fact, if there were such a thing as "interstate equal protection," the courts would have used it long ago to declare existing state winner-take-all laws unconstitutional. The Equal Protection argument that the three-judge federal court and the U.S. Supreme Court rejected in 1968 in *Williams v. Virginia State Board of Elections* would be a winning legal argument.

Moreover, if there were such a thing as "interstate equal protection," there would suddenly also be a legal basis for challenging the numerous other interstate inequalities created by the winner-take-all method of awarding electoral votes. 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 between the two states.

Let's analyze the "interstate equal protection" argument in connection with Kentucky (where the polls are open between only 6 A.M. and 6 P.M.) and New York (where the polls are open between 6 A.M. and 9 P.M.).[60]

The laws of both states concerning voting hours are constitutional, because the Constitution gives states control over the conduct of federal elections and because no provision of the U.S. Constitution is violated if polls close at 6 P.M. rather than 9 P.M.

Ross would argue that the votes cast by Kentucky citizens are diminished in comparison to those cast by New York citizens who enjoy more convenient voting hours, because (diminished) Kentucky votes would be comingled and added together with the New York votes under the National Popular Vote Compact.

However, a vote cast by a voter in Kentucky would be equal to a vote cast by a voter in New York under the Compact.

If there were a possibility of successful litigation against the National Popular Vote Compact on the basis of the "interstate equal protection" doctrine, then that same possibility would exist today with respect to the adding together and comingling of the *electoral votes* cast in the Electoral College. Indeed, when the Electoral College meets in mid-December, it comingles and adds together the votes from 538 presidential electors chosen under distinctly different state election laws concerning the hours of voting.

In fact, when the U.S. Senate and House of Representatives meet and vote on federal legislation, the votes of members chosen under distinctly different state election laws concerning the hours of voting are similarly comingled and added together.

The federal system created by the Founders at the 1787 Constitutional Convention explicitly involves comingling and adding together of votes from presidential electors, U.S. Representatives, and U.S. Senators who were chosen under different state laws.

Opponents of the National Popular Vote Compact would have people believe that federalism must be abandoned, and federal control of elections must be established, in order to have a nationwide vote for President.

The federalist approach to government set forth in the U.S. Constitution divides governmental power between the states and national government. In particular, the Constitution's delegation of power over elections to the states greatly reduces the risk that a single

---

[60] State Poll Opening and Closing Times (2020). *Ballotpedia*. https://ballotpedia.org/State_Poll_Opening_and_Closing_Times_(2020)

political group will be 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:

- 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; extensive advance voting; and mail-in voting in every state.
- Suppose that in 2017, the then-Republican-controlled Congress and a then-sitting Republican President reinstated their preferred election laws on a nationwide basis.
- Suppose that in 2021, the then-Democratic-controlled Congress and a then-sitting Democratic President reinstated their preferred election laws on a nationwide basis.

The Founders resolved this dilemma by choosing a federal approach that gives the states control over elections.

Under the federalist system set forth in the Constitution, both the Republicans and Democrats have been able to enact their preferred election laws in the states where they are in control.

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.

Meanwhile, the National Popular Vote Compact 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.

The Compact provides that the results from each state (and D.C.) would be added together. Note that this is the same process of adding up 51 sets of numbers that would have occurred under the Bayh-Celler constitutional amendment for direct election of the President.

That amendment was endorsed by Richard Nixon after it passed the House in 1969. It 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).[61]

---

[61] Similarly, the U.S. Senate approved the Lodge-Gossett constitutional amendment by a bipartisan 64–27 vote in 1950 (section 4.1). That amendment provided for a fractional-proportional division of each state's electoral votes followed by comingling and adding up of the fractional electoral votes from each state.

Then-Congressman George H.W. Bush supported the Bayh-Celler constitutional amendment under which the states would have continued to conduct elections under differing state election laws by saying on September 18, 1969:

> "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**."[62] [Emphasis added]

9.1.8. MYTH: The U.S. House would be deprived of the opportunity to choose the President, thereby rendering the Compact unconstitutional.

QUICK ANSWER:

- If no presidential candidate receives an absolute majority in the Electoral College, the Constitution provides for a so-called "contingent election" in which the U.S. House of Representatives elects the President on a one-state-one-vote basis. However, the mere existence of a contingent procedure in the U.S. Constitution does not create a constitutional imperative that state election laws must be fashioned so as to guarantee that the contingency can occur.
- If it were unconstitutional for a law to have the political effect of preventing a tie in the Electoral College (thereby depriving the U.S. House of Representatives of the opportunity to choose the President), then the federal statutes that specified the size of the U.S. House of Representatives and that have been in place for about half of American history created a constitutionally impermissible structure for the House.
- Most historians do not subscribe to the theory that the Founding Fathers expected the U.S. House of Representatives to routinely choose the President.

---

[62] *Congressional Record*. September 18, 1969. Pages 25,990–25,991. https://www.congress.gov/bound-congressional-record/1969/09/18/house-section

MORE DETAILED ANSWER:

Rob Natelson offers the following reason why the National Popular Vote Compact is unconstitutional:

> "Because NPV states would have a majority of votes in the Electoral College, NPV would effectively repeal the Constitution's provision for run-off elections in the House of Representatives."[63]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, 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."[64] [Emphasis added]

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 Compact]."[65] [Emphasis added]

It is true that the National Popular Vote Compact would result in the appointment of an absolute majority of presidential electors (at least 270 out of 538) who were nominated in association with the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia.

Most people would consider the elimination of the possibility that the U.S. House of Representatives might elect the President as a highly desirable collateral benefit of the National Popular Vote Compact—a feature, not a bug.

Let us consider the argument made by Schleifer and Ross in detail.

There are two scenarios in which no candidate can end up with an absolute majority in the Electoral College:

- a fragmentation of votes in the Electoral College among multiple candidates (which occurred in the 1824 election)
- a tie in the Electoral College (which occurred in the 1800 election).

---

[63] Natelson, Rob. 2019. Why the "National Public Vote" Scheme is Unconstitutional. *Tenth Amendment Center*. February 9, 2019. https://tenthamendmentcenter.com/2019/02/09/why-the-national-public-vote-scheme-is-unconstitutional/

[64] 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.

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

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 presidential election, four candidates received substantial numbers of electoral votes (99, 84, 41, and 37), and no presidential candidate received the required absolute majority in the Electoral College.

In the 20th and 21st centuries, there have been only three occasions when a presidential candidate not nominated by one of the two major political parties carried a state:

- In 1968, segregationist George Wallace won 46 electoral votes by carrying Alabama, Arkansas, Georgia, Louisiana, and Mississippi.
- In 1948, segregationist Strom Thurmond had a strong regional appeal and won 38 electoral votes by carrying Alabama, Louisiana, Mississippi, and South Carolina.[66]
- In 1912, then-former President Theodore Roosevelt ran as a third-party candidate after he failed to win the Republican Party's nomination against incumbent Republican President William Howard Taft. He won 88 electoral votes by carrying California, Michigan, Minnesota, Pennsylvania, South Dakota, and Washington.

Despite the fragmentation of the vote in these three elections, one of the major-party nominees ended up with a majority in the Electoral College.

In any case, there is a politically plausible scenario that might give rise to a 269–269 tie in the Electoral College in most presidential elections, including the 2024 election, as discussed in section 1.6.4 and shown in figure 1.22.

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 (section 1.6).

Some have argued that the Founding Fathers did not expect that the Electoral College would elect the President in most elections. Instead, some have argued that the Founders anticipated that, after George Washington, no candidate would be likely to 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" theory, the Electoral College would usually merely serve as a screening body to nominate candidates for President, and the U.S. House of Representatives would ordinarily make the final decision.

Dr. Gary Gregg II of the University of Louisville discusses this "designed to fail" interpretation of the method of electing the President in an article entitled "The Origins and Meaning of the Electoral College."[67]

---

[66] In 1948, Thurmond received one additional electoral vote from a faithless Democratic elector in Tennessee. See section 3.7.6.

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

Based on the "designed to fail" theory, it is then argued that the National Popular Vote Compact is unconstitutional because it would have the practical political effect of depriving the U.S. House of Representatives of the opportunity to choose the President.

Gregg, a strong supporter of the current system of electing the President and editor of a book defending it, has dismissed the "designed to fail" 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."[68]

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.

The original size of the U.S. House of Representatives was set by the U.S. Constitution for the nation's first election at 65 members (i.e., an odd number). Since the first census in 1790, the size of the U.S. House of Representatives has been set by federal statute, and it has been both an odd and even number at various times in our nation's history.

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

Because the size of the House has been an odd number (435) since 1961, the size of the Electoral College has been an *even* number (538) since ratification of the 23rd Amendment.

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 in the choice of the size of the House—much less a constitutional imperative. 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 all presidential elections.

---

[68] *Ibid*. Pages 7–9.

That is, the federal statutes establishing the size of the House had the practical political effect of depriving the House of the opportunity to elect the President for roughly half of American history—the same aspect of the National Popular Vote Compact that Natelson, Ross, and Schleifer find offensive.

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* traced the history of the various statutes that set the size of the U.S. House of Representatives.[69]

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 guiding 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 or tertiary objective—it would have been a trivial matter for Congress to accommodate that imperative when it periodically adjusted the size of the House.

If it were unconstitutional to enact a statute that has the almost-certain practical effect of depriving the U.S. House of Representatives of the opportunity to choose the President, then the House has operated with a constitutionally impermissible structure for about half of American history. In particular, it has operated with a constitutionally impermissible structure in every year since 1961.

The contingent election procedure exists in order to resolve a deadlock if one should arise in the Electoral College. However, the existence of a contingent procedure does not create a constitutional imperative that state election laws must be fashioned so as to guarantee that the contingent procedure can occur.

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

---

[69] 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. The lower courts rejected the argument advanced by Clemons, and the U.S. Supreme Court declined to hear the case.

size of the House always be chosen so as to result in an even-numbered size of the Electoral College.

If it were a constitutional imperative not to deprive the U.S. House of Representatives of the opportunity to choose the President, there have been three very convenient occasions since ratification of the original Constitution to do so.

First, the 1st Congress debated the issue of the size of the House of Representatives and approved a constitutional amendment on that very subject.[70] That particular 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. That amendment 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 close examination of the procedures for electing the President. Congress 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.[71,72,73]

Third, 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 a contingent election for President by requiring that the size of the House always be chosen so as to ensure that the size of the Electoral College be an even number.

9.1.9. MYTH: The fact that the states have not used, for an extended period of time, methods other than winner-take-all has extinguished their power to adopt other methods.

QUICK ANSWER:

- Opponents of the National Popular Vote Compact have advanced the so-called "non-use" argument, namely the theory that the widespread use of the winner-take-all method of awarding electoral votes over an extended period of time has extinguished the power of the states to adopt other methods of appointing their presidential electors.
- The U.S. Supreme Court explicitly rejected the non-use argument in *McPherson v. Blacker* by saying that the Constitution's grant of power to the states is not constrained "because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way."

---

[70] Res. 3, 1st Cong., 1st Sess., Art. I, 1 Stat. 97.

[71] Dunn, Susan. 2004. *Jefferson's Second Revolution: The Elections Crisis of 1800 and the Triumph of Republicanism*. Boston, MA: Houghton Mifflin.

[72] Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press.

[73] Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press.

MORE DETAILED ANSWER:

In 2012, Professor Norman Williams of Willamette University advanced the so-called "non-use" argument—the theory that the widespread use of the winner-take-all method of awarding electoral votes, over an extended period of time, has extinguished the power of the states to adopt different methods.

> "**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 … **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."[74]
>
> "Although Article II, Section 1 of the U.S. Constitution entrusts to the state legislatures the power to determine the manner in which presidential electors are selected, **that power is not plenary** in the customary sense. Rather, **that power is limited**, and the extent of that limitation is borne out **by the historical understanding of the scope of state authority** under Article II. At the time of the Framing of the U.S. Constitution, the framers envisioned a system in which states would select electors in accordance with the sentiments of state citizens, not the nation generally. Moreover, in the years following the Framing, every single state, both original and newly admitted, established a system of selecting presidential electors based either directly or indirectly on the sentiments of state voters. At no point in our nation's history has any state sought to appoint its electors on the basis of voter sentiment outside the state, let alone the national popular vote. **The Constitution's delegation of power to the state legislature must therefore be read in light of this uniform, uncontested understanding that states are required to select electors in accordance with popular sentiment of voters in the state or the districts within it**."[75]

Professor Williams' non-use argument echoes the argument made in 1892 before the U.S. Supreme Court by the losing attorney (F.A. Baker) in *McPherson v. Blacker*—the seminal case interpreting state power under Article II, section 1.

Baker argued that the widespread use of the state-by-state winner-take-all method of

---

[74] Williams, Norman. 2012. Why the National Popular Vote Compact is unconstitutional. *Brigham Young University Law Review*. December 1, 2012. Pages 1569–1570. https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2686&context=lawreview

[75] *Ibid*. Page 1523.

awarding electoral votes, over an extended period of time, extinguished the power of the states to adopt different methods of appointing their presidential electors.

> "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**."[76] [Emphasis added]

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

> "From the formation of the government until now, the practical construction of the clause has conceded **plenary power to the state legislatures** in the matter of the appointment of electors."[77]
>
> "In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."[78]
>
> "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**."[79] [Emphasis added]

9.1.10. MYTH: Federal sovereignty would be encroached upon by the Compact.

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 does not encroach on federal sovereignty, because the power to choose the method of awarding a state's electoral votes is a state power.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted:

> "If ever a compact encroached on federal … sovereignty, this is it."[80]

---

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

[77] *McPherson v. Blacker*. 146 U.S. 1 at 34. 1892.

[78] *Ibid.* Page 35.

[79] *Ibid.* Pages 35–36.

[80] 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.

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…."[81] [Emphasis added]

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

> "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."[82] [Emphasis added]

In *Bush v. Gore* in 2000, the U.S. Supreme Court approvingly referred to *McPherson v. Blacker*. The Court identified Article II, section 1 of the Constitution as:

> "the source for the statement in *McPherson v. Blacker* … that the State legislature's power to select the manner for appointing electors is **plenary.**"[83] [Emphasis added]

The U.S. Supreme Court also approvingly referred to *McPherson v. Blacker* in *Chiafalo v. Washington* in 2020.

The National Popular Vote Compact would not encroach on federal sovereignty, because it involves an exercise of the "exclusive" and "plenary" power of the states to choose the method for appointing their presidential electors.

Note that 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.

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 chusing Senators." [Emphasis added]

---

[81] U.S. Constitution. Article II, section 1, clause 2.

[82] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

[83] *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

9.1.11. MYTH: State sovereignty would be encroached upon by the Compact.

QUICK ANSWER:

- The National Popular Vote Compact is an exercise by the states of their sovereignty—not an encroachment of state sovereignty.
- 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 does not encroach on state sovereignty when it exercises one of its own "exclusive" and "plenary" powers.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted:

> "If ever a compact encroached on … state sovereignty, this is it."[84]

The U.S. Supreme Court ruled in *McPherson v. Blacker* in 1892 that the choice of method for appointing a state's presidential electors is an "exclusive" and "plenary" state power.

In addition, the U.S. Supreme Court approvingly referred to *McPherson v. Blacker* as recently as *Bush v. Gore*[85] in 2000 and in *Chiafalo v. Washington*[86] in 2020.

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?

States that choose to enter the National Popular Vote Compact retain the power to review their decision and withdraw from the compact at a future time (section 6.2.4).

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

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

QUICK ANSWER:

- Federalism is concerned with the distribution of power between the states and the federal government.
- The power of state governments—relative to the power of 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 currently used by most states), along congressional district boundary lines (as is currently the case in Nebraska and

---

[84] 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.

[85] *Bush v. Gore*. 531 U.S. 98. 2000.

[86] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

Maine), or national lines (as would be the case under the National Popular Vote Compact).

- There is no connection between the way power is distributed—or should be distributed—between the state and federal governments and whether a state uses the state-level winner-take-all method of awarding electoral votes.
- The National Popular Vote Compact is based on the federal system that exists in the United States and on the political reality that there is widespread legislative and public support for federalism. The Compact is an example of action by state governments to solve a recognized problem using a power explicitly granted to the states by the U.S. Constitution.

MORE DETAILED ANSWER:

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

Supporters of federalism are particularly ardent about preserving and enhancing the power of state governments in relation to the power of the federal government.

John Samples 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**."[87] [Emphasis added]

UCLA law 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**."[88] [Emphasis added]

Lowenstein expanded this argument by saying:

> "**The Electoral College orients elections around the states**. Early in my career in 1971, I went to work for Jerry Brown when he was Secretary of State. I stayed in state government for 8 years. I'm a state government person. I think federal government people are pointy headed bureaucrats who don't know the

---

[87] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 10. https://www.cato.org/policy-analysis/critique-national-popular-vote

[88] 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

> first thing about anything in life outside the Beltway. I share all the prejudices against the federal government. and I believe in **preserving the states as important vital functioning parts of our system**. And I think that **anything that draws public attention to the states is valuable**. And if you follow presidential politics at all, **you hear a lot about states**. … So the presidential elections do **remind Americans that states are the component parts of our federal system**."[89] [Emphasis added]

The power of state governments—relative to the power of 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 currently used by most states), 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 Compact).

In particular, there is no connection between the way power is distributed—or should be distributed—between the state and federal governments and whether a state uses the state-level winner-take-all method of awarding electoral votes.

Many of the Founding Fathers served as state legislators. When they returned from the 1787 Constitutional Convention, many of them helped organize the first presidential election in their respective states. In the nation's first presidential election in 1789, the legislatures of Virginia, Massachusetts, and Delaware chose to elect their presidential electors by district.[90] In choosing not to award electoral votes on a statewide basis, those legislatures certainly did not reduce the powers of their state governments relative to the federal government.

Likewise, when the legislatures of Virginia, Massachusetts, and Delaware subsequently decided to change to the state-level winner-take-all method of awarding electoral votes (in 1800, 1824, and 1832, respectively), the powers of those state governments were not suddenly increased relative to the federal government.

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 continuing to use the state-level winner-take-all method).

In fact, the power of state governments—relative to the power of the federal government—has nothing whatsoever to do with the boundary lines used to select presidential electors.

The National Popular Vote Compact is based on the federal system that exists in the United States and on the political reality that there is widespread legislative and public support for federalism.

In fact, adoption of the National Popular Vote Compact is an exercise of federalism. It is an example of action by state governments to solve a recognized problem using a power explicitly granted to the states by the U.S. Constitution.

---

[89] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008. Timestamp 1:04. https://www.youtube.com/watch?v=ec9-vGUQkmk

[90] Massachusetts used congressional districts. Virginia used presidential-elector districts. Delaware used its three existing counties as its three districts.

9.1.13. MYTH: There are no limits on what state legislatures can do with their electoral votes.

QUICK ANSWER:

- Neither the authors of the National Popular Vote Compact, the authors of this book, nor the National Popular Vote organization contend that the Article II powers of the states are "unconstrained by the Constitution" or that "there are no limits on what legislatures can do with state electoral votes."
- States have far-reaching authority under Article II, section 1 over their choice of method of appointing presidential electors, absent some specific constraint found elsewhere in the Constitution.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, wrote in *Real Clear Politics* in 2024:

> "The California-based National Popular Vote campaign has lobbied states to join its eponymous interstate compact. They claim there are **no limits on what legislatures can do** with state electoral votes."[91] [Emphasis added]

John Samples of the Cato Institute has written:

> "NPV advocates … suggest that the power to appoint electors is unconstrained by the Constitution."[92]

We do not know the identities of John Samples' unnamed "NPV advocates," and Trent England provides no source for his fabricated statement about the National Popular Vote organization.

In any case, neither the authors of the National Popular Vote Compact, the authors of this book, nor the National Popular Vote organization contend that the Article II powers of the states are "unconstrained by the Constitution" or that "there are no limits on what legislatures can do with state electoral votes."

In fact, our position is that stated by the U.S. Supreme Court in *Chiafalo v. Washington* in 2020:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, **absent some other constitutional constraint**."[93]

---

[91] England, Trent. 2024. Popular Vote Compact Collides with Ranked-Choice Voting. *Real Clear Politics*. February 16, 2024. https://www.realclearpolicy.com/articles/2024/02/16/popular_vote_compact_collides_with_ranked-choice_voting_1012308.html

[92] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 8. https://www.cato.org/policy-analysis/critique-national-popular-vote

[93] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). Page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

Justice Kagan continued:

> "**Checks on a State's power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution**. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, see Art. II, §1, cl. 5."[94] [Emphasis added]

Indeed, the Constitution contains numerous restraints on a state's exercise of power to choose the method of awarding its electoral votes under Article II, section 1, including:

- the Due Process clause of the 5th Amendment
- the Equal Protection clause of the 14th Amendment
- the 15th Amendment (outlawing the denial of vote based on race, color, or previous condition of servitude)
- the 19th Amendment (women's suffrage)
- the 24th Amendment (outlawing poll taxes)
- the 26th Amendment (18-year-old suffrage)
- prohibition on *ex post facto* laws (Article I, section 10)
- prohibition on bills of attainder (Article I, section 10)
- prohibition on state actions that impair the obligation of contracts (Article I, section 10)
- the Presidential Qualification Clause (Article II, section 1, clause 5).

For example, while a state legislature may pass a law under Article II, section 1 making it a crime to commit fraud in a presidential election, it cannot pass an *ex post facto* (retroactive) law making it a crime to have committed 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).

Many of the above 10 provisions are discussed elsewhere in this chapter. For example, the Constitution's explicit prohibition against a "law impairing the obligation of contract" operates as a restraint on a state's power under Article II, section 1 is discussed in section 9.25.

The U.S. Supreme Court decision in 1968 in *Williams v. Rhodes* rejected the argument that there are no constraints on a state's power under Article II, section 1 to choose the manner of selecting presidential elector:

> "**The State also contends that it has absolute power to put any burdens it pleases on the selection of electors** because of the First Section of the Second Article of the Constitution, providing that

---

[94] Footnote 4 in *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). Page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…'

to choose a President and Vice President. There of course can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But **the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution**. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. **Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws.** Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections.

"We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that

> 'No State shall … deny to any person … the equal protection of the laws.'"[95] [Emphasis added]

In addition, the U.S. Supreme Court noted in *McPherson v. Blacker* in 1892 that a state's constitution can limit the legislature's choices over the manner of appointing the state's 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**."[96] [Emphasis added]

Article I, section 10, clause 1 of the U.S. Constitution contains three additional specific restrictions on a state's power under Article II, section 1:

> "**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

---

[95] *Williams v. Rhodes*. 393 U.S. 23, 28–29. 1968.

[96] *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

> 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]

9.1.14. MYTH: Implicit constraints on a state's method for appointing presidential electors render the Compact unconstitutional.

QUICK ANSWER:

- In *McPherson v. Blacker*, the seminal case on the power of the states to choose their presidential electors, the U.S. Supreme Court rejected the losing attorney's argument that it should judicially manufacture implicit restrictions on the power of the states to choose the method of awarding their electoral votes.
- In *Chiafalo v. Washington*, the U.S. Supreme Court held that Article II, section 1's "appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint."

MORE DETAILED ANSWER:

Opponents of the National Popular Vote Compact typically concede that there is no explicit prohibition in the U.S. Constitution against the Compact, while simultaneously suggesting that there are implicit restrictions that render the Compact unconstitutional.

For example, John Samples of the Cato Institute wrote:

> "**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**."[97] [Emphasis added]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, writes:

> "The [U.S. Supreme] Court has held that 'the State legislature's power to select the manner for appointing electors is plenary;' … [however] **Is this power of state legislators completely unrestricted?"**[98] [Emphasis added]

The 1787 Constitutional Convention debated numerous methods of choosing the President on 22 separate days and took 30 votes before arriving at the wording that actually appears in the Constitution.[99] The methods that they considered included:

---

[97] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 8. https://www.cato.org/policy-analysis/critique-national-popular-vote

[98] 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.

[99] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 99–100. In particular, see the table on page 100 listing various votes.

- Congress choosing the President
- voters choosing presidential electors by districts
- state legislatures appointing presidential electors
- Governors choosing the President
- nationwide popular election.

At the time the Constitution was written, the concept of having a legislative body select the chief executive was a familiar concept. In 1787, the Governors of eight of the original 13 states were chosen by their legislatures. Moreover, legislative selection of the chief executive was analogous to the method used by the British House of Commons.

Accordingly, on four separate occasions (June 2, July 17, July 24, and July 26), the 1787 Constitutional Convention approved congressional selection of the President.[100]

Notwithstanding the repeated votes by the delegates in favor of congressional selection of the President, the delegates were concerned that this method was incompatible with their goal of creating an independent executive and establishing a separation of powers between the executive and legislative branches of the new government.[101]

Toward the end of the Convention in September, this dilemma was resolved by the creation of a new body—separate from Congress—to choose the President, namely the Electoral College. In this "shadow Congress," each state's number of Electoral College members would equal the state's number of U.S. Representatives and U.S. Senators.[102]

The Founders then specifically foreclosed the possibility that states might designate their members of Congress as their presidential electors by placing a restriction in Article II, section 1 on a state's choice of its 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]

The existence of this explicit constraint on the state's Article II powers is significant because of a standard principle of constitutional, statutory, and contractual interpretation of *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others").

When the Constitution was being debated by ratifying conventions in several states, there was widespread concern that this standard principle of constitutional, statutory, and contractual interpretation might be used to deny the existence of rights not specifically enumerated in the Constitution.

To address this concern, Congress proposed in 1789, and the states ratified by 1791, the

---

[100] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Page 100.

[101] *Ibid.* Pages 99–100.

[102] The Electoral College differs from Congress in several important ways. First, it is not bicameral. Second, it does not meet in one central place but instead meets in the separate states (usually in the state capital).

9th Amendment limiting the *expressio unius est exclusio alterius* principle in connection with the rights of the people. The 9th Amendment states:

> "**The enumeration in the Constitution, of certain rights**, shall not be construed to deny or disparage others retained by the people." [Emphasis added]

Gibson v. Matthews noted:

> "The ninth amendment 'was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution.' *Charles v. Brown*, 495 F. Supp. 862, 863–64 (N.D.Ala.1980)."[103]

In short, under the principle of *expressio unius est exclusio alterius*, the inclusion of an *explicit* constraint in Article II, section 1 of the Constitution (in this case, making members of Congress and federal officials ineligible as presidential electors) excludes the possibility of *implicit* constraints.

The Fidel Castro argument

Notwithstanding the foregoing, opponents of the National Popular Vote Compact continue to argue that there are *implicit* restraints on the power of the states under Article II, section 1.

For example, throughout her book *Enlightened Democracy: The Case for the Electoral College*, Tara Ross generally describes the Founding Fathers in glowing terms:

> "The Electoral College is … **a carefully considered and thought-out solution**."[104] [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."[105]

But, then, after repeatedly extolling the Founders' work product, Ross would have us believe that they lacked "imagination."

> "**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**."

---

[103] *Gibson v. Matthews*. 926 F.2d 532 (6th Cir. 1991).

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

[105] 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.

> "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**."[106] [Emphasis added]

That is, Ross' explanation for the inconvenient actual wording of the Constitution is that the Founders suffered from a "failure of imagination."

However, a glance at the Constitution shows that the Founders displayed no shortage of legal talent or imagination in crafting numerous specific restrictions when they thought ones were advisable.

For example, Article 1, Section 8 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]

Article I, Section 10 provides:

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

The Founders even included three specific limitations on future constitutional amendments in Article V:

> **"No Amendment which may be made** prior to the Year One thousand eight hundred and eight shall in any Manner affect the **first and fourth 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]

The first clause of the ninth section of the first Article itself contains an explicit restriction:

> "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**." [Emphasis added]

Similarly, the first clause of the ninth section of the first Article itself contains an explicit restriction:

> "No Capitation, or other direct, Tax shall be laid, **unless in Proportion to the Census** or Enumeration herein before directed to be taken." [Emphasis added]

---

[106] *Ibid.*

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

If 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 itself would 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 such as a political party's caucus.

Ross' rhetorical question about Fidel Castro echoes the argument made in 1892 by the losing attorney in *McPherson v. Blacker*—the seminal Supreme Court case on the power of state legislatures to choose the manner of appointing their presidential electors.

Referring to Great Britain (the villainous analog in 1892 of Fidel Castro), 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?"[107]

In its unanimous ruling in *McPherson v. Blacker*, the Court answered Baker's argument about whether there were implicit 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.**"[108] [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"[109] [Emphasis added]

---

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

[108] *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

[109] *Ibid.* Page 29.

The argument that the Constitution is obsolete

Attorney F. A. Baker also strenuously urged the Supreme Court in *McPherson v. Blacker* to find implicit limitations in Article II, section 1.

He urged the Court to adopt a "more elastic system of government" and to judicially manufacture restrictions that do not actually appear in the Constitution, saying:

> "There is no rule of constitutional interpretation, or of judicial duty, which requires the court … to adhere to **the obsolete design of the constitution**."[110] [Emphasis added]

In his plea to the Court to engage in what we today call "judicial activism," Baker bemoaned the fact that the Michigan Supreme Court had declined to do so:

> "**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."[111] [Emphasis added]

Chiafalo v. Washington in 2020

In 2020, the U.S. Supreme Court unanimously ruled that states could pass laws requiring presidential electors to vote in the Electoral College for the presidential candidate nominated by the political party that nominated the elector—that is, that states could outlaw faithless presidential electors.

Eight of the nine justices signed Justice Elena Kagan's majority opinion in *Chiafalo v. Washington*, saying:[112]

> "**Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint**. As noted earlier, each State may appoint electors 'in such Manner as the Legislature thereof may direct.'… This Court has described that clause as **'conveying the broadest power of determination'** over who becomes an elector. *McPherson v. Blacker*."
>
> "And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. See *Ray*, 343 U.S., at 227 (A pledge requirement 'is an exercise of the state's right to appoint electors in such manner' as it chooses). Or—so long as nothing else in the Constitution poses an obstacle—a State can

---

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

[111] *Ibid.*

[112] *Chiafalo v. Washington.* 140 S. Ct. 2316. (2020). https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.
>
> "And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. **The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes**, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and … **that is all**."[113] [Emphasis added]

The 10th Amendment argument of Justices Thomas and Gorsuch

Justice Clarence Thomas wrote a concurring opinion in *Chiafalo v. Washington*, saying that the 10th Amendment (rather than Article II, section 1) was the appropriate basis for deciding the case.

The 10th Amendment to the Constitution reads:

> "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."

Justice Thomas started his concurring opinion by saying that he disagreed with the

> "attempt to base that power on Article II. In my view, the Constitution is silent on States' authority to bind electors in voting.
>
> "**I would resolve this case by simply recognizing that**
>
> > '[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.'
>
> ***U.S. Term Limits, Inc. v. Thornton***, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting).
>
> "**The Constitution does not address—expressly or by necessary implication—whether States have the power to require that Presidential electors vote for the candidates chosen by the people**. Article II, §1, and the Twelfth Amendment provide for the election of the President through a body of electors. But neither speaks directly to a State's power over elector voting.

---

[113] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> "The only provision in the Constitution that arguably addresses a State's power over Presidential electors is Clause 2 of Article II, §1. That Clause provides, in relevant part, that
>
> > '[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.'"[114] [Emphasis added]

Justice Neil Gorsuch (who was among the eight justices who signed Justice Kagan's majority opinion in *Chiafalo v. Washington*) joined with the second part of Justice Thomas' concurring opinion, which said:

> "**When the Constitution is silent, authority resides with the States or the people.** This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here."
>
> "This allocation of power is apparent in the structure of our Constitution. **The Federal Government "is acknowledged by all to be one of enumerated powers**." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). '[T]he powers delegated by the … Constitution to the federal government are few and defined,' while those that belong to the States 'remain … numerous and indefinite.' *The Federalist No. 45*. … Article I, for example, enumerates various legislative powers in §8, but it specifically limits Congress' authority to the 'legislative Powers herein granted,' §1. **States face no such constraint because the Constitution does not delineate the powers of the States**."
>
> "This structural principle is explicitly enshrined in the Tenth Amendment. That Amendment states that
>
> > '[t]he 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.'
>
> "As Justice Story explained, '[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.' J. Story, *Commentaries on the Constitution of the United States*."
>
> "Thus, '[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication," the power is "either delegated to the state government or retained by the people." U.S. Term Limits, supra, at 847–848 (THOMAS, J., dissenting)."

---

[114] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 22 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> "Of course, the powers reserved to the States concerning Presidential electors cannot 'be exercised in such a way as to violate express constitutional commands.' *Williams v. Rhodes*…. That is, powers related to electors reside with States to the extent that the Constitution does not remove or restrict that power. **Thus, to invalidate a state law, there must be "something in the Federal Constitution that deprives the [States of] the power to enact such [a] measur[e]."** *U.S. Term Limits*, 514 U. S., at 850 (THOMAS, J., dissenting)." [Emphasis added]

9.1.15. MYTH: The fact that the United States is a republic, not a democracy, renders the Compact unconstitutional.

QUICK ANSWER:

- In a republic (as the term is defined in the *Federalist Papers* and still used today), the people do not rule directly, but instead elect officeholders to whom they delegate the power to conduct the business of government during the period between elections. In a democracy, the people rule directly (as they do today in a small number of New England town meetings).
- Popular election of the chief executive does not determine whether a government is a republic or democracy. At the time of the 1787 Constitutional Convention, five of the original 13 states conducted popular elections for Governor. The U.S. Constitution requires that each state have a "republican form of government." These five states would not have voted for the Constitution at the Convention, or later ratified it, if they believed that their method of electing their chief executive put them in violation of the new Constitution.
- The United States *is* a republic (not a democracy) today, and it would remain a republic even if there were a change in the boundaries of the area used to tally popular votes in electing presidential electors.
- This argument aimed at the National Popular Vote Compact (if it were valid) would apply equally to the winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

Writing in the *Patriot Action Network*, Brad Zinn refers to former Tennessee U.S. Senator and 2008 Republican presidential candidate Fred Thompson 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**."[115] [Emphasis added]

Zinn's opinion as to what constitutes a "republic" differs considerably from the Founders' definition of a "republic" and the use of the term in the U.S. Constitution.

In *Federalist No. 10*, James Madison (frequently called the "Father of the Constitution") said:

> "The two great points of 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."[116] [Emphasis added]

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."[117] [Emphasis added]

In short, the definition of a "republic" is based on whether *elected officeholders exercise governmental power*—compared to the people directly exercising governmental power. In a republic, the people do not rule directly, but instead, they elect officeholders to whom they delegate the power to conduct the business of government during the period between elections.

In the United States, federal legislation is enacted by the joint action of officeholders who serve for a term of two years (in the U.S. House), 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 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, direct democracy in the United States is confined to an occasional "small spot" (to use Madison's wording in *Federalist No. 14*), such as some New England town meetings.

---

[115] 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

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

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

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 for 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, under Maine and Nebraska's method of awarding electoral votes (where the boundaries of the regions to tally popular votes for choosing presidential electors are congressional districts), or under the National Popular Vote Compact (where popular votes would be tallied on a nationwide basis).

A change in the boundaries for tallying popular votes for choosing presidential electors would do nothing to change the fact that the people delegate power to elected officeholders who, in turn, run the government.

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

Moreover, popular election of the chief executive is not incompatible with a "republican form of government."

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**."[118] [Emphasis added]

At the time of the Constitutional Convention in 1787, the chief executive of five of the original 13 states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island) was elected by a statewide popular vote.[119]

If popular election of a state's chief executive meant that the state did not have a "republican form of government," then these five states would have been in violation of the Guarantee Clause starting from the moment that the Constitution was ratified in 1789. These five states would therefore have been subject to immediate action by the federal government (including military intervention) to enforce the Guarantee Clause.

During the Dorr Rebellion in Rhode Island in 1842, President John Tyler acknowledged that the federal government could and would employ military action, if necessary, to enforce the Guarantee Clause. In a letter to the Governor of Rhode Island, President Tyler wrote:

> "I should experience great reluctance in **employing the military power of this Government** against any portion of the people; but however painful the duty, **I have to assure your excellency that if resistance be made to the execution of the laws of Rhode Island by such force as the civil power shall be unable to overcome, it will be the duty of this Government to enforce the constitutional guaranty**—a guaranty given and adopted mutually by all the original States, of which number Rhode Island was one, and which in the same way has been given and adopted by each of the States since

[118] U.S. Constitution. Article IV, section 4, clause 1.

[119] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Pages xix and xx.

> admitted into the Union; and if an exigency of lawless violence shall actually arise the executive government of the United States, on the application of your excellency under the authority of the resolutions of the legislature already transmitted, will stand ready to succor the authorities of the State in their efforts to maintain a due respect for the laws."[120] [Emphasis added]

The five states that conducted popular election for Governor would not have voted for the Constitution at the 1787 Convention, or later ratified it at their respective state ratifying conventions, if they believed that their method of electing their chief executive put them in violation of the new Constitution's requirement that each state have a "republican form of government."

As to the other eight original states, popular election of Governors began in Pennsylvania in 1790, in Delaware in 1792, in Georgia in 1825, in Maryland in 1838, in North Carolina in 1836, in New Jersey in 1844, in Virginia in 1851, and in South Carolina in 1865.[121]

Among the new states that were admitted to the Union shortly after ratification of the Constitution, Vermont (admitted in 1790) was already conducting popular elections for Governor at the time of its admission,[122] and Kentucky (admitted in 1792) adopted that method in 1800.[123]

Every new state admitted between 1796 and 1860 either started conducting popular gubernatorial elections at the time of its admission (such as Tennessee in 1796) or had been doing so prior to its admission.[124]

No one has ever argued that these states denied their citizens a "republican form of government" because they directly elected their chief executive. No one has ever argued that the federal government would or should invoke the Guarantee Clause and intervene to prevent states from electing their Governors by popular vote.

In short, popular election of the chief executive has nothing whatsoever to do with the question of whether a particular state has the constitutionally required "republican form of government" or whether a particular state government is a republic or democracy. Therefore, popular election of the chief executive is not incompatible with a "republican form of government."

---

[120] Letter from President John Tyler to the Governor of Rhode Island Samuel Ward King. May 7, 1842. See Gettleman, Marvin E. 1973. *The Dorr Rebellion: A Study in American Radicalism 1833–1849*. New York, NY: Random House.

[121] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. *Passim*.

[122] When Vermont entered the Union in 1791, it had already been conducting popular elections for its Governor since 1778. Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 265.

[123] In 1792 and 1796, the Governor of Kentucky was elected by a state-level electoral college chosen by popular vote from the same districts that elected members of the Kentucky House of Representatives. Popular election of Governors began in Kentucky in 1800. Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 68.

[124] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. *Passim*.

As Senator Fred Thompson said:

> "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]

9.1.16. MYTH: The Guarantee Clause of the Constitution renders the Compact unconstitutional

QUICK ANSWER:

- The argument that the National Popular Vote Compact violates the Guarantee Clause is not based on the clause's language, any judicial precedent, or the course of conduct of the state and federal governments starting from the time the Constitution went into effect.
- Popular election of the chief executive is not incompatible with "a republican form of government."
- The Guarantee Clause does not apply to the federal government.
- The Guarantee Clause is non-justiciable.
- Direct popular election of the chief executive is not incompatible with the concept of a "compound republic."

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."[125]

In an article entitled "Guaranteeing a Federally Elected President," Kristin Feeley argues that "the NPV legislation violates the Guarantee Clause."[126]

Acceptance of Feeley's conclusion requires all of the following:

- applying the Guarantee Clause to the federal government—that is, extending the words "every State in this Union" to include the federal government
- agreeing that popular election of the President is incompatible with the concept of a "republican form of government"
- overcoming judicial precedents that have established that the Guarantee Clause is non-justiciable
- arguing that popular election of the President is incompatible with the concept of a "compound republic."

---

[125] U.S. Constitution. Article IV, section 4, clause 1.

[126] Feeley, Kristin. 2009. Guaranteeing a federally elected president. *Northwestern University Law Review*. Volume 103, Number 3. Page 1429.

The Guarantee Clause does not apply to the federal government.

In order for the Guarantee Clause to apply to the federal government, it would have to say:

> "**The United States** shall guarantee to **the United States** a Republican Form of Government." [Emphasis added]

However, the Guarantee Clause of the U.S. Constitution does not say that.

Moreover, Feeley acknowledges that she has found no judicial precedent (or even a dissenting opinion) that has ever applied the Guarantee Clause to the national government.

Popular election of the chief executive is compatible with the concept of a "republican form of government."

James Madison—frequently called the "Father of the Constitution"—wrote in *Federalist No. 10*:

> "The two great points of 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**."[127] [Emphasis added]

In addition, Madison wrote in *Federalist No. 14*:

> "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**."[128] [Emphasis added]

In short, in a republic, the people do not rule directly but instead elect officeholders to whom they delegate the power to conduct the business of government during the period between elections.

In contrast, in a democracy, the people rule directly (as they do today in some New England town meetings).

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 Guarantee Clause is non-justiciable.

In 1849, the U.S. Supreme Court held that the Guarantee Clause is non-justiciable in *Luther v. Borden*.[129]

The Court reiterated this position in 1912 when it ruled that enforcement of the Guarantee Clause is a political question in *Pacific States Telephone & Telegraph v. State of Oregon*.[130]

---

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

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

[129] *Luther v. Borden*. 7 How. 1. 1849.

[130] *Pacific States Telephone & Telegraph v. State of Oregon*. 223 U.S. 118 (1912). This case considered whether Oregon's recently adopted initiative and referendum system was unconstitutional under the Guarantee

The Compact is consistent with the concept of a "compound republic."

Feeley raises the additional claim that the National Popular Vote Compact is incompatible with the concept of a "compound republic," saying:

> "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**."[131] [Emphasis added]

The term "compound republic" does not appear in the Constitution; however, it appears twice in the *Federalist Papers*.[132]

James Madison's *Federalist No. 51* discusses a simple "republic" where the people's rights are protected by the separation of powers among different "departments" (that is, the legislative, executive, and judicial branches of government).

Madison then contrasts a simple "republic" with a "compound republic" where the separation of powers *between* two distinct levels of government works to protect the people's rights.

> "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."[133] [Emphasis added]

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

> "a compound republic, partaking both of the national and federal character."[134]

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 National Popular Vote Compact would do nothing to affect the existence of the *two* distinct layers of government—state and federal.

Moreover, the definition of a "compound republic" in the *Federalist Papers* is *not* based on the boundaries of the regions used to count popular votes in electing the head

---

Clause.

[131] Feeley, Kristin. 2009. Guaranteeing a federally elected president. *Northwestern University Law Review*. Volume 103, Number 3. Page 1444–1445.

[132] 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/

[133] 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*.

[134] Publius. *Federalist No. 62*. The Senate. *Independent Journal*. February 27, 1788.

of *one of the three* branches of government (the executive "department") of *one of the two* distinct layers of government (i.e., the federal government).

Thus, the United States is a "compound republic"—with or without—the National Popular Vote Compact.

The National Popular Vote Compact is concerned with the method of choosing presidential electors in the states that enact it.

Finally, Feeley has argued that the National Popular Vote Compact is unconstitutional because:

> "Allowing a minority of states to switch the nation to a national popular vote would also violate the republican principle that **no state shall legislate for another state**."[135] [Emphasis added]

The Compact specifies the manner of appointing presidential electors in the states belonging to the Compact. It does not alter the manner of appointing presidential electors in states that do not belong to the Compact. It does not obligate any non-member state to take any action that it would not otherwise take. It does not prohibit any non-member state from taking any action it may wish to take. In short, the Compact does not legislate for non-member states.

9.1.17. MYTH: The 12th Amendment renders the National Popular Vote Compact unconstitutional.

QUICK ANSWER:

- The National Popular Vote Compact is concerned with the method of selecting presidential electors—not what they do when they meet. There is nothing in the 12th Amendment that even touches on the subject matter of the Compact.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation 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.**"[136] [Emphasis added]

Despite what von Spakovsky claims, there is nothing in the National Popular Vote Compact that changes anything in the 12th Amendment or affects the ability of any state

---

[135] Feeley, Kristin. 2009. Guaranteeing a federally elected president. *Northwestern University Law Review*. Volume 103, Number 3. Page 1430. See also page 1450.

[136] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

(whether it belongs to the Compact or not) to exercise its Article V powers to amend the Constitution.

The 12th Amendment (found in appendix A) deals with the locations of the Electoral College meetings and what the presidential electors do at the meetings. It says nothing about the method of selecting presidential electors.

The National Popular Vote Compact is concerned with the method of selecting presidential electors—not what they do when they meet. There is nothing in the Compact that is contrary to anything in the 12th Amendment.

Opponents of the National Popular Vote Compact often cite the first sentence of the 12th Amendment. That sentence (the so-called "Meetings Clause") provides:

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President."

The National Popular Vote Compact does not alter the fact that the physical meeting of the presidential electors must occur inside each respective state.

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 Tuesday after the second Wednesday in December next following their appointment **at such place in each State in accordance with the laws of the State** enacted prior to election day."[137] [Emphasis added]

9.1.18. MYTH: The Privileges and Immunities Clause of the 14th Amendment renders the Compact unconstitutional.

QUICK ANSWER:

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

MORE DETAILED ANSWER:

The Privileges and Immunities Clause of the 14th Amendment (ratified in 1868) 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 his or her state government as that citizen already possesses, by virtue of national citizenship, relative to abridgments by the federal government.

Peter J. Walliston wrote in the *National Review*:

> "Under the NPV process, any citizen's vote for an elector pledged (in turn) to vote for that voter's preferred presidential candidate would be nullified if all

[137] The Electoral Count Reform Act of 2022 is in appendix B.

> the state's electoral votes are transferred to the winner of the national popular vote. If the NPV goes into effect, what will happen in this case is exactly what the language of the 14th Amendment forbids."
>
> "It can hardly be imagined that **taking away a voter's right to have a vote counted for the person he or she prefers for president** is not abridging that person's privileges and immunities under the 14th Amendment and the U.S. Constitution."[138] [Emphasis added]

The authors of this book would be delighted if Walliston's legal argument were correct in saying that it would be a violation of Privileges and Immunities Clause to:

> "[take] away a voter's right to have a vote counted for the person he or she prefers for president."

Indeed, that is precisely what the current winner-take-all method of awarding electoral votes does.

Thus, if Walliston's legal argument were correct, the winner-take-all method would be unconstitutional.

Under the current state-by-state winner-take-all method of awarding electoral votes, an individual's vote for President is not "counted for the person he or she prefers" if it disagrees with the choice made by a plurality of *other* voters in the state.

That is, the individual voter's choice is zeroed out below the level of the entire jurisdiction served by the office. The current system creates an artificial unanimity at the state level, even though the state's voters are not unanimous.

The authors of this book would be further delighted if Walliston were correct in saying that voting for President or presidential electors were a "privilege" or "immunity" of a citizen of the United States.

The U.S. Supreme Court stated in *Bush v. Gore*:

> "**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**."[139] [Emphasis added]

Thus, Walliston's constitutional argument based on the Privileges and Immunities Clause is, unfortunately, incorrect.

More importantly, Walliston's characterization of the National Popular Vote Compact is dead wrong as a factual matter, because one of the most important virtues of the Com-

---

[138] Walliston, Peter J. 2023. The National Popular Vote Idea Is Unconstitutional and Should Be Abandoned. *National Review*. June 27, 2023. https://www.nationalreview.com/2023/06/the-national-popular-vote-idea-is-unconstitutional-and-should-be-abandoned/?bypass_key=NkRocE9pUEpFV25waE1KVU91SkZuUT09OjpPVlJQVUcxeU4zZE9Vemt5YXpsU09XeFRjell4UVQwOQ%3D%3D

[139] *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

pact is that it guarantees that a voter's vote *is* "counted for the person he or she prefers for president."

Under the National Popular Vote Compact, every voter's vote will be added to the vote total of that voter's choice for President.

9.1.19. MYTH: Section 2 of the 14th Amendment renders the Compact unconstitutional.

QUICK ANSWER:

- The U.S. Supreme Court has considered, and rejected, the argument that section 2 of the 14th Amendment makes the state-level winner-take-all method of awarding electoral votes the only constitutional method of appointment of presidential electors. The 14th Amendment does not require a state to allow its voters to vote directly for the state's presidential electors—much less require that the state-level winner-take-all method be used if there is a popular election.
- No person's right to vote for presidential electors is "denied" or "abridged" by the National Popular Vote Compact. Therefore, the triggering criterion of section 2 (i.e., denial or abridgement of the right to vote) would not be satisfied, and consequently the remedy provided by section 2 (i.e., reduced congressional representation) would not apply.

MORE DETAILED ANSWER:

In 1892, the losing attorney (F.A. Baker) in *McPherson v. Blacker* argued before the U.S. Supreme Court that section 2 of the 14th Amendment required the states to conduct a popular election for presidential electors and to use the state-level winner-take-all method in such elections. The losing brief argued:

> "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**.[140]" [Emphasis added]

In discussing Section 2 of the 14th Amendment, it is important to carefully read what the Amendment actually says—and does not say.

Section 2 of the 14th Amendment does not require a state to allow its voters to vote for the state's presidential electors, nor does it require that the state-level winner-take-all method be used if there is a popular election.

Instead, section 2 of the 14th Amendment provides a significant potential penalty in the form of reduced congressional representation if the right to vote is "denied" or "abridged" by a state. It reads:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

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

> 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 give the voters the right to vote for presidential electors for two reasons.

Note the inclusion of the phrase "judicial officers of a state" in the list of offices in the triggering clause. At the time of formulation, debate, and ratification of the 14th Amendment, judges were not elected by the voters in many states. Indeed, this continues to be the case today. If section 2 of the 14th Amendment meant that the voters of every state had the right to vote for all of a state's judges, then numerous states would have been in violation of the Amendment from the moment it was ratified, and numerous states would be in violation of the Amendment today.

Note also that the historical context of the 14th Amendment shows that it was never intended to prevent state legislatures from appointing presidential electors.

Congress sent the 14th Amendment to the states for ratification on June 13, 1866, and the Secretary of State declared the amendment to have been ratified on July 28, 1868.

Appointment of presidential electors by state legislatures was a familiar occurrence immediately *before and after* the period of the Amendment's debate in Congress and its ratification by the state legislatures.

- The South Carolina legislature appointed the state's presidential electors without a vote by the people in 1860.
- The Florida legislature did so in the 1868 election—less than four months after ratification of the Amendment.
- The Colorado legislature appointed presidential electors without a vote by the people in 1876.
- The congressional act providing for Colorado's admission to the Union in 1876 specifically mentioned that the Colorado legislature was going to appoint the state's presidential electors for the 1876 election.
- In 1868, the U.S. Senate approved a constitutional amendment prohibiting state legislative appointment of presidential electors (although the House did not).

The Senate Committee on Privileges and Elections conducted an extensive review of the presidential election process during the 43rd Congress (1873–1875) and reported:

> "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."[141] [Emphasis added]

If interpretation of the 14th Amendment argued by the losing attorney (F.A. Baker) in *McPherson v. Blacker* 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.

No such argument was made when the Florida legislature appointed the state's presidential electors—just months after ratification of the 14th Amendment in July 1868.

Moreover, if anyone thought the 14th Amendment required statewide popular election of presidential electors, that legal argument would surely have been vigorously advanced during the contentious dispute over the 1876 presidential election.

In 1876, the Colorado legislature appointed three Republican presidential electors, and they voted for Rutherford B. Hayes. If these appointments had been invalid, Democratic candidate Samuel J. Tilden would have had the constitutionally required "majority of the whole number of Electors *appointed*"[142] and, therefore, would have become President—even after the Electoral Commission ruled against Tilden concerning the contested blocs of electoral votes of Louisiana, Florida, and South Carolina and the contested single electoral votes from Oregon and Vermont.

However, Tilden and his supporters never raised any question about the three Republican electors whom the Colorado legislature appointed in 1876.

On February 9, 1868, the U.S. Senate approved the following constitutional amendment by a 39–16 vote:

> "**Each state shall appoint, by a vote of the people** thereof qualified to vote for Representatives in Congress, **a number of electors** equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress … and the Congress shall have the power to prescribe the manner in which electors shall be **chosen by the people**."[143] [Emphasis added]

Why would two-thirds of the U.S. Senate have voted for this constitutional amendment if they thought that the pending 14th Amendment already required popular election of presidential electors? On the day of the Senate vote, the 14th Amendment had already been ratified by 22 of the 28 states needed for ratification, and it acquired the additional six states just five months later (on July 9, 1868).

In any event, the U.S. Supreme Court was not moved by Baker's argument that section

---

[141] Senate Report 395. Forty-Third Congress.

[142] 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.

[143] The amendment provided, *Congressional Globe*. U.S. Senate. 40th Congress. 3rd Session. February 9, 1868. Page 1042–1044. https://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor40

2 of the 14th Amendment requires the states to use the state-level winner-take-all rule. The Court unanimously ruled in *McPherson v. Blacker* in 1892:

> "**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."[144] [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."[145] [Emphasis added]

As to the National Popular Vote Compact, no person's right to vote for presidential electors is "denied" or "abridged" by the Compact.

Under the Compact, voters would continue to vote for presidential electors in all states belonging to the Compact. 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 Compact actually reinforces the people's vote for President in compacting states. Article II of the Compact provides:

> "Each member state shall conduct a statewide popular election for President and Vice President of the United States."[146]

Moreover, the Compact does not discriminate against any voter or groups of voters concerning their ability to vote—whether or not they live in a state belonging to the Compact. Therefore, the triggering criterion of section 2 (i.e., denial or abridgement of the right to vote) would not be satisfied, and section 2's remedy (reduced congressional representation) would not apply.

Even if, for the sake of argument, section 2's triggering criterion applied, section 2 does not require every state to allow its voters to vote for presidential electors or require every state to use the winner-take-all method. Instead, section 2 provides a strong disincentive (in the form of reduced congressional representation) if a state violates section 2.

---

[144] *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

[145] *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

[146] 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."

9.1.20. MYTH: The back-up provision for filling vacancies among presidential electors renders the Compact unconstitutional.

QUICK ANSWER:

- The Compact leaves the choice of method of nominating presidential electors to state law, as long as the correct number of elector candidates are nominated on behalf of the national popular vote winner.
- The Compact's back-up provision for dealing with an insufficient number of nominees for presidential electors is based on Pennsylvania's existing law (enacted in 1937).

MORE DETAILED ANSWER:

William Josephson, a New York attorney, wrote:

> "NPV Compact Article III-7 authorizes the popular vote winner, under certain circumstances, to nominate electors and requires the relevant states' presidential election officers to certify them. Because the Constitution gives only state legislatures power to appoint electors, **NPV's delegation to the winning popular vote candidate of a power to appoint electors is almost certainly unconstitutional**."[147] [Emphasis added]

The National Popular Compact is a state law that expresses the state's choice as to the "manner" of selecting its presidential electors.

The Compact specifies that the winning presidential electors are those who were nominated in that state in association with the national popular vote winner.

The Compact leaves the choice of method of *nominating* presidential electors entirely to existing state laws—provided that the correct number of elector candidates are nominated on behalf of the national popular vote winner in a particular state.

Candidates for the position of presidential elector are most commonly nominated at each party's state and congressional-district conventions in the summer before the presidential election (section 3.2).

There are at least five scenarios (itemized in section 6.2.3) that might possibly result in an incorrect number of persons being nominated by a particular political party in a particular state.

The most frequently occurring scenario involves a state political party nominating an ineligible person—typically a federal official or employee—for the position of presidential elector. The result is that the presidential candidate who is entitled to a state's electoral votes is left with an insufficient number of qualified nominees from his party. In that case, a nominee for presidential elector from an opposing party would become a presidential elector. One or more ineligible candidates for presidential elector were nominated by the

---

[147] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 784. https://repository.law.miami.edu/umlr/vol76/iss3/5/

Republican Party in Idaho in 2016 and Iowa in 2020, and by the Democratic Party in Ohio in 2004.

State laws for replacing such vacancies are sometimes vague—thus creating the possibility of hair-splitting litigation (as illustrated by the situation in Ohio in 2004 discussed in section 6.2.3).

The Compact's remedy for all five scenarios is based on the concept behind the law used in Pennsylvania since 1937 for nominating all of its presidential electors.

Under Pennsylvania law, each presidential nominee personally and directly nominates *all* of the presidential electors who run under his or her name.[148]

The Compact uses the Pennsylvania approach only in the specific situation in which an insufficient (or excessive) number of presidential electors have been nominated in a particular state on behalf of a presidential candidate who has just won the national popular vote. In this specific situation, the Compact allows the presidential candidate who won the most popular votes nationwide to personally and directly nominate replacement electors (or eliminate excessive electors).

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 electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees."

The purpose of the seventh clause of Article III of the Compact is a contingency clause designed to ensure that the presidential slate receiving the most popular votes nationwide gets what it is entitled to—100% of the electoral votes of each member state.

Josephson's claim that the Compact's vacancy-filling procedure is unconstitutional is based on his incorrect statement:

> "The Constitution gives only state legislatures power to appoint electors."

But that is not what the Constitution says. It actually says:

> "Each State shall appoint, in such **Manner** as the Legislature thereof may direct, a Number of Electors…."[149] [Emphasis added]

If Josephson's claim that "the Constitution gives only state legislatures power to appoint electors" were correct, none of the nation's 538 presidential electors in the 2020

---

[148] The method of direct appointment of presidential electors by the presidential nominee is regularly used in Pennsylvania for all of its presidential electors. Section 2878 of the Pennsylvania election code (enacted on June 1, 1937) provides: "The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the position of presidential elector as the State is then entitled to." See section 3.2.1.

[149] U.S. Constitution. Article II, section 1, clause 2.

presidential election (and in over two dozen previous elections) were constitutionally chosen.

In any event, Josephson fails to identify the particular provision of the U.S. Constitution that he thinks may be violated by the Compact's vacancy-filling provision. Instead, he simply asserts that this provision of the Compact "is almost certainly unconstitutional."

Of course, if the Compact's vacancy-filling provision were unconstitutional, then the law Pennsylvania has routinely used since 1937 for nominating *all* of its presidential electors would be unconstitutional.

In particular, according to Josephson, all 20 Biden electors from Pennsylvania in 2020 would not have been validly selected. Tellingly, none of the numerous lawsuits challenging Biden's presidential electors in Pennsylvania in 2020 made this argument.

In any case, the best argument against Josephson's position is a legal analysis concerning the vacancy-filling process that was written in 1996—a decade before the National Popular Vote Compact was first introduced in any state legislature.

> "Federal law provides that 'each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote. The Constitution gives each state authority to determine the manner of appointment of electors for that state. Therefore, **the manner of filling vacancies in the office of elector, the manner of appointing alternate electors, and even the decision of whether alternates are appointed, would appear to be state issues**." [Emphasis added]

This analysis was written by none other than William Josephson.[150]

9.1.21. MYTH: The court decision in the 1995 term limits case renders the Compact unconstitutional.

QUICK ANSWER:

- The 1995 term limits case involved state efforts to limit the number of terms that a U.S. Representative or Senator could serve.
- The Qualification Clauses of the U.S. Constitution require that U.S. Representatives and Senators must be a certain age, have been a citizen for a certain number of years, and be an inhabitant of the state from which they are chosen.
- The U.S. Supreme Court found that state efforts to impose term limits were unconstitutional, because they had "the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses of the Constitution."
- The situation that gave rise to the term limits case (namely an effort to evade a specific "requirement" of the Constitution) is very different from the situation involving the National Popular Vote Compact. The Compact's method of

[150] Josephson, William. 1996. Repairing the Electoral College. *Journal of Legislation*. Volume 22. Issue 2. May 1, 1996. Page 170. https://scholarship.law.nd.edu/jleg/vol22/iss2/1/?utm_source=scholarship.law.nd.edu%2Fjleg%2Fvol22%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages

appointing presidential electors does not evade any "requirement" of the U.S. Constitution. Instead, the Compact explicitly uses an "exclusive" and "plenary" power that the Constitution assigned to the states. Therefore, this court decision is not applicable to the situation presented by the Compact.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, argues that the National Popular Vote Compact is unconstitutional based on quotations from the U.S. Supreme Court's decision in the 1995 term limits case (*U.S. Term Limits, Inc. v. Thornton*). Ross wrote:

> "**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 otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.'
>
> "Allowing such action, he 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.'"[151,152] [Emphasis added]

The authors of this book agree with the U.S. Supreme Court's reasoning and ruling in the term limits case.

The situation that gave rise to the term limits case (that is, an effort to evade a specific "requirement" of the Constitution) is very different from the situation involving the National Popular Vote Compact.

The Qualifications Clause of the Constitution for U.S. Representatives establishes three specific requirements (age, citizenship, and residency):

> "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."[153]

---

[151] 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.

[152] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 at 831. 1995.

[153] U.S. Constitution. Article I, section 2. clause 2.

A similar Qualifications Clause specifies that U.S. Senators must be slightly older and have been a citizen for slightly longer.[154]

In the early 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 access to the ballot to long-serving incumbents.

The U.S. Supreme Court ruled that states cannot impose requirements on members of Congress above and beyond the requirements contained in the Qualifications Clauses.

While the term limits case was concerned with state legislation that attempted to contravene the "requirements" of a specific clause of the U.S. Constitution, the National Popular Vote Compact is state legislation that exercises a power that is explicitly (and exclusively) granted to the states by the U.S. Constitution.

The Compact is state legislation that calls for the appointment of a state's presidential electors nominated in association with the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia.

The Compact (like the winner-take-all laws it would replace) is enacted under the authority of Article II, section 1, clause 1 of the U.S. Constitution, which provides:

> "**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]

Note that there is no "requirement" in Article II, section 1, clause 1—or anywhere else in the U.S. Constitution—that would be evaded by the National Popular Vote Compact.

There certainly is no "requirement" in Article II, section 1, clause 1 mandating that a state's presidential electors be chosen on a winner-take-all basis.

In fact, the U.S. Supreme Court ruled in *McPherson v. Blacker* in 1892:

> "**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."[155] [Emphasis added]

---

[154] U.S. Constitution. Article I, section 3, clause 3.

[155] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

In fact, Article II, section 1, clause 1 contains only one "requirement," which is 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."

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 state legislative power.

In section 9.1.13, we identified 10 restraints on state legislative action that could possibly apply to a new election law. None of them would be evaded by the National Popular Vote Compact.

9.1.22. MYTH: The court decision in the 1998 line-item veto case renders the Compact unconstitutional.

QUICK ANSWER:

- The Line-Item Veto Act of 1996 was a federal law that gave the President the power to selectively veto a portion of a congressional bill.
- The Supreme Court overturned that law on the grounds that it contravened the "finely wrought procedure" in the U.S. Constitution for enacting federal legislation.
- Far from ignoring or contravening a "finely wrought procedure" contained in the Constitution, the National Popular Vote Compact employs the Constitution's specific "procedure" giving the states "exclusive" and "plenary" power to choose the manner of awarding their electoral votes. Therefore, this court decision is not applicable to the situation presented by the Compact.

MORE DETAILED ANSWER:

The issue in the 1998 case of *Clinton v. City of New York* was the constitutionality of a "procedure" for enacting federal laws that contravened the specific procedure contained in the Constitution.

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, cites wording from the U.S. Supreme Court's decision in the 1998 line-item veto case that she says renders the Compact unconstitutional. Ross argues:

> "The Court struck down statutes that were said to upset the compromises struck and the delicate balances achieved during the Constitutional Convention."
>
> "Writing for the majority, Justice Stevens emphasized the '**great debates and compromises that produced the Constitution** itself,' and he found that the [Line-Item Veto] Act could not stand because **it disrupted 'the "finely wrought" procedure** that the Framers designed.' NPV thumbs its nose at the Founders and the painstaking process that they went through to create a Union."[156] [Emphasis added]

---

[156] 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 authors of this book agree with the U.S. Supreme Court's reasoning and ruling in the line-item veto case.

The situation that gave rise to the line-item veto case is very different from the situation involving the National Popular Vote Compact.

Far from contravening any "finely wrought procedure" provision of the Constitution, the National Popular Vote Compact employs the Constitution's specific "procedure" giving the states "exclusive" and "plenary" power to choose the manner of awarding their electoral votes.

Here are the facts concerning the line-item veto case.

The Presentment Clause of the Constitution gives the President the power to veto a bill passed by Congress, saying:

> "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."[157]

The Line-Item Veto Act of 1996 was intended to give the President the power to selectively veto a portion of a legislative bill while allowing the remaining portions to become law.

In 1998, the Supreme Court overturned the Line-Item Veto Act in *Clinton v. City of New York*.

Now let us consider the procedure contained in the Constitution for awarding electoral votes and the history of that procedure at the 1787 Constitutional Convention.

Article II, section 1, clause 1 of the U.S. Constitution contains the procedure for determining the method of appointing a state's presidential electors. Article II, section 1, clause 1 says:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…" [Emphasis added]

All states have enacted state laws specifying the method of appointing their presidential electors, and they have changed those state statutes on numerous occasions (section 2.1).

---

[157] U.S. Constitution. Article I, section 7, clause 2.

There is voluminous evidence that the 1787 Constitutional Convention acted carefully in crafting Article II, section 1. This clause was the end product of considerable "debate and compromise." Indeed, the 1787 Constitutional Convention debated the method of electing the President on 22 separate days and held 30 votes on the topic.[158]

During this debate, the Convention considered numerous methods for selecting the President, including:

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

In the end, the Convention decided that the President would be elected by presidential electors and that each state would have the independent power to choose the method for appointing them.

Moreover, in crafting Article II, section 1, the Convention decided that a state's choice of method *would not be* subject to congressional review or veto by Congress.

Note that Article II, section 1 differs from the procedure that the Convention adopted for congressional elections.

Article I, section 4, clause 1 specifies that state laws governing congressional election *are* subject to review and veto by Congress.

The Constitutional Convention did not give Congress power over laws governing presidential elections because of its concern that a sitting President might (in conjunction with a compliant Congress) manipulate the rules governing the President's own re-election.

Instead, the Founders dispersed power over presidential elections to the states.

If the Convention's lengthy debates about the method of electing the President and its giving Congress a veto over state laws governing congressional elections (while denying Congress a similar veto over state laws governing presidential elections) does not qualify as a "finely wrought procedure," what would?

Article II, section 1 was the procedure that the states used to enact their existing winner-take-all statutes.

Ross claims:

> "NPV thumbs its nose at the Founders and the painstaking process that they went through."[159]

Why does Tara Ross think that the procedure that the states used to enact their winner-take-all laws (Article II, section 1) is legitimate and constitutional, while repealing these same winner-take-all laws using Article II, section 1 would constitute "thumbing its nose at the Founders"?

---

[158] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 99–100.

[159] 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.

In short, 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 the "finely wrought procedure" actually contained in the Constitution.

9.1.23. MYTH: The Compact impermissibly delegates a state's sovereign power.

QUICK ANSWER:

- Except for purely advisory compacts, the *raison d'être* for interstate compacts is to allow a specified and carefully delimited portion of a state's authority to be exercised jointly with other states under terms agreeable to the participating states.
- No court has ever invalidated an interstate compact on the grounds that it impermissibly delegated a state's sovereign power.

MORE DETAILED ANSWER:

Except for purely advisory compacts, the *raison d'être* for interstate compacts is, as Marian Ridgeway wrote in *Interstate Compacts: A Question of Federalism*:

> "[to] shift a part of a state's authority to another state or states."[160]

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 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."[161] [Emphasis added]

In 2023, the U.S. Supreme Court noted that interstate compacts enable a state to allow a mutually agreed portion of its sovereignty to be exercised jointly with other states. In referring to the New York–New Jersey Waterfront Commission Compact, the Court said:

> "Here, **the States delegated their sovereign authority to the Commission** on an ongoing and indefinite basis."[162] [Emphasis added]

The question arises as to whether the National Popular Vote Compact would be an impermissible delegation of a state's sovereign power.

This inquiry requires an examination of whether the appointment of a state's presiden-

---

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

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

[162] *New York v. New Jersey*. 2023 https://www.supremecourt.gov/opinions/22pdf/156orig_k5fl.pdf

tial electors is one of the state's sovereign powers and, if it is, whether that power can be shared with other states by means of an interstate compact.

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 them as a corollary to the ability of independent nations to enter into treaties with one another.

> "The compact … adapts to our Union of sovereign States the age-old treaty making power of sovereign nations."[163]

In *Texas Learning Technology Group v. Commissioner of Internal Revenue* in 1992, 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."[164] [Emphasis added]

The filling of public offices that are central to the operation of state government (including legislative, executive, or judicial offices and the position of delegate to a state constitutional convention) is regarded as a sovereign state power.[165,166]

The historical practice of the states, the long history of approval 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.

Let us consider the three powers mentioned above—taxation, eminent domain, and police power.

Concerning the power to tax, New York and New Jersey granted this sovereign power to the New York–New Jersey Waterfront Commission in certain specified matters in 1953.[167]

Concerning the power of eminent domain and the power to exempt property from taxation, New York and New Jersey delegated these sovereign powers to the Port Authority of New York and New Jersey in certain specified matters. This delegation was upheld in 1944 in *Commissioner of Internal Revenue v. Shamberg's Estate.*[168]

---

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

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

[165] See, 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).

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

[167] Waterfront Commission Compact. See https://www.wcnyh.gov/docs/wcnyh_act.pdf

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

The Port Authority of New York and New Jersey has a police force numbering over 1,600 officers. The New York–New Jersey Waterfront Commission also has a police force.

The Columbia River Compact[169] provides a particularly clear example of the surrender of sovereignty inherent in interstate compacts.

This compact concerns fish in the Columbia River. It was enacted by the states of Washington[170] and Oregon[171] in 1915, and it received congressional consent in 1918.[172]

By entering into this compact, each state agreed to make the other state's approval necessary for it to exercise what otherwise would have been its separate and independent legislative power over fish in the Columbia River.

The entire compact follows:

> "There exists between the states of Washington and Oregon a definite compact and agreement as follows:
>
> "**All laws and regulations** now existing or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, or its tributaries, over which the states of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, **shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states**." [Emphasis added]

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

The Ohio River Valley Water Sanitation Compact provides:

> "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*, 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.

---

[169] Columbia River Compact. https://compacts.csg.org/compact/columbia-river-compact/

[170] RCW 77.75.010. https://app.leg.wa.gov/RCW/default.aspx?cite=77.75.010

[171] ORS 507.010. https://oregon.public.law/statutes/ors_507.010

[172] 40 Stat. 515. 1918. An act to ratify the compact and agreement between the States of Oregon and Washington regarding concurrent jurisdiction over the waters of the Columbia River and its tributaries in connection with regulating, protecting, and preserving fish. https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/40/STATUTE-40-Pg515a.pdf

> 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**."[173] [Emphasis added]

The right to vote for a presidential elector is not beyond the reach of an interstate compact. 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.[174]

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 Marian 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**."[175] [Emphasis added]

This statement reflects various court decisions that emphasize the ability of a sovereign entity to operate independently of any other.[176]

The U.S. Supreme Court recognized in *McPherson v. Blacker* in 1892 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

---

[173] *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22 at 30–31. 1950. https://supreme.justia.com/cases/federal/us/341/22/

[174] *Oregon v. Mitchell*. 400 U.S. 112 at 286–287.

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

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

> 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."[177] [Emphasis added]

The 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**."[178] [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.[179] [Emphasis added]

As far as we are aware, no court has ever invalidated an interstate compact on the grounds that it impermissibly delegated a state's sovereign power.

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.

---

[177] *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

[178] *Ibid*. Pages 24–25.

[179] *Ibid*. Page 27.

Given the temporary nature of the function of presidential 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."[180]

Given the exclusive role of the states to determine the manner of appointing its presidential electors,[181] 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.[182] The fact of the delegation would not, in and of itself, violate the U.S. Constitution.

9.1.24. MYTH: Respect for the Constitution demands a constitutional amendment to change the method of electing the President.

QUICK ANSWER:

- The Constitution contains a built-in provision (Article II, section 1) 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. Amending the Constitution should be the last resort. The method that is built into the Constitution should be pursued before a constitutional amendment is considered.
- Existing state winner-take-all laws were enacted by state legislatures (rather than a federal constitutional amendment). No one argues that the enactment of existing winner-take-all laws showed disrespect to the Constitution.

---

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

[181] *McPherson v. Blacker*. 146 U.S. 1. 1892.

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

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has argued:

> "Even assuming that the Electoral College should be eliminated, respect for the Constitution demands that we go through the formal amendment process."[183]

The National Popular Vote Compact 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 many 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.

The winner-take-all method is not in the U.S. Constitution. It was not created by means of a federal constitutional amendment. Therefore, the winner-take-all method may be repealed in the same manner it was originally adopted namely by passage of state-level legislation under the authority of Article II, section 1 of the Constitution.

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.

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 Compact).

One does not show respect for the Constitution by unnecessarily amending it.

Amending the Constitution should be the last resort.

Existing state winner-take-all laws were enacted by state legislatures (rather than a federal constitutional amendment). No one argues that enactment of these existing winner-take-all laws showed disrespect to the Constitution.

9.1.25. MYTH: The most democratic way to change 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.

MORE DETAILED ANSWER:

In her book *Enlightened Democracy: The Case for the Electoral College*, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, characterizes a federal constitutional amendment as being a fairer and more democratic

[183] 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

means for replacing state winner-take-all laws than the 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. Thus, an amendment favored by states representing 97% of the nation's population could be blocked by the 13 smallest states (representing only 3% of the population).

The winner-take-all rule is not part of the U.S. Constitution. State winner-take-all laws were not adopted by means of a federal constitutional amendment. Therefore, it is difficult to see why the repeal of the existing state winner-take-all laws would require a constitutional amendment—much less why an amendment should be considered a more democratic way to make the change.

9.1.26. MYTH: The Compact cannot be considered by state legislatures, because the U.S. Supreme Court has not already approved it.

QUICK ANSWER:

- The U.S. Supreme Court does not give advisory opinions or advance approvals to proposals pending in state legislative bodies.

MORE DETAILED ANSWER:

While opposing the National Popular Vote Compact in the Connecticut legislature in 2018, State Representative Craig Fishbein said during the House floor debate:

> "What particular Supreme Court case says that this body can deliberate and perhaps vote on this particular compact? … This compact has not been brought before the U.S. Supreme Court."[184]

Representative Charles Ferraro added:

> "I think Representative Fishbein very clearly pointed out that the Supreme Court has not weighed in on this compact."[185]

The U.S. Supreme Court does not give advisory opinions or advance approvals to proposals pending in legislative bodies.

9.1.27. MYTH: The Compact would lead to a federal constitutional convention.

QUICK ANSWER:

- The National Popular Vote Compact has nothing to do with the movement to call a federal constitutional convention.

---

[184] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 101.

[185] *Ibid*. Page 115.

MORE DETAILED ANSWER:

The claim that the National Popular Vote Compact is related to—or would somehow lead to—a federal constitutional convention is a recurring and puzzling urban legend.

A posting on Reddit says:

> "The reason [National Popular Vote] exists is to try to get two-thirds of the states to adopt it. If two-thirds of the states adopt it, the constitution forces congress to call a constitutional convention to discuss an amendment to the constitution."[186]

According to Article V of the U.S. Constitution, a constitutional convention can be called either by Congress or by a petition from two-thirds of the states.

A federal constitutional convention would be a meeting whose purpose would be to propose amendments to the U.S. Constitution—or perhaps write an entirely new constitution.

The National Popular Vote Compact is *state* legislation that specifies how presidential electors are to be chosen. The Compact is not an amendment to the U.S. Constitution. It has nothing to do with the movement to call a federal constitutional convention by getting state legislatures to petition Congress for one.

States enact the National Popular Vote Compact into law under the authority of 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 equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."

9.1.28. MYTH: The Compact is unconstitutional, because it is not a constitutional amendment.

QUICK ANSWER:

- Opponents of the National Popular Vote Compact frequently use a circular argument that uses the desired conclusion (namely that the National Popular Vote Compact is unconstitutional) as the justification for the claim that the goal of the Compact can only be achieved by means of a constitutional amendment.

MORE DETAILED ANSWER:

John Samples of the Cato Institute argues that the National Popular Vote Compact:

> "circumvent[s] the Constitution's amendment procedures."[187]

---

[186] *Reddit*. August 6, 2023. https://www.reddit.com/r/changemyview/comments/15jt1pd/cmv_napavointerco_for_popular_vote_is_an_crappy/

[187] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 14. https://www.cato.org/policy-analysis/critique-national-popular-vote

John Samples' observation that a state legislative body enacted a law without employing the federal Constitution's amendment procedure cannot serve as a substitute for a *specific* legal argument as to why that law violates the Constitution.

Indeed, it is a truism that *every* law enacted by *every* state legislature circumvents the U.S. Constitution's amendment procedures.

However, if a piece of legislation is a valid exercise of a state legislature's power, then there is no requirement that it be enacted using the federal Constitution's amendment procedures.

On the other hand, if the piece of legislation is not a valid exercise of powers granted by the Constitution (that is, if the proposed legislation is unconstitutional), then the constitutional amendment procedure becomes the only way to implement the policy involved.

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 Article II, section 1 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…."[188] [Emphasis added]

Their 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."[189] [Emphasis added]

Ultimately, John Samples makes a circular argument that uses his desired conclusion (namely that the National Popular Vote Compact is unconstitutional) as the justification for his claim that the goal of the Compact can only be achieved by means of a constitutional amendment.

---

[188] U.S. Constitution. Article II, section 1, clause 2.

[189] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

9.1.29. 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 change a constitutional amendment if some adjustment becomes advisable.
- State-level action is preferable to a federal constitutional amendment, because it leaves existing state control of presidential elections untouched.
- State-level action is preferable, because states would retain their exclusive and plenary power to make future changes in the method of awarding their electoral votes.
- The U.S. Constitution contains a built-in mechanism for changing the winner-take-all method of awarding electoral votes, namely state legislation. State action is the right way to make this change, because it is the way specified in the Constitution.
- Building political 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 (i.e., a federal constitutional amendment) that is not easily amended or repealed.

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 (as discussed in chapter 4).

The Constitution's delegation of power over presidential elections (Article II, section 1) is not a historical accident or mistake. It was intended as a "check and balance" on a sitting President who, with a compliant Congress, might be inclined to manipulate election rules to stay in office.[190] The Founders dispersed the power to control presidential elections among the states, knowing that no single "faction" would likely be in power simultaneously in all states.

Third, under the National Popular Vote Compact, states would retain their power to change the method of awarding their electoral votes in the future. A federal constitutional amendment would eliminate this existing state power.

---

[190] In 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.

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

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 by Congress. The last time Congress successfully proposed a federal constitutional amendment that was ratified by the states was the 26th Amendment (voting by 18-year-olds) in 1971. The last constitutional amendment to be ratified was the 27th Amendment (congressional salaries) in 1992.[191] 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 their 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 Congress finally passed the 19th Amendment, women had already won the right to vote in 30 of the 48 states.

9.2. MYTHS THAT PRESIDENTIAL CANDIDATES REACH OUT TO ALL THE STATES UNDER THE CURRENT SYSTEM

9.2.1. MYTH: The current system forces presidential candidates to reach out to all states.

QUICK ANSWER:

- Far from ensuring that candidates reach out to all states in their pursuit of the presidency, the current state-by-state winner-take-all method of awarding electoral votes regularly results in three out of four states being ignored in the general-election campaign for President.
- Almost all (between 91% and 100%) of the general-election campaign events were concentrated in a dozen-or-so closely divided battleground states in the six presidential elections of the 2000s. Over three-quarters (77%) of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states. During this period, 22 states were totally ignored, and nine others received only one visit.

---

[191] The most recently approved constitutional amendment was the 27th Amendment, which became part of the Constitution in 1992. That amendment had been submitted to the states by the 1st Congress on September 25, 1789—203 years earlier. It remained unratified until 1992. The 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."

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted in testimony before a Nevada Senate hearing:

> "Ultimately, the Electoral College ensures that the political parties must **reach out to all the states**."[192] [Emphasis added]

In 2020, Rush Limbaugh said the following about voter fraud in a nationwide vote for President:

> "No matter what anybody tells you, you need to support the Electoral College, and you need to thank your Founding Fathers for it, because it **ensures that everybody in this country has a role in electing the president**. **If they were to succeed and get rid of the Electoral College, five or six states would determine the presidency every election**."[193] [Emphasis added]

In a Heritage Foundation Legal Memo, Thomas Jipping wrote in 2020:

> "America's Founders established the Electoral College so that all states could participate in electing the President—**requiring campaigns to reach the entire country**."[194] [Emphasis added]

Despite the fact that no presidential or vice-presidential candidate has engaged in general-election campaigning in Arkansas since 2000, Doyle Webb, Chairman of the Arkansas Republican Party, said in 2020:

> "Without the Electoral College, candidates for President will just fly over the midsection of the United States, will fly over Arkansas."[195]

The above demonstrably false statements are routinely repeated, with a straight face, by many other defenders of the current state-by-state winner-take-all method of awarding electoral votes.

Table 1.26 and the map in figure 1.14 show the state-by-state distribution of the 1,164 general-election campaign events of the major-party presidential and vice-presidential nominees in the four presidential elections between 2008 and 2020. The table and map show:

- Twenty-two states were totally ignored in these four presidential elections.
- Nine additional states each received only a single visit (out of the total of 1,164) during the entire four-election period.

---

[192] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

[193] Limbaugh, Rush. 2020. SCOTUS 9-0: Electoral College Voters MUST Stay Faithful to State. *Premiere Networks*. July 6, 2020. https://wjno.iheart.com/featured/rush-limbaugh/content/2020-07-06-pn-rush-limbaugh-scotus-9-0-electoral-college-voters-must-stay-faithful-to-state/

[194] Jipping, Thomas. 2020. The National Popular Vote: Misusing an Interstate Compact to Bypass the Constitution. Heritage Foundation Legal Memo No. 272. October 8, 2020. https://www.heritage.org/sites/default/files/2020-10/LM272.pdf

[195] Rose, Shelby. 2020. Democratic Party of Arkansas to vote on electoral college stance. KATV News. October 23, 2020. https://katv.com/news/local/democratic-party-of-arkansas-to-vote-on-electoral-college-stance

- Over three-quarters (77%) of all the general-election events in the four elections (903 of 1,164) were concentrated in nine states.

State winner-take-all laws are the reason why three out of four states and three out of four 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 by campaigning in such states.

A presidential candidate has no reason to spend his or her limited time and money visiting, advertising, and building grassroots support in order to win a state with, say, 58% of its popular vote rather than, say, 55%. Similarly, it does not matter whether a candidate loses a state with 45% rather than 42% of the vote.

Because of this political reality, candidates understandably concentrate their attention on a small handful of closely divided battleground states.

The list of closely divided battleground states is largely stagnant when viewed over a period of two, three, or four consecutive presidential elections. However, even in the short term, the number of "jilted battlegrounds" exceeds the number of "emerging battlegrounds," as discussed in section 1.2.10.

When viewed over several decades, there has been a dramatic shrinkage in the number of closely divided states in presidential elections. For example, all 50 states received general-election campaign events in the 1960 presidential election, as discussed in section 1.2.11.

9.2.2. MYTH: The fact that each state has a unique political, economic, and cultural character is a reason to support the current system.

QUICK ANSWER:

- The fact that each state has a unique political, economic, and cultural character is precisely the reason *not* to support the current state-by-state winner-take-all method of awarding electoral votes. The current system regularly results in three out of four states being ignored in the general-election campaign for President. Over three-quarters of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states.

MORE DETAILED ANSWER:

"Keep the Electoral College, Because States Matter" is the title of an article by Josiah Peterson in the *National Review* that argued:

> "[States] have **unique geographic and political interests** that ought to be reflected in the agenda of the nation's executive."[196] [Emphasis added]

---

[196] Peterson, Josiah. Keep the Electoral College, Because States Matter. *National Review*. May 4, 2018. https://www.nationalreview.com/2018/05/electoral-college-important-states-have-unique-political-interests/

Save Our States (the leading organization that lobbies against the National Popular Vote Compact) has said:

> "To win the presidency, candidates … have to try to win states by addressing the **unique political, economic, and cultural character** of each state's voters."[197] [Emphasis added]

In speaking in opposition to the National Popular Vote Compact during the House floor debate in Connecticut, State Representative Rob Sampson said:

> "I understand that some people might be in favor of [the national popular vote] concept, but there is a legitimate reason … why we don't use that system. Going back to the formation of this country, our **Founding Fathers recognized that the states were different and that the people that lived in them were different**. And that remains the same today. We have some states that are tourism states. We have some states that are devoted to agriculture. We have other states which might be involved in business. But **each of those states has their own interests**."[198] [Emphasis added]

In comparing the key features of the current system of electing the President with the National Popular Vote proposal, Tara Ross defended the current system by saying that it:

> "recognizes that **different states have different needs/priorities**."[199] [Emphasis added]

Ross then criticized a national popular vote for President by saying that it:

> "assumes voters alike nationwide, have the same needs."

The fact that states have different needs, interests, and priorities is precisely the reason *not* to support the current system of electing the President.

Far from ensuring that candidates reach out to all states in their pursuit of the presidency, the current state-by-state winner-take-all method of awarding electoral votes regularly results in three out of four states being ignored in the general-election campaign for President.

Over three-quarters (77%) of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states (as shown in table 1.26 and the map in figure 1.14).

In addition, 22 states were totally ignored in all four elections between 2008 and 2020. Nine additional states received only one visit during this entire period, and the remaining states received only a few visits during this entire period.

---

[197] Save Our States. 2021. Electoral College Encourages Broad Coalitions, Moderation. *Save Our States blog*. Accessed May 22, 2021. https://saveourstates.com/uploads/Electoral-College-encourages-broad-coalitions-moderation.pdf

[198] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 22.

[199] Ross, Tara. 2013. The Electoral College, in a nutshell. May 1, 2013. http://www.taraross.com/2013/05/the-electoral-college-in-a-nutshell-2/

9.2.3. MYTH: The current system encourages coalition-building.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes actively works against coalition building, because it isolates voters sharing the common interests in one state (e.g., farmers) from like-minded voters in other states.
- It also actively works against coalition-building by reducing the number of states that are politically relevant in presidential elections.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has told numerous state legislative committees that the current system encourages coalition-building. In her testimony to an Alaska committee in 2023, she said:

> "The Electoral College continues to help our country in many ways: It encourages coalition building."[200]

In a video for PragerU, Ross said:

> "The system encourages coalition-building and national campaigning."[201]

Far from encouraging coalition-building, the current state-by-state system does exactly the opposite.

Members of a group sharing common interests and views (e.g., farmers) are siloed by state boundary lines. Their votes are not combined with like-minded voters in other states.

In addition, the current state-by-state winner-take-all method of awarding electoral votes actively works against coalition building by reducing the number of states that are politically relevant in presidential elections (as discussed in section 1.2 and section 9.2.1).

9.2.4. MYTH: The concentration of presidential campaigns in a few states is not a deficiency of the current system, because spectator states may become battleground states.

QUICK ANSWER:

- Although it is true that spectator states can become battleground states (and vice versa), changes in a state's political complexion generally occur slowly. Forty-one states voted for the same party in the four presidential elections between 2008 and 2020.
- Because of the current state-by-state winner-take-all method of awarding electoral votes, a person can easily live out a major portion, or all, of his or

---

[200] Testimony of Tara Ross on Senate Bill 61 to Alaska Senate Judiciary Committee. March 13, 2023. Page 5. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=2662

[201] Ross, Tara. 2015. The Electoral College and Why It Matters. *PragerU*. https://www.youtube.com/watch?v=V6s7jB6-GoU

her entire adult life in a state that is totally ignored in the general-election campaign for President. In contrast, in elections for Governor or U.S. Senator, *every* voter in *every* precinct is equally relevant in *every* election. A person's vote in a particular precinct, town, or county is not ignored in an election for Governor or Senator simply because more than 53% or 54% of that voter's neighbors happen to favor another candidate.

- A nationwide vote for President would guarantee that *every* vote in *every* state would be equally relevant in *every* presidential election.

MORE DETAILED ANSWER:

Defenders of the current state-by-state winner-take-all method of awarding electoral votes strenuously argue that the current system forces presidential candidates to pay attention to all the states.

When facts are presented that contradict this manifestly incorrect claim (as they are in section 9.2.1), these same defenders of the current system retreat to the argument that the disproportionate attention received by battleground states is not a deficiency, because spectator states sometimes become battleground states in subsequent years.

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."[202]

Although it is true that spectator states can become battleground states (and vice versa), changes in a state's political complexion generally occur slowly (as detailed in section 1.2.10 entitled "The Stagnant Battleground").

Most battleground states typically enjoy that status for only a couple of elections—typically during the period when the state's allegiance is shifting from one political party to another.

For example, California voted Republican in all six presidential elections between 1968 and 1988. Then, in 1988, California was a battleground state. George H.W. Bush won the state by 3.5% in that year. However, since then, California has voted Democratic in all eight presidential elections between 1992 and 2020.

New Mexico voted Republican in presidential elections for decades prior to 2000. Then, it was a closely divided battleground state in 2000, 2004, and 2008. Its loyalty oscillated from Democratic to Republican to Democratic in that period. Accordingly, it received an extraordinary amount of attention in those years.[203] Then, as the state's political complexion shifted decisively in the Democratic direction, New Mexico found itself almost totally ignored in 2012, 2016, and 2020.

---

[202] Debate at the Dole Institute in Lawrence, Kansas, between Tara Ross and Dr. John R. Koza, Chair of National Popular vote, on November 7, 2011. Timestamp 16:30.

[203] See the tables and maps of general-election campaign events in section 1.2.4 (for 2008), section 1.2.5 (for 2004), and section 1.2.6 (for 2000).

Similarly, Virginia and Colorado were reliably Republican in presidential elections up until and including the 2004 election. Then, they were closely divided battleground states in 2008, 2012, and 2016. Both became spectator states in the 2020 election.

The facts are that:

- Forty-one states voted for the same party in the four presidential elections between 2008 and 2020, as shown in table 1.27.
- Thirty-six states voted for the same party in the six presidential elections between 2000 and 2020, as shown in table 1.28.
- Twenty-nine states voted for the same party in the eight presidential elections between 1992 and 2020, as shown in table 1.29.

Because of the current state-by-state winner-take-all method of awarding electoral votes, a person can easily live out a major portion, or all, of his or her entire adult life in states that are totally ignored in the general-election campaign for President.

For example, the year 2020 was the 108th anniversary of the last time the statewide popular-vote margin in a presidential election in Utah and Nebraska was less than 6%.

In contrast, in elections for Governor or U.S. Senator, *every* voter in *every* county, town, or precinct is equally relevant in *every* election. A person's vote in a particular county, town, or precinct is not ignored in an election for Governor or Senator simply because 53% or 54% of that voter's neighbors happen to favor another candidate.

A nationwide vote for President would guarantee that *every* vote in *every* state would be equally relevant in *every* presidential election.

9.2.5. MYTH: Safe states made up their minds earlier.

QUICK ANSWER:

- The problem with the current system is not that the voters of the spectator states have "made up their mind earlier," but that no presidential candidate cares what's on their minds.
- In each of the six presidential elections between 2000 and 2020, 91% or more of the general-election campaign events were concentrated in about a dozen closely divided battleground states.
- The current system does not force candidates to reach out to undecided voters. There are millions of undecided voters in the 38 or more spectator states that are routinely ignored in the general-election campaign for President. However, no presidential candidate solicits their votes, because they live in politically uncompetitive states.

MORE DETAILED ANSWER:

In an article entitled "Electoral College Means Both Safe and Swing States Are Crucial," Trent England, Executive Director of Save Our States, wrote:

> "Swing states are the late deciders. … Swing states matter because they compel campaigns to reach out to undecided voters."[204]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, testified at the Connecticut committee hearing on March 19, 2018:

> "Safe states are not irrelevant. **They are just states that made up their mind earlier in the process**."[205] [Emphasis added]

This issue is not that the voters of the spectator states "made up their mind earlier," but that no presidential candidate cares what's on their minds.

Under the current system, virtually all general-election campaign events (and a similar fraction of campaign expenditures) are in a handful of closely divided battleground states.

In each of the six presidential elections between 2000 and 2020, 91% or more of the general-election campaign events were concentrated in about a dozen closely divided battleground states (section 1.2.10). Moreover, 41 states voted for the same party in the most recent four presidential elections (table 1.27). The number of closely divided battleground states has been shrinking from decade to decade (section 1.2.11).

The current state-by-state winner-take-all method of awarding electoral votes makes supporters of both a state's majority party and minority party politically irrelevant, because presidential candidates have no reason to pay any attention to the issues of concern to them.

As Wisconsin Governor Scott Walker said in 2015 while running for President:

> "The nation as a whole is not going to elect the next President. Twelve states are."[206]

There are millions of undecided voters in the 38 or more spectator states that are routinely ignored in the general-election campaign for President. However, no presidential candidate solicits their votes, because they live in politically uncompetitive states.

---

[204] England, Trent. 2020. Electoral College Means Both Safe & Swing States Are Crucial. *Real Clear Politics*. September 3, 2020. https://www.realclearpolitics.com/articles/2020/09/03/electoral_college_means_both_safe__swing_states_are_crucial__144128.html

[205] Ross, Tara. Testimony to Hearing of Connecticut Government, Administration, and Elections Committee. March 19, 2018. Timestamp 2:32:32. http://ct-n.com/ctnplayer.asp?odID=15124.

[206] CNBC. 2015. 10 questions with Scott Walker. *Speakeasy*. September 1, 2015. Transcript of interview of Scott Walker by John Harwood https://www.cnbc.com/2015/09/01/10-questions-with-scott-walker.html. Video of quote is at timestamp 1:26 at https://www.youtube.com/watch?v=nNZp1g8oUOI. The full quotation is: "The nation as a whole is not going to elect the next President. Twelve states are. Wisconsin's one of them. I'm sitting in another one right now, New Hampshire. There's going to be Colorado, where I was born, Iowa, where I lived, Ohio, Florida, a handful of other states. In total, it's about 11 or 12 states that are going elect the next President."

9.2.6. MYTH: Candidates will only focus on national issues in a national popular vote.

QUICK ANSWER:

- Just as candidates for Governor campaign on both local and statewide issues, presidential candidates would campaign on both state and national issues in a nationwide campaign.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "[An] NPV lobbyist explained that once the compact is in effect, presidential **candidates will only focus** on 'issues on a national level' rather than what she termed 'specialized interests' that only affect smaller groups of Americans."[207] [Emphasis added]

Parnell's written testimony cites a 2023 news story about Eileen Reavey's comments. However, Reavey did not say that "candidates will *only* focus" on national issues. She simply said that candidates will be "more concerned" about national issues. The news story that Parnell cited actually reported:

> "Reavey also thinks this [National Popular Vote] movement will encourage presidential candidates to campaign in every state instead of focusing on just a handful of battleground states like Pennsylvania or Nevada. 'We're going to see them being **more concerned** about issues on a national level, rather than really specialized interests that affect a small amount of chronically undecided voters in these states,' said Reavey."[208] [Emphasis added]

Just as candidates for Governor campaign on both local and statewide issues, presidential candidates would campaign on both state and national issues in a nationwide campaign.

9.2.7. MYTH: A national popular vote will simply make a different group of states irrelevant in presidential elections.

QUICK ANSWER:

- Every voter, regardless of location, would matter equally under a national popular vote.
- The best indicator of how campaigns would be run under a national popular

---

[207] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 2. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[208] Nevada may join interstate compact to elect president through national popular vote. *3News*. April 7, 2023. https://news3lv.com/news/local/nevada-may-join-interstate-compact-to-nominate-president-through-national-popular-vote

vote is the way they 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 some states irrelevant in presidential elections, the obvious question is: "Which states 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:

Three out of four states and three out of four Americans are ignored in present-day presidential elections conducted under the state-by-state winner-take-all method of awarding electoral votes (as discussed in detail in section 1.2).

John Samples, an opponent of the National Popular Vote Compact, has asserted:

> "Many states now ignored by candidates will continue to be ignored under NPV."[209]

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 campaigns are conducted.

Serious candidates for Governor or U.S. Senator pay attention to their *entire* electorate. 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-quarter of their state's congressional districts while totally ignoring the remaining three-quarters of the state. Taking Wisconsin 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, and 8th districts.

The same principle applies today in present-day presidential races *inside* each closely divided battleground state (as discussed in detail in chapter 8 and section 9.7). Inside a battleground state, every vote is equal. A campaign for Wisconsin's electoral votes under the winner-take-all rule has the same political dynamics as a gubernatorial campaign in the state. 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 Wisconsin, for example, presidential candidates campaign throughout the state. Presidential candidates seek votes in Milwaukee, Madison, and Green Bay well as in suburbs, exurbs, small towns, and rural

---

[209] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1. https://www.cato.org/policy-analysis/critique-national-popular-vote

areas. Every method of communication (including television, radio, newspapers, magazines, direct mail, billboards, telephone, and the internet) is used to reach *every* voter in the state. It would be politically preposterous to suggest that any presidential candidate would campaign in only certain parts of Wisconsin, to the exclusion of other parts, because every vote is equally important inside a presidential battleground state.

As David J. Owsiany of the Buckeye Institute wrote in the *Columbus Dispatch* in 2012 (when Ohio was a closely divided battleground state):

> "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."[210]

An NPR story entitled "Ads Slice Up Swing States With Growing Precision" reported on presidential campaigning in Colorado's small media markets in 2012 (when Colorado was a closely divided battleground state):

> "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.
>
> "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.'"[211] [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 a presidential candidate totally ignore in an election in which the winner is the candidate who receives the most popular votes?"

---

[210] Owsiany, David J. Electoral College helps to make sure that president represents entire nation. *Columbus Dispatch*. September 22, 2012.

[211] 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.

The question answers itself.

Under the National Popular Vote Compact, the winner would be the candidate who receives the most popular votes in the entire country. *Every* voter in *every* state would be equally important and politically relevant in *every* presidential election.

9.3. MYTHS ABOUT SMALL STATES

9.3.1. MYTH: Small states have increased clout under the current system.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes extinguishes the influence of small states in presidential elections. The reason is that political power in presidential elections comes from being a closely divided battleground state. Almost all of the small states are non-competitive one-party states in presidential elections.
- The eight smallest states have about the same combined population (5.9 million) as Wisconsin (5.6 million). These eight smallest states have 24 electoral votes—more than twice Wisconsin's 10 electoral votes. Because Wisconsin is a closely divided battleground state, it received a total of 58 of the nation's 1,164 general-election campaign events in the four presidential elections between 2008 and 2020. In contrast, because the eight smallest states are all one-party states in presidential elections, all together they received only one visit in four elections.

MORE DETAILED ANSWER:

The U.S. Constitution gives each state a number of electoral votes equal to the state's number of U.S. Representatives (which are apportioned on the basis of each state's population) *plus* the state's number of U.S. Senators (two).

Defenders of the current system of electing the President repeatedly assert—with a straight face—that the current system gives small states increased clout in presidential elections.

Trent England, Executive Director of Save Our States, has written:

> "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.**"[212] [Emphasis added]

Professor Robert Hardaway of the University of Denver Sturm College of Law has stated:

> "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**

[212] Freedom Foundation. 2010. Brochure. Olympia, Washington.

> **candidate would be interested in going up there**, because the population is so low. But, … if they have three 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."[213] [Emphasis added]

Senator Mitch McConnell (R–Kentucky) has asked:

> "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 two congressmen and you had a tiny population, when would be the next time you would see or hear from any candidate for president?"[214]

Economics Professor Walter E. Williams of George Mason University has said:

> "Were we to choose the president and vice president under a popular vote … presidential candidates **could safely ignore the interests** of the citizens of Wyoming, Alaska, Vermont, North Dakota, South Dakota, Montana and Delaware."[215] [Emphasis added]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States,[216,217,218] has testified at state legislative hearings in Delaware, Nevada, and elsewhere:

> "Minority political interests, particularly the **small states, are protected** [by the current system]."
>
> "Ultimately, **the Electoral College ensures that the political parties must reach out to all the states**."
>
> "NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in small states."[219] [Emphasis added]

---

[213] 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. Timestamp 18:00. http://www.youtube.com/watch?v=U_yCSqgm_dY

[214] McConnell, Mitch. The Electoral College and National Popular Vote Plan. Heritage Foundation Lecture. December 7, 2011. Washington, DC. Timestamp 19:36.

[215] Williams, Walter E. 2018. The Electoral College debate. *Atlanta Constitution*. October 15, 2018. https://www.myajc.com/news/opinion/opinion-the-electoral-college-debate/TiHmvVp3lCteA0icMwCQEP

[216] Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition.

[217] Ross, Tara. 2017. *The Indispensable Electoral College: How the Founders' Plan Saves Our Control from Mob Rule*. Washington, DC: Regnery Gateway.

[218] Ross, Tara; Cooper, Kate E.; and Ross, Emma. 2016. *We Elect a President: The Story of Our Electoral College*. Dallas, TX: Colonial Press L.P.

[219] Ross, Tara. 2011. Testimony for Delaware Senate on the National Popular Vote Bill (HB 198). June 21, 2010. Ross made identical statements at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

Gary Gregg II of the University of Louisville and editor of *Securing Democracy: Why We Have an Electoral College*,[220] a book defending the current system, said that a national popular vote for President:

> "would mean ignoring every rural and small-state voter in our country."[221]

None of these statements is true.

The eight states with three electoral votes

The major-party nominees for President and Vice President conducted a total of 1,164 general-election campaign events in the four elections between 2008 and 2020.

In table 9.1, the first four columns show the number of general-election campaign events in those four elections that took place in the eight states with three electoral votes.[222,223] The last four columns of the table show the Republican percentage of the two-party vote in each election. The table is sorted according to the Republican nominee's percentage in 2020.

Table 9.1 Presidential campaigns in the eight states with three electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%
				Wyoming	72%	76%	71%	67%
				North Dakota	67%	70%	60%	54%
				South Dakota	63%	66%	59%	54%
				Montana	58%	61%	57%	51%
				Alaska	55%	58%	57%	61%
				Delaware	40%	44%	41%	37%
				Vermont	32%	35%	32%	31%
			1	D.C.	6%	4%	7%	7%
0	**0**	**0**	**1**	**Total**				

The table shows that there was only one general-election campaign event conducted in the eight smallest states between 2008 and 2020. It was in the District of Columbia in 2008.

The table also shows why both Republican and Democratic presidential candidates almost totally ignored the eight smallest states.

All eight of the smallest states are one-party states in presidential elections. The outcome in each was a foregone conclusion long before Election Day. The two-party vote in these states was not within the narrow range that gives a candidate any chance to change the outcome.

---

[220] Gregg, Gary L, II. (editor). 2001. *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books.

[221] Gregg, Gary. Keep Electoral College for fair presidential votes. *Politico*. December 5, 2012.

[222] The District of Columbia received three electoral votes under the 23rd Amendment (ratified in 1961). For convenience, we frequently refer to the District of Columbia as a "state" in this book.

[223] The number of electoral votes presented in this table (and similar tables later in this section) are for the 2012, 2016, and 2020 elections. The (slightly different) number of electoral votes for the 2008 election may be found in table 3.1.

Comparison of the eight smallest states with the battleground state of Wisconsin

Wisconsin's population (5,698,230) is about the same as the combined population of the eight smallest states (5,912,842).[224]

Because of the two senatorial electoral votes that every state receives, the eight smallest states have a whopping 24 electoral votes—compared to only 10 for Wisconsin.

According to the defenders of the current system, the disproportionately large number of electoral votes possessed by the small states gives them increased clout.

However, Wisconsin received a total of 58 general-election campaign events between 2008 and 2020, compared to only one visit for the eight smallest states combined.

Wisconsin received 6% of the nation's 1,164 campaign events during the four elections—even though the state has 2% of the nation's population. That is, it got three times more attention than warranted by its population.

In contrast, the eight smallest states received only 0.1% of the 1,164 campaign events during this period—even though these states have 2% of the nation's population. That is, the smallest states received one-twentieth of the attention that their population warrants.

Figure 9.1 shows that Wisconsin received considerably more attention than the eight smallest states, even though the eight states have considerably more electoral votes.

The current state-by-state winner-take-all method of awarding electoral votes is the reason why the 5.6 million people in Wisconsin received so much attention, and why the equivalent number of people in the eight smallest states received virtually no attention.

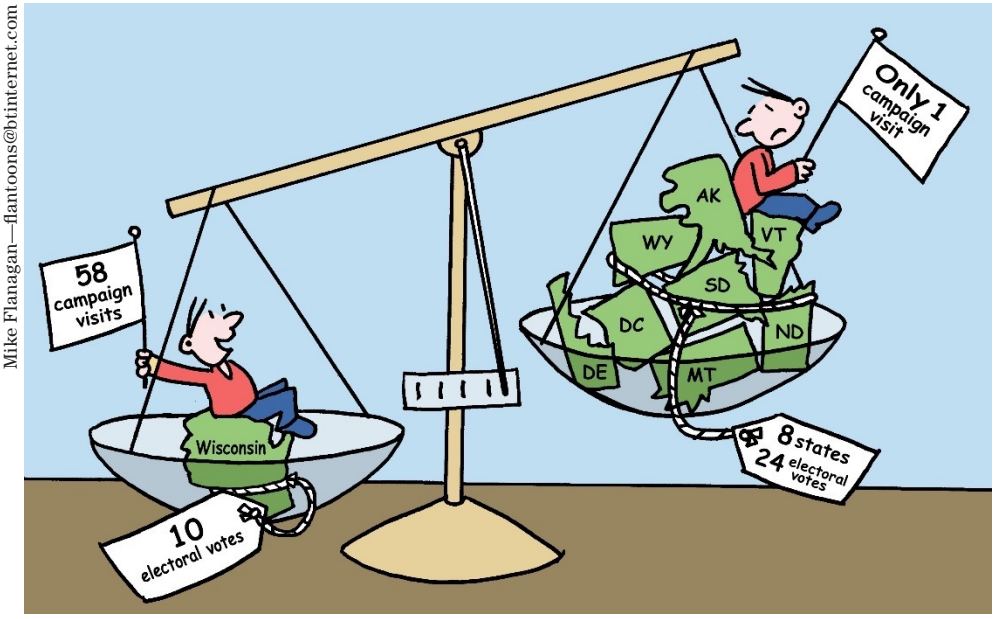


Figure 9.1 The battleground state of Wisconsin received considerably more attention than the eight smallest states, even though the eight small states together have considerably more electoral votes.

[224] The 2010 census is used throughout this section.

A thought experiment involving the eight smallest states

Now suppose the 5.9 million voters of the eight smallest states were not politically isolated inside the boundaries of their respective states but that they lived in a single state.

Given that this imaginary combined state has essentially the same population as Wisconsin, it would have only 10 electoral votes—considerably fewer than the 24 actually possessed by the eight separate states today.

The two-party vote in this imaginary combined state was closely divided in all four presidential elections between 2008 and 2020:

- 51%–49% for Biden in 2020
- 52%–48% for Trump in 2016
- 52%–48% for Obama in 2012
- 54%–46% for Obama in 2008

That is, this imaginary combined state would be equivalent to Wisconsin in terms of:

- population
- number of electoral votes
- competitiveness.

Thus, the voters of this imaginary combined state would be as important in presidential politics as Wisconsin. They would therefore receive essentially the same amount of attention from presidential candidates as Wisconsin currently does.

Presidential candidates would become familiar with the issues of concern to the voters of this imaginary combined state, fashion their platforms to appeal to these voters, communicate their platforms to these voters through advertising, and do all the other things that candidates do to solicit votes (e.g., open offices, run a ground game, encourage grassroots participation).

The same thing would happen under a national popular vote for President. Every voter in this imaginary combined state would suddenly matter to both the Democratic and Republican nominee. A vote in this imaginary combined state would become as valuable as a vote anywhere else in the country.

In short, a national popular vote for President would eliminate the artificial Balkanization of small-state voters and make them politically relevant in presidential elections.

The 13 states with three or four electoral votes

A similar pattern emerges if we expand the definition of a small state to include the 13 states with three or four electoral votes.

Table 9.2 shows the number of general-election campaign events and the Republican percentage of the two-party vote between 2008 and 2020 in the 13 smallest states.

New Hampshire stands out in this table in terms of the amount of attention that it received in these general-election campaigns. It received almost all (50 of the 58) of the campaign events received by this entire group of states.

New Hampshire's 50 general-election campaign events were 4% of the nationwide total of 1,164 events—far in excess of the number warranted by the state's population.

The reason why presidential candidates campaigned vigorously in New Hampshire—while ignoring equally populous states such as Idaho, Rhode Island, and Hawaii and all the

Table 9.2 Presidential campaigns in the 13 states with three or four electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%	EV
				Wyoming	72%	76%	71%	67%	3
				North Dakota	67%	70%	60%	54%	3
				Idaho	66%	68%	66%	63%	4
				South Dakota	63%	66%	59%	54%	3
				Montana	58%	61%	57%	51%	3
				Alaska	55%	58%	57%	61%	3
4	**21**	**13**	**12**	**New Hampshire**	**46%**	**49.8%**	**47%**	**45%**	**4**
2	3		2	Maine	45%	48%	42%	41%	4
				Delaware	40%	44%	41%	37%	3
				Rhode Island	39%	42%	36%	36%	4
				Hawaii	35%	33%	28%	27%	4
				Vermont	32%	35%	32%	31%	3
			1	D.C.	6%	4%	7%	7%	3
6	**24**	**13**	**15**	**Total**					**44**

other small states—is that its statewide popular vote was closely divided in New Hampshire, whereas the other small states were non-competitive one-party states.[225]

Note that Maine is the only other small state in table 9.2 that received any significant amount of attention among the 13 smallest states.

The reason is that Maine awards two of its electoral votes by congressional district. Its 2nd district (the northern part of the state) was closely divided in three of the four elections (2008, 2016, and 2020).

Presidential candidates campaigned in Maine because they perceived (correctly) that one electoral vote was up for grabs in the northern part of the state. In fact, Donald Trump carried the 2nd district in 2016 and 2020. Meanwhile, the Democratic presidential nominee carried the state as a whole in all four elections because of the heavily Democratic 1st district (centered in Portland). In other words, the state of Maine was not politically competitive, but the 2nd district was.

Table 9.2 also shows that the six states at the top of the table are heavily Republican and did not receive any campaign events in any of the four elections. The Republican presidential nominees (wisely) decided that they could take these states for granted and still win all of their electoral votes.[226] The Democratic nominees (equally wisely) wrote off these solidly red states, because they had no realistic possibility of winning any electoral votes there.

---

[225] Note that there were 21 general-election campaign events in New Hampshire in 2016 when the race was extremely close (49.8% to 50.2%), but only four events in 2020 (when there was an eight percentage-point spread between Biden and Trump). That is, the degree of closeness determines the amount of attention that a state receives. See section 9.1.6 for a discussion of the "3/2 rule."

[226] The partisan orientation of these six red states has been the same for a considerable period of time. The Republican nominee carried all of them in all eight presidential elections between 1992 and 2020, except in 1992, when Ross Perot's candidacy enabled Bill Clinton to eke out a plurality in Montana.

Similarly, five of the states at the bottom of table 9.2 are so heavily Democratic that the Democratic nominees knew that they were in the bag. Meanwhile, the Republican nominees knew that those states were hopelessly out of reach.[227]

A thought experiment involving the 12 smallest non-battleground states

Now let's return to the claim that small states have increased clout because of the two senatorial electoral votes that every state receives.

The 12 *non-battleground* small states in table 9.2 (that is, the 13 smallest states except New Hampshire) have a combined population of 11,241,524.

Coincidentally, Ohio has almost the same number of people (11,568,495).

Because of the two senatorial electoral votes that every state receives above the number warranted by its population, the 12 non-battleground small states have 40 electoral votes, whereas Ohio has only about half as many.[228]

Despite having only about half as many electoral votes as the 12 non-battleground small states, Ohio received a total of 196 general-election campaign events in the four elections (out of a total of 1,164 events nationwide). Meanwhile, the 12 non-battleground small states received just eight events out of 1,164. Moreover, seven of those eight events were in Maine in years when the state's northern congressional district was competitive.

The current state-by-state winner-take-all method of awarding electoral votes is the reason why the 11.5 million people in Ohio received so much attention, and why the 11.2 million people in the 12 non-battleground small states received so little attention. Under the current system, political clout does not arise from the number of electoral votes that a state possesses, but from whether the state is closely divided.

If the 11.2 million people in the 12 noncompetitive small states had lived in a single state, that imaginary combined state would have been a closely divided battleground state. Its two-party vote would have been:

- 51%–49% for Biden in 2020
- 51%–49% for Trump in 2016
- 53%–47% for Obama in 2012
- 55%–45% for Obama in 2008.

This imaginary combined state would have essentially the same population as Ohio. However, it would have only 20 electoral votes[229]—not the 40 electoral votes actually possessed by the 12 separate small states.

In other words, the voters of this imaginary combined state would have almost the same population, number of electoral votes, and political complexion as Ohio.

Thus, it would become as important in presidential politics as Ohio's voters, and presidential campaigns would necessarily give the imaginary combined state more or less as much attention as Ohio.

As former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote in 2012:

---

[227] The partisan orientation of these six blue states has been the same for a considerable period of time. The Democratic nominees carried all six of them in all eight presidential elections between 1992 and 2020.

[228] Ohio had 20 electoral votes in 2008, and 18 after the 2010 census.

[229] The imaginary state would have the same 18 electoral votes as Ohio, plus two senatorial electoral votes.

> "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.**"[230] [Emphasis added]

The 25 smallest states (three to seven electoral votes)

Let's now generously expand the definition of a small state to include the 25 states with three to seven electoral votes.

Table 9.3 shows the number of general-election campaign events and the Republican percentage of the two-party vote between 2008 and 2020 in the 25 smallest states. These states have a combined population of 46,819,264.

As can be seen in the table, only three of the 25 states (New Hampshire, Nevada, and Iowa) received any significant amount of attention over the course of the four elections. They accounted for almost all (163 out of 189) of the campaign events received by this entire group of states. Fifteen of these smallest states received no attention at all.

The reason why so much attention was lavished on these particular three states becomes apparent by looking at the level of support in each state for each candidate.

New Hampshire, Nevada, and Iowa received almost all of the attention, because they were closely divided. In addition, Maine and Nebraska received a modest number of events, because one congressional district in each state was competitive. New Mexico was competitive in 2008 and received a considerable amount of attention at the time. However, it has not been a battleground state in presidential elections since then.

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.**"[231] [Emphasis added]

---

[230] Tancredo, Tom. Should every vote count? *WND*. November 11, 2011. http://www.wnd.com/index.php?pageId=366929

[231] *Congressional Record*. July 10, 1979. Page 17748. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

Table 9.3 Presidential campaigns in the 25 states with three to seven electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%	EV
				Wyoming	72%	76%	71%	67%	3
			1	West Virginia	70%	72%	64%	57%	5
				North Dakota	67%	70%	60%	54%	3
				Oklahoma	67%	69%	67%	66%	7
				Idaho	66%	68%	66%	63%	4
				Arkansas	64%	64%	62%	60%	6
				South Dakota	63%	66%	59%	54%	3
	1			Utah	61%	62%	75%	65%	6
1	2			Nebraska	60%	64%	61%	58%	5
				Montana	58%	61%	57%	51%	3
	1			Mississippi	58%	59%	56%	57%	6
				Kansas	57%	61%	61%	58%	6
				Alaska	55%	58%	57%	61%	3
5	**21**	**27**	**7**	**Iowa**	**54%**	**55%**	**47%**	**45%**	**6**
11	**17**	**13**	**12**	**Nevada**	**49%**	**49%**	**47%**	**44%**	**6**
4	**21**	**13**	**12**	**New Hampshire**	**46%**	**49.8%**	**47%**	**45%**	**4**
2	3		2	Maine	45%	48%	42%	41%	4
	3		8	New Mexico	44%	45%	45%	42%	5
				Oregon	42%	44%	44%	42%	7
				Delaware	40%	44%	41%	37%	3
	1			Connecticut	40%	43%	41%	39%	7
				Rhode Island	39%	42%	36%	36%	4
				Hawaii	35%	33%	28%	27%	4
				Vermont	32%	35%	32%	31%	3
			1	D.C.	6%	4%	7%	7%	3
23	**70**	**53**	**43**	**Total**					**189**

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**."[232] [Emphasis added]

The political clout of the small states is not based on the Electoral College.
In discussing the political clout of small states, it is well to remember that the Electoral College is not the bulwark of influence for the small states in the U.S. Constitution.

The small states' source of political clout is the equal representation of the states in the U.S. Senate (and, to a lesser extent, the equal representation of the states in the constitutional amendment process and, to an even lesser extent, the equal representation of the states in contingent elections for President in the U.S. House).

The 13 smallest states (with 3% of the nation's population) have 25% of the votes in the U.S. Senate—an enormously significant source of political clout in fashioning federal legislation (as well as in the confirmation and treaty-making processes).

9.3.2. MYTH: The small states give the Republican Party a systemic advantage in the Electoral College.

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. Whether measured by number of states, number of electoral votes, or number of popular votes, the smallest states are almost equally divided politically in presidential elections. In fact, there is a slight tilt in favor of the Democrats as measured by all three yardsticks.
- All but one of the smallest states are non-competitive one-party states in presidential elections. The one closely divided small state (New Hampshire) went Democratic in seven of the eight presidential elections between 1992 and 2020.

MORE DETAILED ANSWER:
One of the most frequently repeated statements about presidential elections is the inaccurate claim that the small states give the Republican Party a systemic advantage in the Electoral College.

There were 13 states with three or four electoral votes after the 1990, 2000, and 2010 census.

---

[232] *Congressional Record.* January 15, 1979. Page 309. https://www.congress.gov/bound-congressional-record/1979/01/15/senate-section

We examine these states in terms of three yardsticks:

- number of states won by each party,
- number of electoral votes won by each party, and
- number of popular votes won by each party.

Number of small states won by each party between 1992 and 2020

The smallest states have been almost equally divided politically in the eight presidential elections between 1992 and 2020 (with a slight edge to the Democrats).

The Republican presidential nominee almost always carried six small states between 1992 and 2020—Alaska, Idaho, Montana, North Dakota, South Dakota, and Wyoming.

Montana is the only one of these states that did not vote Republican in all eight elections. It went for Bill Clinton in 1992 when independent candidate Ross Perot divided the state's popular vote.

The Democratic presidential nominee carried seven small states between 1992 and 2020—Delaware, the District of Columbia, Hawaii, Maine, New Hampshire, Rhode Island, and Vermont.

New Hampshire is the only one of these states that did not vote Democratic in all eight elections. It went for George H.W. Bush in 2000 when third-party candidate Ralph Nader divided the vote.

Table 9.4 shows which party carried each of the 13 smallest states in the eight presidential elections between 1992 and 2020.[233]

Overall, the Democratic presidential nominee won the smallest states 56 times, while the Republican won them 48 times in the eight presidential elections between 1992 and 2020.

The Democratic presidential nominee won the 13 smallest states by a 7–6 margin in six of the eight elections.

The Democratic nominee won these states by an 8–5 margin in 1992, and the Republican nominee won these states by a 7–6 margin in 2000.

Number of electoral votes won by each party between 1992 and 2020

Table 9.4 also shows that the Democrats won more electoral votes than the Republicans from the smallest states in seven of the eight presidential elections between 1992 and 2020.

Overall, the Democratic presidential nominee won 189 electoral votes from the 13 smallest states, while the Republican won 163 electoral votes.

---

[233] The table shows which party's presidential candidate won statewide. Maine awards two of its four electoral votes by congressional district. In 2016 and 2020, Donald Trump won one of Maine's district-level electoral votes by carrying the state's 2nd congressional district, while the Democratic nominee won three electoral votes (representing the state as a whole and the 1st district).

Table 9.4 Presidential voting by the 13 smallest states 1992–2020

State	1992	1996	2000	2004	2008	2012	2016	2020
Delaware	D	D	D	D	D	D	D	D
D.C.	D	D	D	D	D	D	D	D
Hawaii	D	D	D	D	D	D	D	D
Maine	D	D	D	D	D	D	D	D
Rhode Island	D	D	D	D	D	D	D	D
Vermont	D	D	D	D	D	D	D	D
New Hampshire	D	D	R	D	D	D	D	D
Montana	D	R	R	R	R	R	R	R
Alaska	R	R	R	R	R	R	R	R
Idaho	R	R	R	R	R	R	R	R
North Dakota	R	R	R	R	R	R	R	R
South Dakota	R	R	R	R	R	R	R	R
Wyoming	R	R	R	R	R	R	R	R
Democratic states	**8**	**7**	**6**	**7**	**7**	**7**	**7**	**7**
Republican states	**5**	**6**	**7**	**6**	**6**	**6**	**6**	**6**
Democratic EV	**27**	**24**	**20**	**24**	**24**	**24**	**23**	**23**
Republican EV	**17**	**20**	**24**	**20**	**20**	**20**	**21**	**21**

Number of popular votes won by each party between 2000 and 2020

The popular vote in the 13 smallest states has been almost equally divided in the six presidential elections between 2000 and 2020.[234]

Overall, the Democratic presidential nominee won 16,951,920 popular votes (51%) from the 13 smallest states in the six presidential elections between 2000 and 2020, while the Republican won 16,298,161 popular votes (49%), as shown in table 9.5.

Table 9.5 The popular vote in the 13 smallest states was divided 51%–49% in favor of the Democratic presidential nominee in the six presidential elections between 2000 and 2020.

Year	Republican popular votes	Democratic popular votes
2000	2,361,723	2,171,442
2004	2,801,822	2,612,915
2008	2,544,113	3,137,100
2012	2,603,226	2,942,513
2016	2,754,608	2,673,800
2020	3,232,669	3,414,150
Total	16,298,161	16,951,920
Two-party percentage	**49.0%**	**51.0%**

In terms of percentages, the two-party popular vote in the 13 smallest states between 2000 and 2020:

- favored Biden 51.4% to 48.6% in 2020
- favored Trump 50.7% to 49.3% in 2016

[234] Ross Perot received 19% of the national popular vote in 1992 and 8% in 1996.

- favored Obama 53.1% to 46.9% in 2012
- favored Obama 55.2% to 44.8% in 2008
- favored George W. Bush 51.7% to 48.3% in 2004
- favored George W. Bush 52.1% to 47.9% in 2000.

Fourteen states have three or four electoral votes in 2024 and 2028.

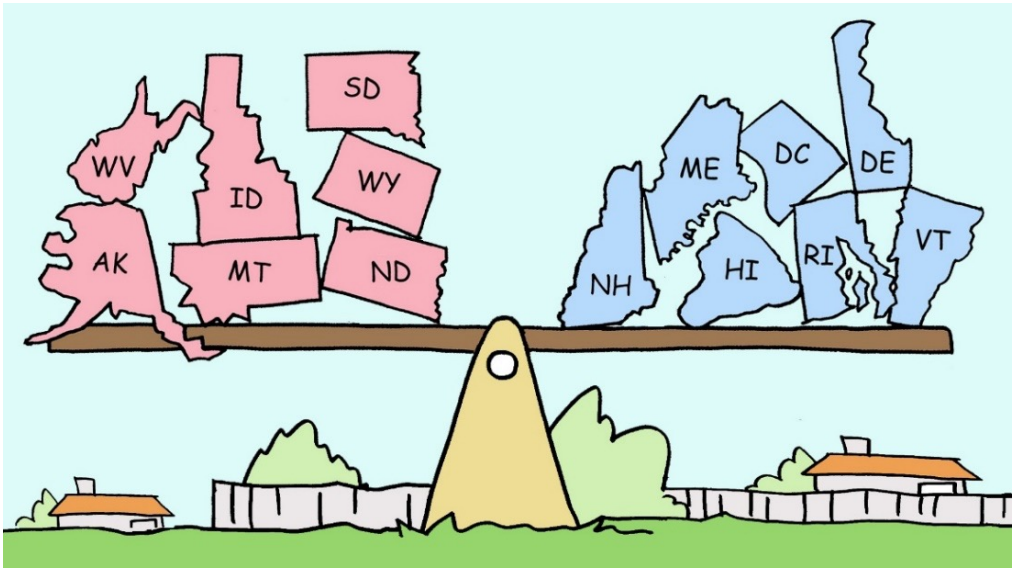
West Virginia lost one congressional district as a result of the 2020 census and will therefore have only four electoral votes in 2024 and 2028.

Montana gained one congressional district and will have four electoral votes.

Both states are safely Republican in presidential elections and therefore received no general-election campaign events in the four presidential elections between 2008 and 2020.

New Hampshire continues to be the only one of the 14 smallest states that is likely to be competitive in 2024.

Figure 9.2 shows that the 14 states with three or four electoral votes in the 2024 and 2028 presidential elections were equally divided in the four presidential elections between 2004 and 2020.



Mike Flanagan—flantoons@btinternet.com

Figure 9.2 The current 14 smallest states were equally divided by party between 2004 and 2020.

Possible origin of the myth that the small states are Republican in presidential elections

The origin of this myth may be the fact that the 12 smallest states divided 9–3 in favor of the Republicans in the relatively close presidential elections of 1960, 1968, and 1976 as well as the fact that there were Republican landslides in the Electoral College in four other elections during this period (1972, 1980, 1984, 1988).

The 13 smallest states cast 3% of the nation's popular vote while possessing 6% of the electoral votes. That is, the 13 smallest states have 26 electoral votes above what their population would warrant.

Even if these 26 electoral votes unanimously favored the Republican Party (and this is manifestly not the case), 26 electoral votes out of 538 would not create a controlling advantage.

Biden won in 2020 by a 306–232 margin in the Electoral College. Trump won in 2016 with an identical margin. Obama won in 2012 by a 332–206 margin, and he won in 2008 by a 365–173 margin.

9.3.3. MYTH: Thirty-one states would lose power under a national popular vote.

QUICK ANSWER:

- The claim that 31 states would lose power under a national popular vote is based on an arithmetic calculation that bears no relation to what happens in real-world presidential campaigns.
- The claim is based on the ratio of each state's percentage share of the nation's voters to the state's percentage share of the entire country's 538 electoral votes. This ratio creates the impression that the 31 smallest states have enhanced clout in presidential elections under the current system. However, the actual behavior of real-world presidential candidates indicates that political clout comes from being a closely divided state. Presidential candidates concentrate virtually all of their general-election campaigning in battleground states. Because almost all smaller states are one-party states in presidential races, they are politically irrelevant in general-election campaigns for President.

MORE DETAILED ANSWER:

In a 2011 article entitled "National Popular Vote Plan Would Hurt Most States," Morton C. Blackwell, a long-standing member of the Republican National Committee from Virginia, wrote:

> "Thirty-one states would lose power in presidential elections under [the National Popular Vote] plan."
>
> "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."[235]

---

[235] Blackwell, Morton C. National Popular Vote plan would hurt most states. *The Western Journal*. June 25, 2011. Blackwell's 2011 memo and calculations for each state may be found at https://www.leadershipinstitute.org/img/email/nationalpopularvote.pdf. *The Unleash Prosperity Hotline*. Newsletter 3838 (August 18, 2023) of the Committee to Unleash Prosperity discussed Blackwell's memo in its edition under the heading "National Popular Vote Would Screw the Small States."

Blackwell based this statement upon an arithmetic calculation that compares each state's percentage share of the nation's voters in 2008 to the state's percentage share of the entire country's 538 electoral votes.

Table 9.6 shows Blackwell's calculation.

- Column 2 is the state's number of electoral votes.
- Column 3 is the state's percentage share of the entire country's 538 electoral votes. For example, Wyoming's three electoral votes represent 0.56% of the entire country's 538 electoral votes.
- Column 4 is the number of popular votes cast in the state in the 2008 presidential election.
- Column 5 is the state's percentage share of the entire country's 132,454,039 popular votes for President in 2008.[236] For example, Wyoming's 256,035 popular votes for President constituted 0.19% of the nationwide total.
- Column 6 is the difference between column 5 and column 3. For example, the difference between 0.19% and 0.56% is –0.37% for Wyoming. That is, Wyoming's percentage share of the nation's voters in 2008 is less than its percentage share of the entire country's 538 electoral votes.
- Column 7 is the ratio of column 6 to column 3. For example, the –0.37% difference for Wyoming in column 6 is –65.48% of 0.56%. Blackwell then interprets this negative number as demonstrating that Wyoming would lose 65.48% of its power in presidential elections.

Blackwell's arithmetic is correct. However, this arithmetic bears no relation to what happens in real-world presidential campaigns.

Presidential candidates concentrate virtually all of their general-election campaigning in closely divided states.

Because almost all small states are one-party states in presidential races, they are politically irrelevant in the general election campaign for President.

Political clout comes from being a battleground state—not from the ratio of electoral votes to the number of voters (as discussed in detail in section 9.1).

An examination of table 9.2 shows that 11 of the 13 smallest states (those with three or four electoral votes) received no attention at all in the 2008 campaign. The only significant amount of campaigning was in New Hampshire—the sole closely divided state among the 13 smallest states.

Note that the tendency of small-population states to be one-party states in presidential election extends to the 31 smallest states, as shown in table 1.15 and figure 1.12. In fact, 22 of the 31 smallest states were totally ignored under the current state-by-state winner-take-all method of awarding electoral votes.

Yet, Blackwell would have us believe that the current system confers enhanced political clout on these 31 smallest states.

---

[236] Blackwell's vote counts differ slightly from those found in Leip's Election Almanac (131,461,581) by about 8,000 votes nationwide. Blackwell's article does not state the source of his vote counts. However, this tiny nationwide discrepancy does not affect Blackwell's argument.

Table 9.6 Morton Blackwell's calculations

State	EV	% of 538	Popular votes	% of popular vote	% difference in power	Change due to NPV
Alabama	9	1.67%	2,105,622	1.59%	–0.08%	–4.97%
Alaska	3	0.56%	327,341	0.25%	–0.31%	–55.68%
Arizona	10	1.86%	2,320,851	1.75%	–0.11%	–5.73%
Arkansas	6	1.12%	1,095,958	0.83%	–0.29%	–25.81%
California	55	10.22%	13,743,177	10.38%	0.15%	1.49%
Colorado	9	1.67%	2,422,236	1.83%	0.16%	9.32%
Connecticut	7	1.30%	1,644,845	1.24%	–0.06%	–4.56%
Delaware	3	0.56%	413,562	0.31%	–0.25%	–44.01%
D.C.	3	0.56%	266,871	0.20%	–0.36%	–64.02%
Florida	27	5.02%	8,453,743	6.38%	1.36%	27.18%
Georgia	15	2.79%	3,940,705	2.98%	0.19%	6.71%
Hawaii	4	0.74%	456,064	0.34%	–0.40%	–53.69%
Idaho	4	0.74%	667,506	0.50%	–0.24%	–31.90%
Illinois	21	3.90%	5,578,195	4.21%	0.31%	7.89%
Indiana	11	2.04%	2,805,986	2.12%	0.07%	3.61%
Iowa	7	1.30%	1,543,662	1.17%	–0.13%	–10.35%
Kansas	6	1.12%	1,264,208	0.95%	–0.17%	–14.78%
Kentucky	8	1.49%	1,858,578	1.40%	–0.08%	–5.64%
Louisiana	9	1.67%	1,979,852	1.49%	–0.18%	–10.49%
Maine	4	0.74%	744,456	0.56%	–0.18%	–24.05%
Maryland	10	1.86%	2,651,428	2.00%	0.14%	7.62%
Massachusetts	12	2.23%	3,102,995	2.34%	0.11%	5.03%
Michigan	17	3.16%	5,039,080	3.80%	0.64%	20.40%
Minnesota	10	1.86%	2,921,147	2.21%	0.35%	18.57%
Mississippi	6	1.12%	1,289,939	0.97%	–0.15%	–13.05%
Missouri	11	2.04%	2,992,023	2.26%	0.21%	10.48%
Montana	3	0.56%	497,599	0.38%	–0.18%	–32.91%
Nebraska	5	0.93%	811,923	0.61%	–0.32%	–34.04%
Nevada	5	0.93%	970,019	0.73%	–0.20%	–21.25%
New Hampshire	4	0.74%	719,643	0.54%	–0.20%	–26.58%
New Jersey	15	2.79%	3,910,220	2.95%	0.16%	5.88%
New Mexico	5	0.93%	833,365	0.63%	–0.30%	–32.35%
New York	31	5.76%	7,721,718	5.83%	0.07%	1.17%
North Carolina	15	2.79%	4,354,571	3.29%	0.50%	17.92%
North Dakota	3	0.56%	321,133	0.24%	–0.32%	–56.71%
Ohio	20	3.72%	5,773,387	4.36%	0.64%	17.25%
Oklahoma	7	1.30%	1,474,694	1.11%	–0.19%	–14.36%
Oregon	7	1.30%	1,845,251	1.39%	0.09%	7.16%
Pennsylvania	21	3.90%	5,996,229	4.53%	0.62%	15.98%
Rhode Island	4	0.74%	475,428	0.36%	–0.38%	–51.49%
South Carolina	8	1.49%	1,927,153	1.45%	–0.04%	–2.35%
South Dakota	3	0.56%	387,449	0.29%	–0.27%	–47.77%
Tennessee	11	2.04%	2,618,238	1.98%	–0.06%	–3.10%
Texas	34	6.32%	8,078,524	6.10%	–0.22%	–3.49%
Utah	5	0.93%	971,185	0.73%	–0.20%	–21.16%
Vermont	3	0.56%	326,822	0.25%	–0.31%	–55.94%
Virginia	13	2.42%	3,753,059	2.83%	0.42%	17.26%
Washington	11	2.04%	3,071,587	2.32%	0.28%	13.68%
West Virginia	5	0.93%	731,691	0.55%	–0.38%	–40.60%
Wisconsin	10	1.86%	2,997,086	2.26%	0.40%	21.65%
Wyoming	3	0.56%	256,035	0.19%	–0.37%	–65.48%
Total	**538**	**100.00%**	**132,454,039**	**100.00%**		

A closer examination of Blackwell's calculation shows that it simply demonstrates a geographical and historical oddity concerning the peculiar distribution of state sizes in the United States, namely that about two-thirds of states happen to have a *below-average* number of electoral votes.

The average number of electoral votes per state is 10.55 (that is, 538 divided by 51).

The fact is that two-thirds of the states have a *below-average* number of electoral votes—that is, 33 states have 10 or fewer electoral votes.

Because each state receives two electoral votes (above and beyond what would be warranted by its population), the percentage share of the nation's 538 electoral votes for each of the 33 below-average-sized states is larger than the state's percentage share of the nation's population.[237]

In short, Blackwell's calculation is just a reflection of the particular geographical distribution of the U.S. population among the states.

9.3.4. MYTH: The small states are so small that they will not attract any attention under any system.

QUICK ANSWER:

- Presidential candidates are not averse to campaigning in small states. In fact, they have lavished a considerable amount of attention on the one small state (New Hampshire with four electoral votes) that has been closely divided in recent general elections for President. Moreover, they have also frequently campaigned in Maine trying to win one electoral vote from the state's competitive 2nd congressional district.
- The other small states (those with three or four electoral votes) are not ignored because they are small, but because they are one-party states in presidential elections.
- Serious candidates for office solicit every vote that could possibly decide whether they win. Every vote in every state would matter in every presidential election in a nationwide vote for President. Under a national popular vote, a voter in a small state would become as important as any other voter in the United States. Moreover, in most cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs.

MORE DETAILED ANSWER:

Because New Hampshire was a closely divided state in the four presidential elections between 2008 and 2020, it received 50 of the 58 general-election events that took place in the 13 smallest states (as shown in table 9.2).

---

[237] If there were no differences in voter turnout among states, and no changes in population since the immediately preceding census (eight years earlier in the case of Blackwell's article), a state's percentage share of the 538 electoral votes would be larger for all 33 of the smallest states. Because there are differences in voter turnout from state to state as well as some intra-decade population changes, Blackwell's calculation ends up showing that a state's percentage share of the 538 electoral votes is larger for 31 of the 33 smallest states.

Thus, New Hampshire received 4.2% of the nation's general-election campaign events even though it has only 0.42% of the nation's population.

Because Maine awards electoral votes by congressional district, and its 2nd district was closely divided in three of the four elections between 2008 and 2020, it received some attention (two or three events) in those elections.

Meanwhile, 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 their voters under the winner-take-all system.

In short, the table shows that the determinant of whether a state receives attention is whether it is a closely divided state at the state level or, in the case of Maine, whether its 2nd congressional district happened to be competitive in a particular year.

In a nationwide vote for President, every voter in every state would be equally important in every presidential election. Under a national popular vote, a voter in a small state would become as important as any other voter in the United States. Moreover, in many cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs (section 9.13.7).

The fact that serious candidates solicit every voter *who matters* was further demonstrated in 2008 by Nebraska's 2nd congressional district (the Omaha area). 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 worth of ads were run in the Omaha media market in 2008.[238] The reason for this activity in the Omaha area was that Nebraska awards electoral votes by congressional district. The campaigns paid attention to the 2nd district, because it was closely divided and because 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 vote *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 district[239] and that the Obama campaign was also active in the Omaha area at the time.[240]

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

---

[238] The 2008 ad spending figure was reported in Steinhauser, Paul. Nevada number one in ad spending per electoral vote. *CNN Politics*. July 4, 2012.

[239] Walton, Don. Romney will compete for Omaha electoral vote. *Lincoln Journal Star*. July 19, 2012.

[240] Henderson, O. Kay. Obama trip targets seven electoral college votes in Iowa, Nebraska. *Radio Iowa*. August 13, 2012.

district (the Omaha area) mattered, while the issues relevant to Nebraska's remaining two districts did not.

When votes matter, presidential candidates vigorously solicit those voters. When votes don't matter, they ignore those areas.

9.3.5. MYTH: The small states oppose a national popular vote for President.

QUICK ANSWER:

- The fact that the small states are disadvantaged by the current state-by-state winner-take-all method of awarding electoral votes has long been recognized by prominent officials from small states. In 1966, the state of Delaware led a group of 12 predominantly small states in bringing a lawsuit at the U.S. Supreme Court aimed at getting winner-take-all laws declared unconstitutional. The plaintiffs argued that the winner-take-all method of awarding electoral votes is unconstitutional because it "debases the national voting rights and political status of plaintiff's citizens and those of other small states."
- As of July 2024, the National Popular Vote Compact has been enacted into law by six small states (Delaware, Hawaii, Maine, Rhode Island, Vermont, and the District of Columbia).
- Polls of public support for a national popular vote for President in small states are substantially the same as those in medium-sized and big states.

MORE DETAILED ANSWER:

Prominent officials from small states have long recognized the fact that the small states are disadvantaged by the current state-by-state winner-take-all method of awarding electoral votes.

Lawsuit by Delaware and other small states challenging the winner-take-all rule

In 1966, the state of Delaware and a group of eleven other predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) argued 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**."[241] [Emphasis added]

This lawsuit was filed after the flurry of Supreme Court decisions in the 1960s that established the one-person-one-vote principle in connection with congressional and state legislative districts.

Defendant New York's political importance in presidential elections in the 1960s cannot be overemphasized. New York was not only a closely divided state, but it was the nation's biggest state at the time. It possessed the largest number of electoral votes (45). None

[241] *State of Delaware v. State of New York*. 385 U.S. 895. 1966.

of the prominent battleground states in recent elections (e.g., Ohio, Pennsylvania, Florida) has been the biggest or even second-biggest state.

Delaware Attorney General David P. Buckson (R) led the effort. The plaintiff's brief in *State of Delaware v. State of New York* argued:

> "The state unit-vote system [winner-take-all] **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 influence 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."**[242] [Emphasis added]

Delaware's brief also 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**." [Emphasis added]

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 the choice of manner of awarding electoral votes is exclusively a state decision under *McPherson v. Blacker*).

Ironically, the defendant New York is no longer a battleground state. Today, New York suffers the very same disadvantage as Delaware, because it is now politically noncompeti-

---

[242] Delaware's brief in the 1966 case may be found at https://www.nationalpopularvote.com/elevenplaintiffs. New York's brief may be found at https://www.nationalpopularvote.com/newyorkbrief. Delaware's argument in its request for a re-hearing may be found at https://www.nationalpopularvote.com/delawarebrief.

tive in presidential elections. Today, a voter in New York is equal to a voter in Delaware—both are politically irrelevant in presidential elections.

The Compact has been enacted by six small states.
As of July 2024, the National Popular Vote Compact has been enacted into law by six small states (Delaware, Hawaii, Maine, Rhode Island, Vermont, and the District of Columbia).

Public opinion in small states supports national popular vote.
Public support for a national popular vote for President is substantially the same in state-level polls of small states, medium-sized states, and big states, as discussed in detail in section 9.22.

9.3.6. MYTH: Equal representation of the states in the U.S. Senate is threatened by the National Popular Vote Compact.

QUICK ANSWER:

- The composition of the U.S. Senate is established and protected by the U.S. Constitution. It cannot be changed by passage of any state law or any interstate compact. In fact, equal representation of the states in the U.S. Senate cannot even be changed by an ordinary constitutional amendment, but instead can only be changed by unanimous consent of all 50 states.
- Changing the winner-take-all method of awarding electoral votes would have no effect on the equal representation of the states in the U.S. Senate.

MORE DETAILED ANSWER:
Equal representation of the states in the U.S. Senate is explicitly established and protected in the U.S. Constitution.

The composition of the U.S. Senate cannot be changed by the passage of any state law or any 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."

That is, this feature of the U.S. Constitution may only be changed by a constitutional amendment that, in addition to the usual requirements, is approved by unanimous consent of all 50 states.

The National Popular Vote Compact is concerned with the method of selecting members of the Electoral College. The power to change the method of selecting the manner of appointing presidential electors is explicitly granted to each state by the U.S. Constitution:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[243]

Changing the winner-take-all method of awarding electoral votes would have no effect on the equal representation of the states in the U.S. Senate.

9.4. MYTHS ABOUT BIG STATES

9.4.1. MYTH: Eleven states would control the outcome of a nationwide popular vote for President.

QUICK ANSWER:

- Opponents of a nationwide vote for President sometimes claim that the voters of the 11 most populous states could alone elect a President. However, this criticism is based on the politically preposterous assumption that a particular presidential candidate would receive 100% of the popular vote in each of these 11 states (when, in fact, 54%–46% is the average margin by which the winning candidate wins the 11 most populous states).
- This criticism of a national popular vote has an even more serious flaw—it applies to the current system more than to a national popular vote. Under the *current* state-by-state winner-take-all method of awarding electoral votes, a candidate receiving a plurality of the popular votes in these same 11 states would win a majority of the Electoral College (and hence the presidency). That is, under the *current* system, a President could theoretically be elected with about 25% of the nationwide popular vote.
- In a national popular vote for President, every voter in every state would be equal throughout the United States. A vote cast in a populous state would be no more or less valuable than a vote cast anywhere else.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated that the National Popular Vote Compact:

> "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**."[244] [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:

---

[243] U.S. Constitution. Article II, section 1, clause 2.

[244] Von Spakovsky, Hans. 2011. Protecting Electoral College from popular vote. *Washington Times*, October 26, 2011.

> "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."

Brian Mark Weber in *The Patriot Post* wrote in 2020:

> "Think about it: Under NPV, a candidate could theoretically lose 39 states and still win the presidency."[245]

It is true that the 11 biggest states possessed a majority of the electoral votes, according to the 2010 census.[246]

However, the voters of these 11 states alone could elect a President in a nationwide popular vote *only* if one makes the politically preposterous assumption that one candidate receives 100% of the popular vote from each of these 11 states.

The implausibility of this hypothetical scenario is demonstrated by the fact that *no* big state delivered more than 63% of its two-party popular vote to *any* candidate in the six presidential elections between 2000 and 2020 (as shown in table 9.7).

As can be seen in the table, the highest percentage is 63%, and there were only eight cases (out of 66 entries in the table) where the winning candidate won more than 60% of the vote.

More importantly, the average of the entries in the table is 54%.

Note also that many of the percentages in the table are close to 50%, because many of the biggest states were battleground states in one or more elections.[247]

Von Spakovsky's criticism of the National Popular Vote Compact has an even more serious flaw—it applies to the current system more than to a national popular vote.

Table 9.7 Popular-vote percentage won by the winner of the 11 biggest states 2000–2020

State	2000	2004	2008	2012	2016	2020
California	53%	54%	61%	60%	61%	63%
Texas	59%	61%	56%	57%	52%	52%
New York	60%	58%	63%	63%	59%	61%
Florida	49%	52%	51%	50%	49%	51%
Illinois	55%	55%	62%	57%	55%	57%
Pennsylvania	51%	51%	55%	52%	48%	50%
Ohio	50%	51%	52%	51%	51%	53%
Michigan	51%	51%	57%	54%	47%	51%
Georgia	55%	58%	52%	53%	50%	49%
New Jersey	56%	53%	57%	58%	55%	57%
North Carolina	56%	56%	49%	50%	50%	50%

[245] Weber, Brian Mark. 2020. The National Popular Vote Ruse. *Patriot Post.* September 4, 2020. https://patriotpost.us/articles/73202-the-national-popular-vote-ruse-2020-09-04

[246] After the 2020 census, it takes the 12 biggest states to get to a majority of the electoral votes. That is, Virginia must be added to the list of states shown in this section.

[247] Note that a statewide winner often wins a state with less than 50% of the vote when minor-party and/or independent candidates receive a substantial number of votes.

Anyone who is concerned about the possibility that the 11 most populous states might alone control the outcome of a national popular vote by voting unanimously for one candidate should be considerably more agitated about the *current* state-by-state winner-take-all method of awarding electoral votes.

The current system enables a candidate who receives 50.01% (in fact, just a plurality) of the popular votes in the 11 most populous states to win a majority of the Electoral College (and hence the presidency).

That is, under the *current* system, a President could be elected with about 25% of the nationwide popular vote if one makes the politically preposterous assumption that the candidate receives 100% of the vote from each of the 11 states.[248]

9.4.2. MYTH: California and New York would dominate a national popular vote for President.

QUICK ANSWER:

- It is a fact that California has about 37 million people and gave Hillary Clinton 62% of its votes and a popular-vote margin of 4.3 million votes in 2016. However, there is no reason to worry about California dominating a national popular vote for President, because the Republican Party enjoys an equally strong base of support elsewhere in the country. There is a bloc of Republican-leaning south-central states (which Nate Cohn christened "Appalachafornia") with essentially the same population as California (37.9 million). These Republican-leaning states gave Donald Trump essentially the same percentage of its vote (61%) and essentially the same popular-vote margin (4.5 million). In 2020 and 2012, California was similarly counterbalanced by a group of Republican-leaning south-central states.
- If California's Democratic popular-vote margin is worrisome, then the equivalent Republican popular-vote margin must also be. In a nationwide vote for President, votes from California and the equivalent Republican-leaning south-central states would be added together (along with votes from all the other states) to produce a nationwide popular vote. In the calculation of the national popular vote, California voters and those in the equivalent Republican-leaning area would balance each other out. Neither group of voters would be more influential, important, or controlling than the other.
- Similarly, there is no reason to worry about California and New York together dominating the nationwide outcome. A slightly larger group of Republican-leaning south-central states has the same population as California and New York combined. Those Republican-leaning states gave Trump essentially the same percentage of their vote and essentially the same popular-vote margin.

---

[248] The current state-by-state winner-take-all method of awarding electoral votes actually permits fewer than 25% of the voters to elect a President. According to calculations made by MIT Professor Alexander S. Belenky, using actual voter-turnout data, an Electoral College majority could have been won with between 16% and 22% of the national popular vote in the 15 elections between 1948 and 2004. 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.

- Both California and the Republican-leaning south-central states have something in common. Because both areas give about 60% of their votes to their respective preferred parties, all the voters in both areas are ignored by general-election presidential candidates under the current state-by-state winner-take-all method of awarding electoral votes. Both California and the Republican-leaning south-central states would benefit from a nationwide vote, because presidential candidates would pay attention to their voters.
- The misplaced concern about California dominating a national popular vote arises from an exaggerated view of how many people live in California, how many people vote there, and how heavily Democratic the state is. One out of eight of the country's voters lives in California, but four out of 10 of them vote Republican. Meanwhile, one out of eight voters lives in Appalachafornia, and four out of 10 of them vote Democratic. In fact, neither of these areas dominated a nationwide election in which 137 million votes were cast in 2016.
- The talking point about California has first-blush plausibility only because of the historical accident that there are only three states along the Pacific Coast, whereas the Atlantic Coast is divided among 14 states. If California had been admitted to the Union as six separate states (as was discussed at the time), the resulting six states would simply be average-sized states today. California was admitted to the Union as a single state in the pre-Civil-War era because of the then-delicate balance in the U.S. Senate between slave states and free states.
- Civil discourse is undermined by partisan talking points about alternative universes in which certain states are treated as if they are not legitimate parts of the United States. Every loser in every election would have won if carefully selected parts of his election district were excised from the vote count.

MORE DETAILED ANSWER:

California has 37 million people and in 2016 gave Hillary Clinton 62% of its vote and a popular-vote margin of 4.3 million votes.

Some defenders of the current state-by-state winner-take-all method of awarding electoral votes have used Clinton's large lead in California to argue that the state would monopolize the attention of presidential candidates and dominate the choice of President under the National Popular Vote Compact.

Bryan Fischer, a talk-show host on American Family Radio, said:

> "America's Founders knew if every presidential election was decided simply by the popular vote, the larger states such as California and New York would determine the outcome of every election until the end of time."[249,250]

---

[249] Fischer, Bryan. 2020. How the Electoral College is supposed to work. *OneNewsNow*. January 24, 2020. https://onenewsnow.com/perspectives/bryan-fischer/2020/01/24/how-the-electoral-college-is-supposed-to-work

[250] The Founding Fathers were indeed prescient because, at the time the Constitution was written, New York was only the fifth largest state according to the 1790 census. *Schedule of the Whole Number of Persons*

Michigan State Representative Ann Bollin said the following about the National Popular Vote Compact in June 2024:

> "The ultimate goal of this legislation is to force Michigan's electoral votes to be determined by the national popular vote, effectively silencing the voices of Michigan residents in favor of those in other states like California or New York."[251]

In an article in the *New York Times* after the 2016 presidential election, Nate Cohn wrote:

> "Conservative analyst Michael Barone [said] the Electoral College serves as a necessary bulwark against big states, preventing California in particular from imposing 'something like **colonial rule over the rest of the nation**.'"[252] [Emphasis added]

These statements overlook the fact that the Republican Party enjoys a virtually identical base of support in a different part of the country.

As political analyst Nate Cohn observed, there is a bloc of Republican-leaning south-central states with the same population as California that gave Trump essentially the same percentage of its vote and the same popular-vote margin as California gave Clinton in 2016.

Cohn gave the name "Appalachafornia" to these Republican-leaning states.[253]

The facts concerning Appalachafornia and California in 2016 are as follows:

- Both areas gave their favored candidate almost identical percentages of their popular vote (61% versus 62%, respectively).
- Both areas gave their favored candidate almost identical margins (4.5 versus 4.3 million votes, respectively).
- Both areas had almost identical populations (37.9 and 37.3 million, respectively). Appalachafornia had 12.25% of the country's population of 309,785,186, while California had 12.05% (according to the 2010 census).

Table 9.8 shows that the Republican-leaning states of Appalachafornia had a combined population of 37,961,426, gave Trump 61% of their vote in 2016, and gave Trump a popular-vote margin of 4,475,297 votes.[254]

Table 9.9 shows that California had a population of 37,341,989, gave Clinton 61% of its vote, and gave Clinton a margin of 4,269,978 votes.

---

within the Several Districts of the United States. 1793. Page 3. https://www.census.gov/library/publications/1793/dec/number-of-persons.html

[251] Bollin, Ann. 2024. Press Release: Rep. Bollin reaffirms strong opposition to National Popular Vote compact. June 12, 2024. https://gophouse.org/posts/rep-bollin-reaffirms-strong-opposition-to-national-popular-vote-compact

[252] Cohn, Nate. Why Trump Had an Edge in the Electoral College. *New York Times*. December 19, 2016. http://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html

[253] *Ibid*.

[254] For this table and similar tables in this section, the percentages in columns 5 and 6 are of the total vote.

Table 9.8 Appalachafornia gave Trump a margin of 4,475,297 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Trump margin
Alabama	4,802,982	729,547	1,318,255	34%	62%	588,708
Arkansas	2,926,229	380,494.	684,872.	34%	61%	304,378
Idaho	1,573,499	189,765	409,055	27%	59%	219,290
Kansas	2,863,813	427,005	671,018	36%	57%	244,013
Kentucky	4,350,606	628,854	1,202,971	33%	63%	574,117
Louisiana	4,553,962	780,154	1,178,638	38%	58%	398,484
Montana	994,416	177,709	279,240	36%	56%	101,531
Nebraska	1,831,825	284,494	495,961	34%	59%	211,467
North Dakota	675,905	93,758	216,794	27%	63%	123,036
Oklahoma	3,764,882	420,375	949,136	29%	65%	528,761
South Dakota	819,761	117,442	227,701	32%	62%	110,259
Tennessee	6,375,431	870,695	1,522,925	35%	61%	652,230
West Virginia	1,859,815	188,794	489,371	26%	69%	300,577
Wyoming	568,300	55,973	174,419	22%	68%	118,446
Total	**37,961,426**	**5,345,059**	**9,820,356**	**33%**	**61%**	**4,475,297**

Table 9.9 California gave Clinton a margin of 4,269,978 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Clinton margin
California	37,341,989	8,753,788	4,483,810	62%	32%	4,269,978

Figure 9.3 shows that the political complexion of California is a mirror image of that of a bloc of Republican-leaning south-central states.

In a nationwide vote for President, California would not assert "colonial rule" over the rest of the United States any more than the Republican-leaning south-central states (Appalachafornia) would.

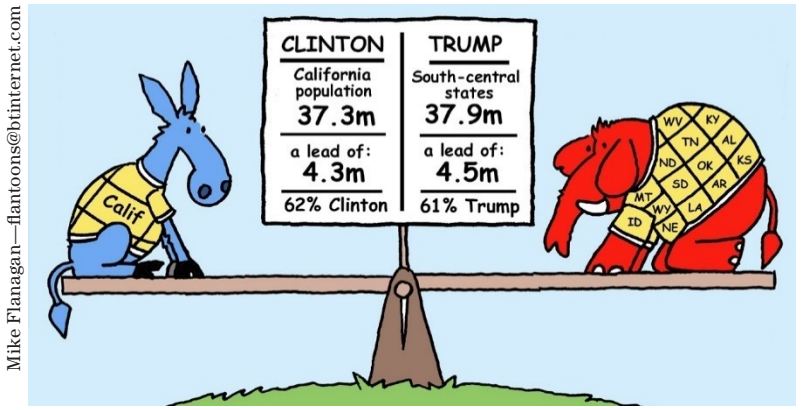


Figure 9.3 The political profile of California is the mirror image of that of a bloc of Republican-leaning south-central states.

In the calculation of the national popular vote, the votes from California and the essentially equivalent Republican-leaning area would balance each other out.

The misplaced concern about California "colonization" arises from an exaggerated view of how many people live in California, how many people vote there, and how heavily Democratic it is.

The facts are that one out of eight of the country's voters lives in California, but four out of 10 of them vote Republican. Out of the 137,125,484 votes cast nationwide for President in 2016, there were 8,753,788 votes for Clinton in California.

Conversely, one out of eight voters lives in Appalachafornia, but four out of 10 of them vote Democratic. Out of the 137,125,484 votes cast nationwide for President in 2016, Trump received 9,820,356 votes from Appalachafornia.

To put it another way, there were 118,551,340 votes cast in places other than California and Appalachafornia together in 2016.

Ironically, the "colonial rule" that Barone bemoans *is actually occurring today*. Both California and the equivalent Republican-leaning area support their respective favored candidates at about the 60% level. That is, neither California nor the Republican-leaning states are closely divided. As a result, both California and the Republican-leaning states are routinely ignored by presidential candidates under the current state-by-state winner-take-all method of awarding electoral votes.

The decision as to who becomes President under the current system is not made by California or the bloc of south-central Republican-leaning states. It is made by the dozen-or-so closely divided battleground states.

If any states are exercising "colonial rule over the rest of the nation," it is the battleground states, because they are the states that actually pick the President under the current system.

California and New York together were also equally balanced in 2016 with a slightly expanded Republican area.

There is a related myth involving California and New York together.

Michael Gomez, another defender of the current state-by-state winner-take-all method of awarding electoral votes, has extended the California "colonization" argument to include New York.

> "Of Hillary Clinton's reported 65,844,954 votes in the 2016 presidential election, 8,753,788 came from California. If California is subtracted from the equation, **Donald Trump wins the national popular vote in the remaining 49 states** by 1,404,903 votes. And if New York is also subtracted, Trump's margin increases to 3,137,876. So, **the notion that the NPVIC would make 'every vote count'**…, as its advocates affirm, **is disproven** when looking at the aforementioned raw number results."[255] [Emphasis added]

Gomez's argument is just as invalid as Barone's.

---

[255] Gomez, Christian. National Popular Vote Compact Threatens Republic. *The New American*. February 1, 2017. http://www.thenewamerican.com/usnews/constitution/item/25202-national-popular-vote-compact-threatens-republic

If Nate Cohn's Appalachafornia is expanded to include four additional Republican states (Indiana, Mississippi, Missouri, and South Carolina), the resulting "expanded Appalachafornia" has about the same population (58,098,701) as California and New York together (56,763,044 people). This "expanded Appalachafornia" area has 18.7% of the country's population. California and New York together have 18.3%.

The facts in 2016 concerning the "expanded Appalachafornia" and California and New York together were:

- Both areas gave their favored candidates almost identical percentages of their popular vote (60% and 61%, respectively).
- Both areas gave their favored candidates almost identical margins (6,038,499 and 6,006,563 votes, respectively).
- Both areas had almost identical populations (58.1 and 56.8 million, respectively).

Table 9.10 shows that "expanded Appalachafornia" had a combined population of 58,098,701, gave Trump 60% of its vote in 2016, and gave Trump a margin of 6,038,499 votes.

Table 9.11 shows that California and New York had a combined population of 56,763,044, gave Clinton 61% of their votes, and gave Clinton a margin of 6,006,563 votes.

Of course, there are numerous combinations of Republican states aside from Nate Cohn's Appalachafornia that could be assembled to counterbalance California's vote (and to counterbalance the combined votes of California and New York).

The reality is that 4.3% is the average margin in the national popular vote for President in the eight presidential elections between 1992 and 2020. That is, the presidential vote in

Table 9.10 Expanded Appalachafornia gave Trump a margin of 6,038,499 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Trump margin
Alabama	4,802,982	729,547	1,318,255	34%	62%	588,708
Arkansas	2,926,229	380,494	684,872	34%	61%	304,378
Idaho	1,573,499	189,765	409,055	27%	59%	219,290
Indiana	6,501,582	1,033,126	1,557,286	37%	60%	524,160
Kansas	2,863,813	427,005	671,018	36%	57%	244,013
Kentucky	4,350,606	628,854	1,202,971	33%	63%	574,117
Louisiana	4,553,962	780,154	1,178,638	38%	58%	398,484
Mississippi	2,978,240	485,131	700,714	40%	59%	215,583
Missouri	6,011,478	1,071,068	1,594,511	38%	60%	523,443
Montana	994,416	177,709	279,240	36%	56%	101,531
Nebraska	1,831,825	284,494	495,961	34%	59%	211,467
North Dakota	675,905	93,758	216,794	27%	63%	123,036
Oklahoma	3,764,882	420,375	949,136	29%	65%	528,761
South Carolina	4,645,975	855,373	1,155,389	41%	57%	300,016
South Dakota	819,761	117,442	227,701	32%	62%	110,259
Tennessee	6,375,431	870,695	1,522,925	35%	61%	652,230
West Virginia	1,859,815	188,794	489,371	26%	69%	300,577
Wyoming	568,300	55,973	174,419	22%	68%	118,446
Total	**58,098,701**	**8,789,757**	**14,828,256**	**36%**	**60%**	**6,038,499**

Table 9.11 California and New York together gave Clinton a margin of 6,006,563 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Clinton margin
California	37,341,989	8,753,788	4,483,810	62%	32%	4,269,978
New York	19,421,055	4,556,142	2,819,557	59%	37%	1,736,585
Total	**56,763,044**	**13,309,930**	**7,303,367**	**61%**	**33%**	**6,006,563**

the United States as a whole is divided approximately equally between the parties. By the way, 4% is approximately the margin of error of a typical national political poll. That is, typical recent presidential campaigns have usually been jump balls.

California and Appalachafornia were also equally balanced in 2012.

Barone's "colonial rule" argument was equally invalid in 2012.

The facts concerning the Republican-leaning south-central states of Appalachafornia and California in 2012 are:

- Both areas gave their favored candidates almost identical percentages (61% and 60%, respectively) of their popular vote.
- Both areas gave their favored candidates similar margins (3.5 million and 3.0 million votes, respectively).
- Both areas had almost identical populations (37.9 million and 37.3 million, respectively).

Table 9.12 shows that the Republican states of Appalachafornia gave Romney 61% of their vote and a margin of 3,520,970 votes in 2012.

Table 9.12 Appalachafornia gave Romney a margin of 3,520,970 votes in 2012.

State	Population 2010	Obama	Romney	Obama percent	Romney percent	Romney margin
Alabama	4,802,982	795,696	1,255,925	38%	61%	460,229
Arkansas	2,926,229	394,409	647,744	37%	61%	253,335
Idaho	1,573,499	212,787	420,911	33%	65%	208,124
Kansas	2,863,813	439,908	689,809	38%	60%	249,901
Kentucky	4,350,606	679,370	1,087,190	38%	60%	407,820
Louisiana	4,553,962	809,141	1,152,262	41%	58%	343,121
Montana	994,416	201,839	267,928	42%	55%	66,089
Nebraska	1,831,825	302,081	475,064	38%	60%	172,983
North Dakota	675,905	124,827	188,163	39%	58%	63,336
Oklahoma	3,764,882	443,547	891,325	33%	67%	447,778
South Dakota	819,761	145,039	210,610	40%	58%	65,571
Tennessee	6,375,431	960,709	1,462,330	39%	59%	501,621
West Virginia	1,859,815	238,269	417,655	36%	62%	179,386
Wyoming	568,300	69,286	170,962	28%	69%	101,676
Total	**37,961,426**	**5,816,908**	**9,337,878**	**38%**	**61%**	**3,520,970**

Table 9.13 shows that California gave Obama 61% of its vote and a margin of 4,269,978 votes in 2012.

Table 9.13 California gave Obama a margin of 3,014,327 votes in 2012.

State	Population 2010	Obama	Romney	Obama percent	Romney percent	Obama margin
California	37,341,989	7,854,285	4,839,958	60%	37%	3,014,327

California and Appalachafornia were also equally balanced in 2020.

The "colonial rule" argument was also invalid in 2020.

The facts concerning the Republican-leaning south-central states of Appalachafornia and California in 2020 are:

- Both areas gave their favored candidates identical percentages (63%) of their popular vote.
- Both areas gave their favored candidates similar margins (4.5 million for Appalachafornia and 5.1 million votes for California).
- Both areas had almost identical populations (39.9 and 39.5 million, respectively).

Table 9.14 shows that the Republican states of Appalachafornia (which had a 2020 population of 39,928,632) gave Trump 63% of their vote and gave him a margin of 4,517,320 votes in 2020.

Table 9.14 Appalachafornia gave Trump a margin of 4,517,320 votes in 2020.

State	Population 2020	Biden	Trump	Biden percent	Trump percent	Trump margin
Alabama	5,024,279	849,624	1,441,170	37%	63%	591,546
Arkansas	3,011,524	423,932	760,647	35%	64%	336,715
Idaho	1,839,106	287,021	554,119	33%	66%	267,098
Kansas	2,937,880	570,323	771,406	42%	57%	201,083
Kentucky	4,505,836	772,474	1,326,646	36%	63%	554,172
Louisiana	4,657,757	856,034	1,255,776	40%	59%	399,742
Montana	1,084,225	244,786	343,602	41%	58%	98,816
Nebraska	1,961,504	374,583	556,846	39%	60%	182,263
North Dakota	779,094	114,902	235,595	32%	67%	120,693
Oklahoma	3,959,353	503,890	1,020,280	32%	67%	516,390
South Dakota	886,667	150,471	261,043	36%	63%	110,572
Tennessee	6,910,840	1,143,711	1,852,475	37%	62%	708,764
West Virginia	1,793,716	235,984	545,382	30%	70%	309,398
Wyoming	576,851	73,491	193,559	27%	72%	120,068
Total	**39,928,632**	**6,601,226**	**11,118,546**	**37%**	**63%**	**4,517,320**

Table 9.15 shows that California (with a 2020 population of 39,538,223), gave Biden 63% of its votes, and gave Biden a margin of 5,103,821 votes in 2020.

Table 9.15 California gave Biden a margin of 5,103,821 votes in 2020.

State	Population 2020	Biden	Trump	Biden percent	Trump percent	Biden margin
California	39,538,223	11,110,250	6,006,429	63%	35%	5,103,821

The talking point about California is the result of a historical accident that put most of the Pacific Coast in one state.

Barone's talking point about California has first-blush plausibility because of the historical accident that there are only three states along the Pacific Coast, whereas there are 14 states on the Atlantic Coast.

In fact, just four of the 14 Atlantic Coast states (Florida, Georgia, South Carolina, and North Carolina) together have considerably more people than California. That is, there is nothing particularly eye-catching about California's population other than the fact that it is contained in one state.

If California had been admitted to the Union as six separate states in 1850 (as was suggested at the time), the populations of none of the resulting six smaller states would be particularly noteworthy today.

California was admitted to the Union as a single state under the Compromise of 1850 because of the then-delicate political balance in the U.S. Senate between slave states and free states. There was talk of creating six new states when the California statehood convention convened in Monterey in September 1849.[256]

However, the political reality in Washington at the time was that the creation of *even one* new free state threatened to upset the existing delicate balance between the 15 slave states and 15 free states in the U.S. Senate.

Prior to 1850, the problem of balancing slave states and free states in the U.S. Senate had been finessed for by carefully orchestrating the admission of one new slave state with each new free state.[257]

For example, the Missouri Compromise of 1820 involved simultaneously admitting a slave state (Missouri) and a free state (Maine). In fact, the creative genius of the Missouri Compromise was to carve Maine out of Massachusetts' existing territory in order to create the necessary new free state.[258]

Prior to the Missouri Compromise of 1820, Alabama and Illinois had been admitted to the Union in the preceding two years. Mississippi and Indiana had been admitted in 1816 and 1817.

After the Missouri Compromise of 1820, Arkansas and Michigan were admitted in 1836 and 1837. Later, two slave states (Texas and Florida) and two free states (Wisconsin and Iowa) were admitted between 1845 and 1848.

Up to 1850, the slave states had maintained parity with the free states in the U.S. Senate. However, by 1850, the free states commanded a clear and growing majority in both the U.S. House of Representatives and the Electoral College.

In 1850, there was no suitable prospective slave state available to balance out the admission of *even one* new free state—much less six new free states.

The possibility of creating more than one state out of the territory that is now California was foreclosed because one of the Monterey convention's first acts was the unanimous adoption of a prohibition against slavery.

---

[256] Bordewich, Fergus M. 2012. America's Great Debate: Henry Clay, Stephen A. Douglas, and the Compromise that Preserved the Union. New York, NY: Simon & Schuster. Page 50.

[257] *Ibid*. Page 12.

[258] *Ibid*. Pages 76–79.

The resulting political crisis preoccupied Congress for nine months in 1850 (during which almost no other business was transacted).

The eventual Compromise of 1850 involved admitting the huge area that is now California as a single free state—thereby upsetting the 15–15 balance in the U.S. Senate by only one state. Meanwhile, the South was placated with the enactment of a harsh federal Fugitive Slave Law, a financial bailout of the slave state of Texas, and other concessions.[259]

The result of the Compromise of 1850 was that the population of the Pacific Coast today is largely concentrated in the single state of California.

Democracy is undermined by political talking points about alternative universes in which certain voters are treated as illegitimate.

In an article entitled "If Only You Couldn't Vote," Mark Mellman wrote:

> "A favorite meme in Trump World argues that if it weren't for California, Hillary Clinton would have lost the national popular vote for president, which she won by almost 3 million ballots. … Of course, it's also true that **without … Texas and Alaska, Trump would have lost the Electoral College** along with the popular vote. … **Such attempts to fashion an alternate universe attack a fundamental tenet of American democracy**. … Pitting urban against rural, Texas against California, **rips the 'United' out of the United States**."[260] [Emphasis added]

This recently minted partisan talking point has seeped into state-level politics as well. After Wisconsin Governor Scott Walker (R) lost his 2018 re-election race, Assembly Speaker Robin Vos (R) said:

> "If you took Madison and Milwaukee out of the state election formula, we would have a clear majority."[261]

However, as Mellman pointed out,

> "Without Waukesha, Washington and Ozaukee counties, Scott Walker would not have been elected Governor in the first place."[262]

Indeed, every loser in every election would have won if carefully selected parts of the election district had been excised from the vote count.

---

[259] The Compromise of 1850 also included settling a boundary dispute in the Southwest and abolishing the slave trade (but not slavery) in the District of Columbia (the only tangible result of which was that the slave markets moved across the Potomac River to Virginia).

[260] Mellman, Mark. 2018. If only you couldn't vote. *The Hill*. December 18, 2018. https://thehill.com/opinion/campaign/421996-mellman-if-only-you-couldnt-vote

[261] *Ibid*.

[262] *Ibid*.

9.4.3. MYTH: A candidate's entire nationwide margin could come from just one state in a nationwide presidential election.

QUICK ANSWER:

- It is true that a candidate's entire *national-popular-vote* margin came from just one state in six of the 50 presidential elections between 1824 and 2020. However, one candidate's entire *electoral-vote* margin came from just one state in 17 elections—about three times as often.
- This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is actually slightly superior to the current system.

MORE DETAILED ANSWER:

There have been six instances in the 50 presidential elections between 1824 and 2020 in which a candidate's entire *national-popular-vote* margin came from just one state, as shown in table 9.16.[263,264]

However, one presidential candidate's entire *electoral-vote* margin came from just one state in 17 elections—about three times as often, as shown in table 9.17.

Note that one candidate's entire *electoral vote* margin came from just one state in four of the five elections in which that candidate failed to win the most popular votes nationwide (2000, 1888, 1876, and 1824).

This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is actually slightly superior to the current system.

Table 9.16 There have been six presidential elections in which a candidate's entire *national-popular-vote* margin came from just one state.

Year	State	Candidate who won the state	Party	Popular-vote margin of the national popular vote winner	Popular-vote margin of the national popular vote winner coming from the state
2016	California	Clinton	D	2,868,518	4,269,978
2000	California	Gore	D	543,816	1,293,774
1960	Massachusetts	Kennedy	D	118,574	510,424
1888	Texas	Cleveland	D	89,283	142,219
1884	Texas	Cleveland	D	62,670	133,030
1880	Iowa	Blaine	R	8,355	78,059

[263] This comparison starts at 1824 because that was the first year in which a majority of the states (18 of 24) conducted popular elections for presidential elector. By 1828, 22 of the 24 states conducted popular elections.

[264] In 1824, Andrew Jackson led John Quincy Adams in the Electoral College 99–84 (and also led in the national popular vote); however, no candidate received an absolute majority in the Electoral College, because William H. Crawford and Henry Clay also won electoral votes from various states.

Table 9.17 There have been 17 presidential elections in which a candidate's entire *electoral-vote* margin came from just one state.

Year	State	Candidate who won the Electoral College	Party	Electoral-vote margin of the Electoral College winner	Electoral-vote margin of the Electoral College winner coming from the one state
2004	Ohio	G.W. Bush	R	16	20
2000	Florida	G.W. Bush	R	1	25
1976	California	Carter	D	27	45
1968	California	Nixon	R	31	40
1960	New York	Kennedy	D	34	45
1948	New York	Truman	D	37	47
1916	Ohio	Wilson	D	11	24
1888	New York	B. Harrison	R	32	36
1884	New York	Cleveland	D	18	36
1880	New York	Garfield	R	29	35
1876	New York	Hayes	R	0	35
1860	New York	Lincoln	R	28	35
1856	New York	Buchanan	D	25	35
1848	New York	Taylor	Whig	17	36
1844	New York	Polk	D	32	36
1836	New York	Van Buren	D	22	42
1824	Pennsylvania	Jackson	D	15	28

9.4.4. MYTH: Eleven colluding big states are trying to impose a national popular vote on the country.

QUICK ANSWER:

- The asserted "collusion" among the nation's 11 biggest states is demonstrably false, as evidenced by the actual list of states that have adopted the National Popular Vote Compact. As of July 2024, the Compact has been enacted into law by six small states, nine medium-sized states, and three big states.
- If anyone considers the fact that the 11 biggest states possess a majority of the electoral votes represents a danger in terms of adopting the National Popular Vote Compact, this same fact must be regarded as an argument against the *current* state-by-state winner-take-all method of electing the President. Indeed, these same 11 states could, if they were to act in concert, elect a President in every presidential election.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the Compact on the grounds that "11 colluding states" could, if they were to act in concert, impose a national popular vote on the country.

The 11 biggest states did indeed possess a majority of the electoral votes—270 of 538, according to the 2010 census.[265]

First, the actual list of states that have adopted the National Popular Vote Compact demonstrates that Ross' claimed "collusion" among the nation's 11 biggest states is untrue.

As of July 2024, only four of the 11 biggest states have enacted the National Popular Vote Compact.

Specifically, the Compact has been enacted into law by 18 jurisdictions together possessing 209 electoral votes:

- six small states
  - Delaware–3
  - District of Columbia–3
  - Hawaii–4
  - Maine–4
  - Rhode Island–4
  - Vermont–3
- nine medium-sized states
  - Colorado–10
  - Connecticut–7
  - Maryland–10
  - Massachusetts–11
  - Minnesota–10
  - New Jersey–14
  - New Mexico–5
  - Oregon–8
  - Washington–12
- three big states
  - California–54
  - Illinois–19
  - New York–28

Second, the 11 biggest states have little in common with one another politically. They rarely act in concert on policy issues. These disparate 11 states rarely agree on a choice for President.

Table 9.18 shows the distribution of the 11 biggest states carried by the Republican and Democratic nominees.

Ross considers the fact that the 11 biggest states possess a majority of the electoral votes to be dangerous in terms of adopting the National Popular Vote Compact. If so, this same fact should also be considered as a reason to abandon the *current system* of elect-

[265] After the 2020 census, it takes the 12 biggest states to get to a majority of the electoral votes. That is, Virginia must be added to the list of states shown in this section.

Table 9.18 Winner of the 11 biggest states 2000–2020

Election	Republican	Democratic
2000	TX, FL, OH, GA, NC	CA, NY, IL, PA, MI, NJ
2004	TX, FL, OH, GA, NC	CA, NY, IL, PA, MI, NJ
2008	TX, GA	CA, NY, FL, IL, PA, OH, MI, NC NJ
2012	TX, GA. NC	CA, NY, FL, IL, PA, OH, MI, NC NJ
2016	TX, FL, OH, MI, GA, NC, PA	CA, NY, IL, NJ
2020	TX, FL, OH, NC	CA, NY, IL, PA, MI, GA, NJ,

ing the President, because these same 11 states could (if they ever were to act in concert) impose their choice for President on the country in every presidential election.

Indeed, a mere plurality of voters in states possessing a majority of the electoral votes are sufficient to produce a majority in the Electoral College under the current state-by-state winner-take-all method of awarding electoral votes.

9.5. MYTHS ABOUT BIG COUNTIES

9.5.1. MYTH: A mere 146 of the nation's 3,143 counties would dominate a nationwide popular vote for President.

QUICK ANSWER:

- Opponents of a nationwide vote for President sometimes complain that the voters of the nation's 146 most populous counties (out of 3,143) could alone elect a President. However, this criticism is based on the politically preposterous assumption that one particular candidate would receive 100% of the popular vote in each of these counties (when, in fact, these counties are only about 60% Democratic).
- This criticism applies to the current system more than to a nationwide popular vote. Under the current state-by-state winner-take-all method of awarding electoral votes, a candidate who receives 100% of the popular votes in just 61 counties would win a majority of the Electoral College (and hence the presidency).
- In a national popular vote for President, every voter in every county would be equal throughout the United States. A vote cast in a populous county would be no more or less valuable than a vote cast anywhere else.

MORE DETAILED ANSWER:

Nathan Fleming criticized a national popular vote for President by saying:

> "Just 146 counties (out of 3,000+) could elect a President. Bad idea."[266]
>
> "You could **theoretically** get 50.1% of popular vote with only those 146 counties."[267] [Emphasis added]

[266] Fleming, Nathan. *Twitter.* August 23, 2014. https://twitter.com/StephenFleming/status/503298466731524096

[267] Fleming, Nathan. *Twitter.* August 23, 2014. https://twitter.com/StephenFleming/status/503308470117220353

It is a fact that a majority of the nation's voters live in the 146 most populous counties (out of 3,143 counties).[268]

However, the key word in Fleming's criticism is "theoretically."

In fact, the voters of these 146 counties could elect a President in a nationwide popular vote *only* if you make the politically preposterous assumption that one candidate receives 100% of the vote from each of these counties. However, these 146 high-population counties voted only 59% Democratic in the 2012 presidential election—nowhere near the 100% on which Fleming's scary scenario is based.

This criticism of a national popular vote has an even more serious flaw—it applies to the current system more than to a national popular vote.

Anyone who is bothered about the hypothetical possibility that 146 counties might control the outcome of a national popular vote should be considerably more agitated about the *current* state-by-state winner-take-all method of awarding electoral votes. The current system enables a candidate who receives 100% of the popular votes in just 61 counties to win a majority of the Electoral College (and hence the presidency).

Under the current system, a candidate receiving 100% of the popular vote in a mere 61 counties in 2012 would have:

- won a majority of the statewide popular vote in each of the 18 states containing those 61 counties; and
- therefore won 100% of the electoral votes from each of those 18 states; and
- therefore won the presidency, because those 18 states have a majority of the nation's 538 electoral votes.

Moreover, these 61 counties contained only 26.6% of the nation's voters.

Table 9.19 lists these 61 counties and 18 states for 2012.

- Columns 1 and 2 indicate the state and its number of electoral votes.[269]
- Column 3 shows the state's presidential vote in 2012.
- Column 4 shows a majority of the state's presidential vote.
- Column 5 shows the number of the state's most populous counties that, if 100% of their voters were to support one candidate, would constitute a majority of the state's presidential vote.
- Column 6 lists the specific counties.
- Column 7 shows the total presidential vote for those counties.
- Column 8 shows the percentage of the national popular vote cast in those counties.

For example, California had 55 electoral votes in 2012. A total of 13,038,547 votes were cast for President in 2012 in the state. A statewide majority was therefore 6,519,275. Five populous counties cast 6,801,011 votes for President—more than half of the state's vote. Those five counties were Los Angeles County with 3,181,067 votes; San Diego County with 1,192,282; Orange County with 1,122,664; Riverside County with 661,907; and Santa Clara

---

[268] Hickey, Walter and Weisenthal, Joe. Half of the United States Lives in These Counties. *Business Insider*. September 4, 2014. http://www.businessinsider.com/half-of-the-united-states-lives-in-these-counties-2013-9

[269] The District of Columbia is treated as a state with one county for purposes of this discussion.

Table 9.19 The 61 counties

State	EV	Statewide vote	Majority of statewide vote	Number of biggest counties providing majority of statewide vote	Counties	Total vote in listed counties	Percent of national popular vote in listed counties
AZ	11	2,306,559	1,153,281	1	Maricopa	1,380,959	1.1%
CA	55	13,038,547	6,519,275	5	Los Angeles, San Diego, Orange, Riverside, Santa Clara	6,801,011	5.3%
CT	7	1,558,075	779,039	2	Fairfield, Hartford	788,370	0.6%
DC	3	293,764	146,883	1	Washington, D.C.	293,764	0.2%
DE	3	413,890	206,946	1	New Castle	251,996	0.2%
FL	29	8,490,162	4,245,082	8	Miami-Dade, Broward, Palm Beach, Hillsborough, Orange, Pinellas, Duval, Brevard	4,406,259	3.4%
HI	4	434,697	217,350	1	Honolulu	296,742	0.2%
IL	20	5,244,174	2,622,088	3	Cook, Du Page, Lake	2,700,172	2.1%
KS	6	1,159,971	579,987	4	Johnson, Sedgwick, Shawnee, Wyandotte	584,506	0.5%
MA	11	3,128,134	1,564,068	4	Middlesex, Worcester, Essex, Norfolk	1,824,390	1.4%
MD	10	2,707,327	1,353,665	4	Montgomery, Prince George's, Baltimore, Anne Arundel	1,488,673	1.2%
MI	16	4,740,250	2,370,126	5	Wayne, Oakland, Macomb, Kent, Genesee	2,372,520	1.8%
NV	6	1,014,918	507,460	1	Clark	691,190	0.5%
NY	29	7,061,925	3,530,964	7	Kings (Brooklyn), New York (Manhattan), Queens, Suffolk, Nassau, Erie, Westchester	3,879,885	3.0%
RI	4	446,049	223,026	1	Providence	239,786	0.2%
TX	38	7,993,851	3,996,927	8	Harris, Dallas, Tarrant, Bexar, Travis, Collin, Denton, Fort Bend	4,175,421	3.2%
UT	6	1,019,815	509,909	2	Salt Lake, Utah	561,887	0.4%
WA	12	3,141,106	1,570,554	3	King, Pierce, Snohomish	1,648,921	1.3%
Total	**270**	**64,193,214**	**32,096,630**	**61**		**34,386,452**	**26.6%**

County with 643,091. If those five counties had cast 100% of their votes for a single presidential candidate, that candidate would have won all of California's electoral votes. The actual vote for President for these five counties was 6,801,011, which was 5.3% of the national popular vote for President.

Figure 9.4 shows the 61 counties.

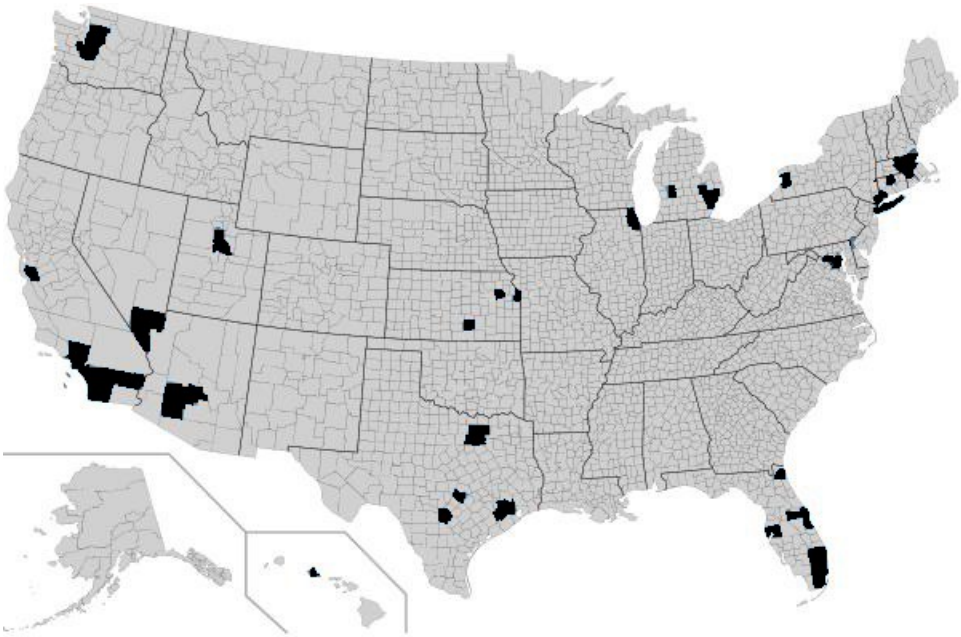


Figure 9.4 The 61 counties

The above analysis and map come from a FairVote report[270] by Nathan Nicholson and additional research by Andrea Levien of FairVote (who analyzed the 2004 election and showed a similar pattern).

In any event, there is nothing special—much less controlling—about the voting power of the voters in the 146 biggest counties, any more than there is anything special or controlling about the voting power of the voters in the remaining 2,997 counties.

Moreover, counties do not vote for President—voters do. County boundaries were not established for the purpose of electing the President and have never played any specific role in presidential elections. County boundaries (especially in the early states in the eastern and midwestern parts of the country) were typically established to enable people to conveniently reach the county seat for voting and other business.

[270] Nicholson, Nathan. Fighting Misconceptions about a National Popular Vote for President. FairVote report. September 12, 2014. http://www.fairvote.org/fighting-misconceptions-about-a-national-popular-vote-for-president

9.6. MYTHS ABOUT BIG CITIES

9.6.1. MYTH: Big cities would dominate a national popular vote for President.

QUICK ANSWER:

- The 100 biggest cities contain almost one-fifth of the U.S. population (about 65 million people). To put this in perspective, the population of Baton Rouge, Louisiana—the nation's 100th biggest city—is 225,128.
- Rural America contains one-fifth of the population (about 66 million).
- 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 influential or controlling than a vote cast anywhere else.

MORE DETAILED ANSWER:

David Barton, founder of Wall Builders, in an interview with Conservative Broadcasting Network (CBN) said:

> "If you just went to a popular vote—there are 35,000 cities in the United States. **Twenty cities have the majority of the vote in America.** You could win a presidential campaign by just spending your time in 20 cities—who cares about the other 34,980 cities."[271] [Emphasis added]

First, these statistics are all wrong. The population of the 20 biggest cities is 331,449,281—only 10.4% of the U.S. population.

In fact, the 100 biggest cities contain only 19.6% of the U.S. population (64,983,448 people out of 331,449,281), according to the 2020 census.[272]

Second, the voters of the 20 biggest cities do not vote unanimously in favor of any candidate.

Barton's statement is illustrative of numerous similar erroneous statements based on claims that:

- the nation's big cities are bigger than they actually are;
- rural America is smaller than it actually is; and
- presidential campaigns would ignore any group of voters when every vote is equal and the winner is the candidate who receives the most popular votes.

A look at our country's actual demographics contradicts these misstatements.

---

[271] Wishon, Jennifer. 2020. As Blue States Push to Abolish Electoral College, Critics Warn: "You Would Have Violence." *CBN News*. March 23, 2020. https://www1.cbn.com/cbnnews/us/2020/march/as-blue-states-push-to-abolish-electoral-college-critics-warn-you-would-have-violence

[272] U.S. Census Bureau. 2021. *City and Town Population Totals: 2020-2021.* SUB-IP-EST2021-POP. Accessed February 15, 2023. https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html#tables

The 100 biggest cities have one-fifth of the U.S. population.

Let's start with the facts concerning how big the big cities are.

The 100 biggest cities contain 64,983,448 people—19.6% of the U.S. population of 331,449,281, according to the 2020 census.[273]

To put this in perspective, the nation's 100th biggest city is Baton Rouge, Louisiana (with a population of 225,128). To put it another way, about 80% of the U.S. population lives in places with populations of less than 225,000.

The nation's largest city (New York City) has 8,804,190 people and constitutes 2.7% of the nation's population. The 10 biggest cities together (New York, Los Angeles, Chicago, Houston, Phoenix, Philadelphia, San Antonio, San Diego, Dallas, and San Jose) constitute 7.9% of the nation's population.

The 50 biggest cities together constitute 15.3% of the nation's population. To put this in perspective, the nation's 50th biggest city is Arlington, Texas (with a population 394,218).

The 100 biggest cities together constitute 19.6% of the nation's population—that is, almost one in five Americans live in the 100 biggest cities.

Table 9.20 shows the population of the 100 biggest cities.

Rural America is one-fifth of the U.S. population.

The population of rural America is 66,300,254 people—20.0% of the U.S. population.[274,275]

Figure 9.5 shows that rural America has almost the same population as the 100 biggest cities (actually a tad more). Each has about one-fifth of the U.S. population.

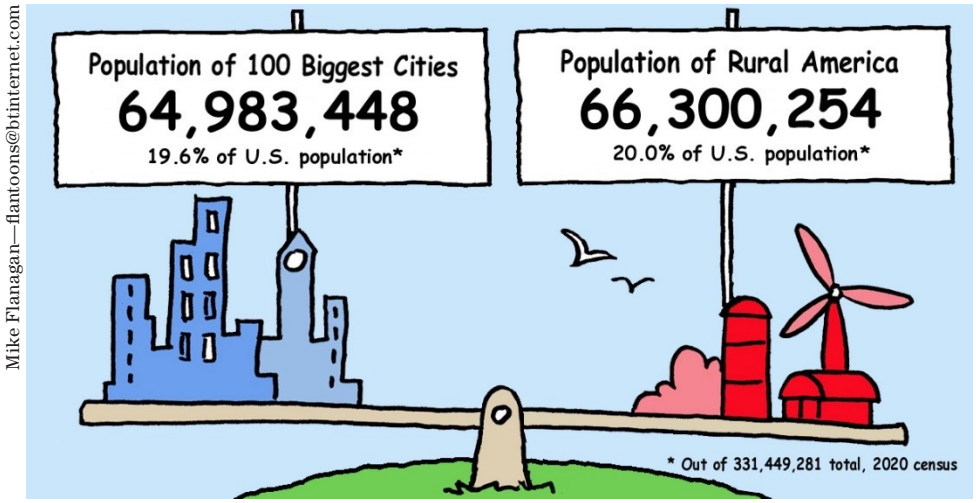


Figure 9.5 The 100 biggest cities and rural America each have about one-fifth of the U.S. population.

[273] *Ibid.*

[274] U.S. Census Bureau. 2023. *2020 Census Urban Areas Facts*. February 9, 2023. Accessed February 15, 2023. https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2020-ua-facts.html

[275] U.S. Census Bureau. 2022. *2020 Census Urban-Rural Classification Fact Sheet*. https://www.census.gov/content/dam/Census/library/factsheets/2022/dec/2020-census-urban-rural-fact-sheet.pdf

Table 9.20 Population of the 100 biggest U.S. cities

Rank	City	Population	
1	New York, New York	8,804,190	Biggest city is 2.7% of U.S. population
2	Los Angeles, California	3,893,986	Top 2 cities are 3.8% of U.S. population
3	Chicago, Illinois	2,747,231	Top 3 cities are 4.7% of U.S. population
4	Houston, Texas	2,302,792	Top 4 cities are 5.4% of U.S. population
5	Phoenix, Arizona	1,607,739	Top 5 cities are 5.8% of U.S. population
6	Philadelphia, Pennsylvania	1,603,797	Top 6 cities are 6.3% of U.S. population
7	San Antonio, Texas	1,434,270	Top 7 cities are 6.8% of U.S. population
8	San Diego, California	1,385,922	Top 8 cities are 7.2% of U.S. population
9	Dallas, Texas	1,304,442	Top 9 cities are 7.6% of U.S. population
10	San Jose, California	1,014,545	Top 10 cities are 7.9% of U.S. population
11	Austin, Texas	959,549	
12	Jacksonville, Florida	949,577	
13	Fort Worth, Texas	918,377	
14	Columbus, Ohio	905,672	
15	Indianapolis, Indiana	887,752	
16	Charlotte, North Carolina	874,541	
17	San Francisco, California	873,965	
18	Seattle, Washington	735,157	
19	Denver, Colorado	715,522	
20	Washington, District of Columbia	689,545	
21	Nashville-Davidson, Tennessee	689,504	
22	Oklahoma City, Oklahoma	681,387	
23	El Paso, Texas	678,587	
24	Boston, Massachusetts	676,216	
25	Portland, Oregon	652,089	Top 25 cities are 11.5% of U.S. population
26	Las Vegas, Nevada	641,825	
27	Detroit, Michigan	639,614	
28	Louisville-Jefferson, Kentucky	632,689	
29	Memphis, Tennessee	632,207	
30	Baltimore, Maryland	585,708	
31	Milwaukee, Wisconsin	577,235	
32	Albuquerque, New Mexico	564,563	
33	Fresno, California	542,161	
34	Tucson, Arizona	541,349	
35	Sacramento, California	522,754	
36	Kansas City, Missouri	507,969	
37	Mesa, Arizona	504,500	
38	Atlanta, Georgia	498,602	
39	Omaha, Nebraska	490,627	
40	Colorado Springs, Colorado	479,260	
41	Raleigh, North Carolina	467,592	
42	Long Beach, California	466,302	
43	Virginia Beach, Virginia	459,470	
44	Miami, Florida	442,265	
45	Oakland, California	439,349	
46	Minneapolis, Minnesota	428,403	
47	Tulsa, Oklahoma	412,458	
48	Bakersfield, California	402,907	
49	Wichita, Kansas	397,070	
50	Arlington, Texas	394,218	Top 50 cities are 15.3% of U.S. population

(Continued)

Table 9.20 (Continued)

Rank	City	Population	
51	Aurora, Colorado	386,241	
52	New Orleans, Louisiana	383,997	
53	Tampa, Florida	382,769	
54	Cleveland, Ohio	373,091	
55	Urban Honolulu CDP, Hawaii	350,943	
56	Anaheim, California	347,015	
57	Lexington-Fayette, Kentucky	322,570	
58	Stockton, California	320,759	
59	Corpus Christi, Texas	317,929	
60	Henderson, Nevada	317,521	
61	Riverside, California	314,347	
62	St. Paul, Minnesota	311,448	
63	Newark, New Jersey	310,876	
64	Santa Ana, California	310,538	
65	Cincinnati, Ohio	310,242	
66	Orlando, Florida	307,674	
67	Irvine, California	305,313	
68	Pittsburgh, Pennsylvania	303,160	
69	St. Louis, Missouri	301,578	
70	Greensboro, North Carolina	297,899	
71	Jersey City, New Jersey	292,412	
72	Anchorage, Alaska	291,247	
73	Lincoln, Nebraska	291,114	
74	Plano, Texas	285,900	
75	Durham, North Carolina	283,547	
76	Buffalo, New York	278,302	
77	Chandler, Arizona	276,330	
78	Chula Vista, California	276,025	
79	Toledo, Ohio	270,726	
80	Madison, Wisconsin	268,414	
81	Gilbert Town, Arizona	268,302	
82	Fort Wayne, Indiana	263,852	
83	Reno, Nevada	263,436	
84	North Las Vegas, Nevada	262,678	
85	St. Petersburg, Florida	258,277	
86	Lubbock, Texas	257,180	
87	Irving, Texas	256,793	
88	Laredo, Texas	255,181	
89	Winston-Salem, North Carolina	249,443	
90	Chesapeake, Virginia	249,422	
91	Glendale, Arizona	248,345	
92	Garland, Texas	246,132	
93	Scottsdale, Arizona	241,488	
94	Norfolk, Virginia	238,005	
95	Boise City, Idaho	235,670	
96	Fremont, California	232,084	
97	Santa Clarita, California	229,213	
98	Spokane, Washington	228,831	
99	Richmond, Virginia	226,610	
100	Baton Rouge, Louisiana	225,128	Top 100 cities are 19.6% of U.S. population
	Total for 100 biggest cities	**64,983,448**	

The myth about big cities may stem from the incorrect belief that big cities are bigger than they actually are, and that they account for a greater fraction of the nation's population than they actually do.

It is certainly true that most of the biggest cities in the country have a Democratic majority. However, most exurbs, small towns, and rural areas generate Republican majorities. Suburbs of big cities are usually politically divided.

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. However, innumerable Republicans have won races for Governor and U.S. Senator without ever carrying the biggest city in their respective states.

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.

Philadelphia, Pittsburgh, Detroit, and Milwaukee certainly have not monopolized the attention of presidential candidates when they have campaigned in the battleground states of Pennsylvania, Michigan, and Wisconsin. Moreover, these cities manifestly do not control the statewide outcomes. In 2016, Hillary Clinton won Philadelphia, Pittsburgh, Detroit, and Milwaukee but did not carry Pennsylvania, Michigan, or Wisconsin.

Even if one makes the far-fetched assumption that a candidate could win 100% of the votes in the nation's 100 biggest cities, that candidate would have won only 20% of the national popular vote.

A big city that is located in a closely divided state is critically important in presidential races (as are the suburban, ex-urban, and rural parts of that state).

However, big cities that are located in spectator states such as Houston, Chicago, and Seattle 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 a city such as Baltimore that is located in a spectator state such as Maryland (which has the same 10 electoral votes as Wisconsin).

9.6.2. MYTH: One major reason for establishing the Electoral College was to prevent candidates from campaigning only 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 can be safely said that the Founding Fathers were not concerned about presidential candidates campaigning in big cities.
- If the Founding Fathers were concerned about the political clout of big cities, they were totally derelict in addressing the problem. The U.S. Constitution makes no distinction between a vote cast in a city versus a vote cast anywhere else in a state. Moreover, state winner-take-all laws enacted under the authority of Article II, section 1 of the Constitution do not treat votes cast in a city any differently from votes cast in small towns or rural areas.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated:

> "A major reason for establishing the Electoral College in the first place [was] to prevent elections from becoming contests where presidential candidates would simply campaign in big cities for votes."[276]

In an op-ed entitled "Electoral College Is Evidence of Founders' Brilliance," Joseph Mendola wrote:

> "In 1787, the Founders were concerned that the popular vote system **would give the two largest population enclaves in the country at that time—Philadelphia and New York—the power to choose the president**, taking away the voice of farmers and working people in less populous states."[277] [Emphasis added]

Dave Cooper of Churubusco, Indiana (population 1,796) wrote in the *Churubusco News* in 2018:

> "The founders were very clever when they conceived the idea of the Electoral College. Why, they wrote, should a large metropolitan area like New York City have more influence than a very small rural village?"[278]

According to the 1790 census,[279] the combined population of New York City and Philadelphia was 61,653—a mere 1.6% of the country's total population of 3,929,214.

Table 9.21 shows that the combined population of the only five cities in the country with a population of over 10,000 was 109,835—a mere 2.8% of the country's population of 3,929,214 at the time.

Moreover, there were only 24 places with a population over 2,500 in 1790. Their combined population was 201,655—a mere 5% of the country's population.

Table 9.21 Population of the only five cities in the U.S. with population over 10,000 according to 1790 census

Rank	City	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**

[276] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

[277] Mendola, Joseph. 2018. Electoral College is evidence of Founders' brilliance. *Concord Monitor*. July 25, 2018. https://www.concordmonitor.com/Working-people-rule-18933239

[278] Cooper, Dave. 2018. State Electoral College? *Churubusco News*. December 5, 2018. https://www.kpcnews.com/article_b0f22275-71be-583e-bc99-c993326e230f.html

[279] See *1790 Census: Whole Number of Persons within the Districts of the U.S.* 1793. https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1790.html

In other words, 95% of the country's population lived in places with fewer than 2,500 people in 1790.

If the Founding Fathers had been concerned about the political clout of big cities, they were derelict in addressing this problem. Indeed, nothing in the U.S. Constitution makes any distinction between a vote cast in a city and a vote cast elsewhere in a state.

Moreover, the winner-take-all method of awarding electoral votes does not treat votes cast in a city any differently from votes cast in small towns or rural areas. All votes are equal inside each state.

While the current system makes a voter in a big city located in a closely divided state (such as Philadelphia, Phoenix, and Milwaukee) very important in presidential elections, it also makes every voter in a small town or rural area important.

Likewise, the current system makes a voter in a big city located in a spectator state (e.g., Chicago, Houston, and New York City) politically irrelevant in presidential elections, and it also renders a voter in a small town or rural area of a spectator state unimportant.

Finally, the Founding Fathers were *not* concerned that "presidential candidates would campaign in big cities for votes," because they weren't concerned with candidates campaigning *anywhere*.

Instead, they envisioned the Electoral College as an elite deliberative body. John Jay (the presumed author of *Federalist No. 64*) described the Electoral College 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."[280] [Emphasis added]

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**."[281] [Emphasis added]

Moreover, the Founding Fathers were divided (and, accordingly, the Constitution is silent) as to whether the voters should even be allowed to vote for these aristocratic presidential electors.

The 1787 Constitutional Convention left that question to the states. Only six of the 10 states that participated in the nation's first presidential election in 1789 allowed their voters to vote for the state's presidential electors.

---

[280] The powers of the senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

[281] Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

9.7. MYTHS ABOUT BIG METROPOLITAN AREAS

9.7.1. MYTH: Presidential candidates will concentrate on the populous metropolitan areas in a national popular vote for President.

QUICK ANSWER:

- Under a national popular vote, every vote would be equal throughout the United States. A voter in a big metropolitan area would be no more influential or controlling than a voter anywhere else.

MORE DETAILED ANSWER:

John W. York, a policy analyst at the Heritage Foundation, wrote in 2019:

> "If the U.S. were to abandon the electoral college in favor of a national popular vote, the same few cities would be the focus of the battle for the White House every cycle. Given that they have limited time and money, **presidential candidates of both parties would be foolish to waste their energy anywhere but the most densely populated urban centers**. This is where the largest concentration of voters are, so racking up the votes in these areas would be the overwhelming focus of any election. Under a national popular vote, cities like Los Angeles and New York … would thoroughly and perpetually dominate electoral politics as well."[282] [Emphasis added]

When every vote is equal, candidates for office know that they need to solicit voters throughout their *entire* constituency in order to win.

Contrary to what York says, presidential candidates would not be "foolish" to campaign throughout the entire electorate—they would be crazy not to.

In a national popular vote for President, a voter in a populous metro area would be no more valuable or important than a vote cast in a suburb, an exurb, a small town, or a rural area. Big metro areas would not receive all the attention or even a disproportionate amount of attention—much less control the outcome.

Perhaps the most convincing evidence for the fact that big metro areas do not control elections comes from looking at the way that presidential races are actually run inside today's 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.

That is, the way to win everything that the battleground state has to offer (that is, all of its electoral votes) is identical to the way to win everything that the National Popular Vote Compact has to offer.

If there were any tendency for a nationwide presidential campaign to overemphasize heavily populated metro areas or ignore rural areas, we would see evidence of this ten-

---

[282] York, John W. 2019. No, the electoral college isn't 'electoral affirmative action' for rural states. *Los Angeles Times*. October 9, 2019. https://www.latimes.com/opinion/story/2019-10-09/electoral-college-affirmative-action-rural-states

dency in the way presidential campaigns are actually conducted inside today's closely divided states.

Let's use Pennsylvania as an example.

Pennsylvania's population of 12.7 million people is divided into two almost equal parts:[283]

- 6.4 million living in the Philadelphia[284] and Pittsburgh[285] metropolitan statistical areas and
- 6.3 million living in the rest of the state (often called "the T").[286]

Pennsylvania was a closely divided "battleground" state in 2016. It received 54 of the nation's 399 general-election campaign events.

Table 9.22 shows the locations of Pennsylvania's 54 general-election campaign events in 2016. As can be seen, the campaigns visited a mix of small towns, middle-sized places, and big cities.

Figure 9.6 is a map showing the locations of Pennsylvania's 54 campaign events in 2016.

These 54 events were divided almost exactly in proportion to population between the two halves of the state.

- 28 events in the Philadelphia and Pittsburgh metro areas
- 26 events in "the T"

In 2016, the Democratic ticket won the Philadelphia and Pittsburgh metro areas by a 60%–40% margin, while the Republican ticket won "the T" by 62%–38%. Overall, the Republican ticket won the state in 2016 by a 50.4%–49.6% margin, as shown in table 9.23.

In 2016, there were 28 Republican events (Trump, Pence) and 26 Democratic events (Clinton, Kaine). Each ticket devoted somewhat more attention to the parts of the state where it had highest support. However, taken together, the overall result is that the biggest metro areas and "the T" each received almost exactly the same overall amount of attention, as shown in table 9.24.

Chapter 8 provides additional information on the distribution of campaign events in the big metropolitan statistical areas of other battleground states versus the less populous parts of those same states.

---

[283] Pennsylvania had a population of 12,702,379, according to the 2010 census. The Philadelphia Metropolitan Statistical Area (MSA) and the Pittsburgh MSA had a combined population of 6,365,279 (50.1% of the total), while the remainder of the state had a population of 6,337,100 (49.9% of the total).

[284] The Philadelphia metropolitan statistical area (MSA) consists of five counties (Philadelphia County, Montgomery, Bucks, Delaware, and Chester).

[285] The Pittsburgh MSA consists of seven counties (Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland).

[286] The rest of the state consists of 55 counties.

Table 9.22 Locations of Pennsylvania's 54 events in 2016

Place	Population	Campaign event	County	CD
Youngwood	3,050	Pence (11/1)	Westmoreland	18
Grantville	3,581	Pence (10/5)	Dauphin	11
Chester Twp.	3,940	Trump (9/22)	Delaware	7
Pipersville	6,212	Pence (8/23)	Bucks	8
Ambridge	7,050	Trump (10/10)	Beaver	12
Gettysburg	7,620	Pence (10/6), Trump (10/22)	Adams	4
Hanover Twp.	10,866	Kaine (8/31)	Northampton	15
Hershey	14,257	Trump (11/4)	Dauphin	11
Aston	16,592	Trump (9/13)	Delaware	7
Hatfield Twp.	17,249	Clinton-Kaine (7/29)	Montgomery	6
Newtown Twp.	19,299	Kaine (10/26), Trump (10/21)	Bucks	8
King of Prussia	19,936	Pence (8/23)	Montgomery	7
Johnstown	20,978	Clinton-Kaine (7/30), Pence (10/6), Trump (10/21)	Cambria	12
East Hempfield	23,522	Trump (10/1)	Lancaster	16
Moon Twp.	24,185	Pence (11/3), Trump (11/6)	Allegheny	14
Wilkes-Barre	41,498	Trump (10/10)	Luzerne	11
State College	42,034	Kaine (10/21)	Centre	5
York	43,718	Pence (9/29)	York	4
Altoona	46,320	Trump (8/12)	Blair	9
Haverford Twp.	48,491	Clinton (10/4)	Delaware	7
Harrisburg	49,528	Clinton (10/4), Clinton-Kaine (7/29), Trump (8/1)	Dauphin	11
Lancaster	59,322	Pence (8/9), Kaine (8/30)	Lancaster	16
Bensalem	60,427	Pence (10/28)	Bucks	8
Scranton	76,089	Trump-Pence (7/27), Clinton (8/15), Pence (9/14), Trump (11/7)	Lackawanna	17
Erie	101,786	Trump (8/12), Kaine (8/30), Pence (11/7)	Erie	3
Allentown	118,032	Kaine (10/26)	Lehigh	15
Pittsburgh	305,704	Clinton-Kaine (7/30, 10/22), Pence (8/9), Kaine (9/5, 10/6), Clinton (11/4, 11/7)	Allegheny	14
Philadelphia	1,526,006	Clinton (8/16, 9/19, 11/5, 11/6, 11/7), Kaine (10/5), Clinton-Kaine (7/29, 10/22)	Philadelphia	2

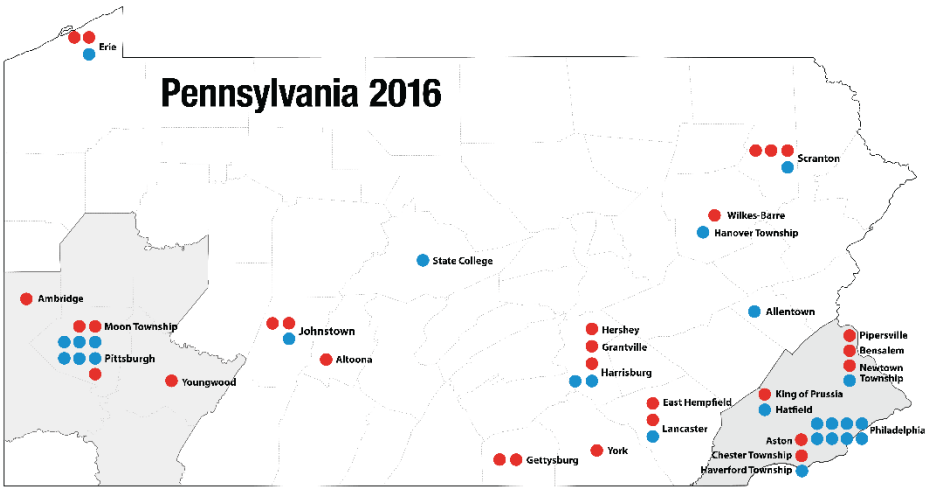


Figure 9.6 Locations of Pennsylvania's 54 events in 2016

Table 9.23 Pennsylvania 2016 outcome

	Republican	Democratic
2 biggest metro areas	40.4%	59.6%
"The T"	61.8%	38.2%
Total	**50.4%**	**49.6%**

Table 9.24 Partisan breakdown of Pennsylvania's 54 events in 2016

	Republican	Democratic	Total
2 biggest metro areas	11	17	28
The T	17	9	26
Total	**28**	**26**	**54**

Illogic of York's concern about densely populated urban centers

One wonders why York expresses concern about the amount of attention received by the half of Pennsylvania's population living in the state's two biggest metro areas, but expresses no similar concern about the essentially equal amount of attention conferred on half of the state's population living outside the biggest metro areas.

Moreover, there is nothing in the provisions of the U.S. Constitution that established the Electoral College and nothing in the state laws that enacted the winner-take-all system that makes any distinction between popular votes cast in "densely populated urban centers," compared to votes cast elsewhere in the state.

2012 Campaign in Pennsylvania

The 2012 presidential campaign in Pennsylvania illustrates another important characteristic of the current state-by-state winner-take-all method of awarding electoral votes—namely that battleground status is fleeting and fickle.

The Democratic ticket was comfortably ahead in Pennsylvania in 2012. In fact, the Obama-Biden ticket ended up winning the state by 323,931 votes—a 54%–46% margin.

An eight percentage-point spread between the top two candidates is the outer boundary at which presidential campaigning usually occurs under the current winner-take-all system. In fact, almost all campaigning takes place in states where the top two candidates are within six percentage points of each other, and the vast majority of that campaigning occurs in states where the spread is considerably less than six percentage points.

Because polling showed that the Democratic ticket was comfortably ahead in Pennsylvania throughout 2012, Pennsylvania received only five of the nation's 253 general-election campaign events in 2012—compared to 54 events in 2016 and 47 events in 2020. That is, Pennsylvania received only about one-tenth of the attention in 2012 that it received in 2016 and 2020.

Pennsylvania's spectator status in 2012 was further evidenced by the fact that neither President Obama nor Vice President Biden bothered to make even one visit to Pennsylvania during the general-election campaign.

As the campaign drew to a close, Governor Romney and Congressman Ryan made five visits to Pennsylvania—four at the very end of the campaign.

The locations of Pennsylvania's five general-election campaign events in 2012—all Republican—are shown in table 9.25.

Table 9.25 Locations of Pennsylvania's five events in 2012

Place	Population	Campaign event	County
Morrisville	8,728	Romney (11/4)	Bucks
Middletown	45,436	Ryan (11/3)	Dauphin
Moon Twp.	24,185	Ryan (10/20)	Allegheny
Wayne	31,531	Romney (9/28)	Delaware
Pittsburgh	305,704	Romney (11/6)	Allegheny

9.8. MYTHS ABOUT RURAL STATES AND RURAL VOTERS

9.8.1. MYTH: Rural states would lose political influence under a national popular vote.

QUICK ANSWER:

- None of the 10 most rural states was a closely divided battleground state in 2020, 2016, or 2012. Political clout in the general-election campaign for President under the current state-by-state winner-take-all method of awarding electoral votes comes from being a closely divided state.
- In contrast, in a national popular vote for President, rural voters would not be siloed by state boundaries. The rural population of the United States is almost exactly equal to the population of the 100 biggest cities. The rural population consists of 59,492,267 people (19.3% of the U.S. population, according to the 2010 census). The population of the 100 biggest cities consists of 59,849,899 people (19.3% of the U.S. population).

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, wrote:

> "**NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas** and in small states."[287] [Emphasis added]

Hans von Spakovsky of the Heritage Foundation has stated:

> "The NPV scheme would … diminish the influence of smaller states and rural areas of the country."[288]

The myth 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.

Rural states have almost no political influence in the general-election campaign for President under the current state-by-state winner-take-all method of awarding electoral votes.

---

[287] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[288] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

The reason is that political clout under the current system comes from being a closely divided state, and rural states are usually one-party states in presidential elections.

The 10 states with the highest percentage of rural residents are:

- Maine–61%[289]
- Vermont–61%
- West Virginia–51%
- Mississippi–51%
- Montana–44%
- Arkansas–44%
- South Dakota–43%
- Kentucky–42%
- Alabama–41%
- North Dakota–40%.

None of the 10 most rural states was a closely divided state in 2020, 2016, or 2012.

Moreover, even if one considers the 20 most rural states, only four were battleground states in 2020, 2016, or 2012, namely New Hampshire (12th most rural), Iowa (13th most rural), North Carolina (16th most rural), and Wisconsin (20th most rural).

In table 9.26:

- Column 2 shows each state's total population.
- Column 3 shows the state's urban-suburban population.
- Column 4 shows the state's rural population.
- Column 5 shows the percentage of the state's population that is rural (column 2 divided by column 4). Nationwide, this percentage is 19.27%.
- Column 6 shows the state's "rural index"—obtained by dividing the state's rural percentage by the overall national rural percentage of 19.27%. An index provides a quick way to compare a state with the nation as a whole. 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. The states appear in the table in descending order based on their "rural index."

In contrast, in a national popular vote for President, voters in rural states would not be siloed by state boundary lines.

The country's rural population is almost exactly equal to the population of the 100 biggest cities.

Specifically, the rural population, as defined by the U.S. Census Bureau, was 59,492,267 people—that is, 19.3% of the country's population of 308,745,538 according to the 2010 census.[290]

---

[289] The state of Maine as a whole has voted Democratic for President since 1992. Maine awards two of its four electoral votes by congressional district. Maine's 2nd district was closely divided in 2016 and 2020. In fact, Donald Trump carried that district in both years.

[290] U.S. Census Bureau. *2010 Census Urban and Rural Classification and Urban Area Criteria*. https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html

Table 9.26 Rural population by state

State	Total population	Urban-suburban population	Rural population	Rural percent	Rural index
Maine	1,328,361	513,542	814,819	61%	318
Vermont	625,741	243,385	382,356	61%	317
West Virginia	1,852,994	902,810	950,184	51%	266
Mississippi	2,967,297	1,464,224	1,503,073	51%	263
Montana	989,415	553,014	436,401	44%	229
Arkansas	2,915,918	1,637,589	1,278,329	44%	228
South Dakota	814,180	461,247	352,933	43%	225
Kentucky	4,339,367	2,533,343	1,806,024	42%	216
Alabama	4,779,736	2,821,804	1,957,932	41%	213
North Dakota	672,591	402,872	269,719	40%	208
New Hampshire	1,316,470	793,872	522,598	40%	206
Iowa	3,046,355	1,950,256	1,096,099	36%	187
Wyoming	563,626	364,993	198,633	35%	183
Alaska	710,231	468,893	241,338	34%	176
North Carolina	9,535,483	6,301,756	3,233,727	34%	176
Oklahoma	3,751,351	2,485,029	1,266,322	34%	175
South Carolina	4,625,364	3,067,809	1,557,555	34%	175
Tennessee	6,346,105	4,213,245	2,132,860	34%	174
Wisconsin	5,686,986	3,989,638	1,697,348	30%	155
Missouri	5,988,927	4,218,371	1,770,556	30%	153
Idaho	1,567,582	1,106,370	461,212	29%	153
Indiana	6,483,802	4,697,100	1,786,702	28%	143
Nebraska	1,826,341	1,335,686	490,655	27%	139
Louisiana	4,533,372	3,317,805	1,215,567	27%	139
Minnesota	5,303,925	3,886,311	1,417,614	27%	139
Kansas	2,853,118	2,116,961	736,157	26%	134
Michigan	9,883,640	7,369,957	2,513,683	25%	132
Georgia	9,687,653	7,272,151	2,415,502	25%	129
Virginia	8,001,024	6,037,094	1,963,930	25%	127
New Mexico	2,059,179	1,594,361	464,818	23%	117
Ohio	11,536,504	8,989,694	2,546,810	22%	115
Pennsylvania	12,702,379	9,991,287	2,711,092	21%	111
Oregon	3,831,074	3,104,382	726,692	19%	98
Delaware	897,934	747,949	149,985	17%	87
Washington	6,724,540	5,651,869	1,072,671	16%	83
Texas	25,145,561	21,298,039	3,847,522	15%	79
Colorado	5,029,196	4,332,761	696,435	14%	72
Maryland	5,773,552	5,034,331	739,221	13%	66
New York	19,378,102	17,028,105	2,349,997	12%	63
Connecticut	3,574,097	3,144,942	429,155	12%	62
Illinois	12,830,632	11,353,553	1,477,079	12%	60
Arizona	6,392,017	5,740,659	651,358	10%	53
Utah	2,763,885	2,503,595	260,290	9%	49
Rhode Island	1,052,567	955,043	97,524	9%	48
Florida	18,801,310	17,139,844	1,661,466	9%	46
Hawaii	1,360,301	1,250,489	109,812	8%	42
Massachusetts	6,547,629	6,021,989	525,640	8%	42
Nevada	2,700,551	2,543,797	156,754	6%	30
New Jersey	8,791,894	8,324,126	467,768	5%	28
California	37,253,956	35,373,606	1,880,350	5%	26
D.C.	601,723	601,723	0	0%	0
Total	**308,745,538**	**249,253,271**	**59,492,267**	**19.27%**	**100**

The 100 biggest cities in the United States had 59,849,899 people—that is, 19.3% of the U.S. population).[291]

The 2020 census confirmed that the country's rural population is almost exactly equal to the population of the 100 biggest cities, as shown by the data in section 9.6.1.

9.9. MYTHS ABOUT ABSOLUTE MAJORITIES AND RUN-OFFS

9.9.1. MYTH: The absence of an absolute majority requirement is a flaw in the Compact.

QUICK ANSWER:

- Neither the current system of electing the President nor the National Popular Vote Compact requires an absolute majority of the popular vote to win. If traditional plurality voting is considered a flaw, the current system has the same flaw.
- No state requires that a candidate receive an absolute majority of its popular vote in order to win the state's electoral votes.
- No federal constitutional provision or law requires that a candidate receive an absolute majority of the national popular vote in order to become President.
- More than a third (16 of 46) of the nation's Presidents came into office without winning an absolute majority of the national popular vote (and five of them came into office without winning the most popular votes nationwide). Lincoln was elected President with 39% of the nationwide popular vote in 1860.
- The vast majority of elective offices in the United States are filled on the basis of winning the most votes (a plurality) rather than an absolute majority.
- This myth about run-offs is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the National Popular Vote Compact on the grounds that it does not require that the winner receive an absolute majority of the popular votes. She told a Delaware Senate committee:

> "The compact … 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**."[292] [Emphasis added]

---

[291] *Wikipedia*. List of United States cities by population. http://en.wikipedia.org/wiki/List_of_United_States_cities_by_population Accessed November 16, 2019.

[292] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

John Samples of the Cato Institute criticizes the Compact by saying:

> "If a plurality suffices for election, **a majority of voters may have chosen someone other than the winner**."[293] [Emphasis added]

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**."[294] [Emphasis added]

These three writers fail to mention that the current system of electing the President is identical to the National Popular Vote Compact in that it uses America's traditional plurality-voting system.

No current federal constitutional provision or law requires that a candidate receive an absolute majority of the national popular vote in order to become President.

No current state law requires that a candidate receive an absolute majority of the state's popular vote in order to win the state's electoral votes.[295]

More than a third (16 of 46) of the nation's Presidents up to 2020 came into office without winning an absolute majority of the national popular vote (and five of them came into office without even winning the most popular votes nationwide):

- John Quincy Adams in 1826
- James Polk in 1844
- Zachary Taylor in 1848
- James Buchanan in 1856
- Abraham Lincoln in 1860
- Rutherford Hayes in 1876
- James Garfield in 1880
- Grover Cleveland in 1884 and 1892
- Benjamin Harrison in 1888
- Woodrow Wilson in 1912 and 1916
- Harry Truman in 1948
- John Kennedy in 1960
- Richard Nixon in 1968
- Bill Clinton in 1992 and 1996
- George W. Bush in 2000
- Donald Trump in 2016.

---

[293] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 2. https://www.cato.org/policy-analysis/critique-national-popular-vote

[294] Hickey, 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.

[295] The two states that use ranked choice voting (RCV) in their presidential election (Maine starting in 2020, and Alaska starting in 2024) do *not* require an absolute majority of their popular vote in order to win their electoral votes. Instead, they require a majority of the ballots expressing a choice at a given state of the RCV tabulation.

Lincoln was elected with 39% of the nationwide popular vote in 1860.

Presidential candidates frequently win a state's electoral votes without receiving an absolute majority of its popular vote.

In 2016, no candidate received an absolute majority of the popular vote in 13 states (almost all of which were the closely divided battleground states that decided the 2016 election).

Donald Trump's percentages of the popular vote in the six states from this group that he carried were:

- Arizona–48%
- Florida–49%
- Michigan–47%
- Pennsylvania–48%
- Utah–45%
- Wisconsin–47%

Hillary Clinton's percentages of the popular vote in the seven states from this group that she carried were:

- Colorado–48%
- Maine–48%
- Minnesota–46%
- Nevada–48%
- New Hampshire–47%
- New Mexico–48%
- Virginia–49.8%

In 1992, no candidate received an absolute majority of the statewide popular vote in 49 of the 50 states.[296]

The public seems content with the plurality-vote system. 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.

Moreover, the vast majority of all other elections in the United States are decided on the basis of winning a plurality of the popular votes (the so-called "first past the post" system) rather than an absolute majority.

Mayoral elections in Richmond, Virginia

We know of only one place in the United States that currently selects its chief executive using an Electoral College type of arrangement.

The Mayor of Richmond Virginia is chosen under a system that resembles the Electoral College in that it applies the winner-take-all rule to districts within the jurisdiction served by the office.

There are nine city-council districts in the city.

---

[296] 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 Richmond City Charter (section 3.01.1) states:

> "In the general election, the person receiving the most votes in each of at least five of the nine city council districts shall be elected mayor. Should no one be elected, then the two persons receiving the highest total of votes city wide shall be considered nominated for a runoff election. … In any such runoff election, write-in votes shall not be counted, and the person receiving the most votes in each of at least five of the nine city council districts shall be elected mayor."[297,298]

9.9.2. MYTH: The absence of a run-off is a flaw in the Compact.

QUICK ANSWER:

- No state requires a run-off when the leading presidential candidate fails to receive an absolute majority of its popular vote.
- No federal constitutional provision or law requires a run-off when the leading presidential candidate fails to receive an absolute majority of the national popular vote.
- The vast majority of elective offices in the United States are filled without a run-off.
- This myth about run-offs is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, complains that the Compact does not require a run-off election when the leading candidate fails to win an absolute majority of the national popular vote:

> "[Under the National Popular Vote Compact] no candidate is required to obtain majority support. [It] does not include a run-off provision. **Electoral votes are given to the winner of any plurality—even a very small one**.[299] [Emphasis added]

Of course, this criticism applies equally to the current system.

No state requires a run-off when the leading presidential candidate fails to receive an absolute majority of its popular vote.

---

[297] Richmond Virginia City Charter. https://law.lis.virginia.gov/charters/richmond/

[298] For a history of this system, see Katta, Venugopal. 2017. Nine Districts: How Richmond came to possess one of America's strangest rules for electing a Mayor. Election Law Society. February 15, 2017. https://stateofelections.pages.wm.edu/2017/02/15/nine-districts-how-richmond-came-to-possess-one-of-americas-strangest-rules-for-electing-a-mayor/

[299] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

Presidential candidates who did not receive an absolute majority of the state's popular vote routinely win a state's electoral votes.

No federal constitutional provision or law requires a run-off when the leading candidate fails to receive an absolute majority of the national popular vote.

After the 1992 election (in which no candidate received an absolute majority of the popular vote in 49 of the 50 states),[300] we cannot recall any demand from legislators, the public, the media, or anyone else for a run-off election.

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).

As for Ross' concern that "Electoral votes are given to the winner of any plurality—even a very small one," the fact is that small pluralities frequently decide the outcome under the current state-by-state winner-take-all method of awarding electoral votes (section 1.3).

For example, George W. Bush received all of Florida's electoral votes (and the presidency) because he received 537 more popular votes than Al Gore in Florida in 2000.

In 2016, Donald Trump received all of the electoral votes of Michigan, Wisconsin, and Pennsylvania by winning pluralities of 10,704 and 22,748 and 44,292 in those states, respectively.

Practical considerations concerning run-off elections

Run-offs, like all election procedures, have advantages and disadvantages.

Run-off elections could tilt the playing field in favor of a candidate who is in a position to come up with significant amounts of additional money on very short notice.

Run-off elections would increase the difficulty and cost of administering elections to some degree. It is already difficult to recruit the mass of citizen volunteers needed to conduct elections. It might be difficult to recruit volunteers on short notice after the first election.

The additional time to conduct a run-off election would be an additional consideration.

Before a run-off election for President could be called, it would be necessary to determine whether the run-off should be held in the first place. That is, it would be necessary to ascertain the results of the first election.

Finalization of the initial count of the first election requires processing all absentee ballots and all provisional ballots (a process that currently takes up to 10 days in some states). It also requires certifying all the local counts to the state official or board that, in turn, certifies the statewide result. This multi-step process typically attracts litigation in close presidential elections.

Then, if the leading candidate's total vote in the first election happens to be close to the threshold for triggering a run-off, there could be a demand for a recount. Such demands typically lead to litigation (from the leading candidate) over whether the requested recount is justified.

---

[300] 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. However, no candidate received an absolute majority of the popular vote in 49 states.

Current federal law specifies that the Electoral College meets on the Tuesday after the second Wednesday in December—42 days after Election Day.

Absent a major streamlining of state election laws and procedures, an identical period (more or less) would be required to reach a final determination of the results of the first election of a two-election process.

At that point, the run-off campaign could commence.

Then, after the run-off, it would seem that a second period of 42 days (more or less) would be required to reach a final determination of the results of the run-off.

If, at some time in the future, the public decides that it wants the benefits of a run-off, ranked choice voting (also aptly referred to as "instant run-off voting") offers a way to build the run-off into the initial election, thereby eliminating many of the disadvantages of a separate run-off election (section 9.27.1).

9.10. MYTHS ABOUT THE PROLIFERATION OF CANDIDATES AND A BREAKDOWN OF THE TWO-PARTY SYSTEM

9.10.1. MYTH: There will be a proliferation of candidates, Presidents being elected with 15% of the popular vote, and a breakdown of the two-party system under the Compact.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for preventing a proliferation of candidates and presidential candidates being elected with as little as 15% of the vote, we would see evidence of these conjectured problems in elections that do not employ an Electoral College type of arrangement. The chief executive of every state is currently elected by popular vote rather than an Electoral College type of arrangement. The evidence shows that 88% of the gubernatorial winners received more than 50% of the vote; 97% of the winners received more than 45%; 99% of the winners received more than 40%; and 100% of the winners received more than 35%.
- Eight states originally had an Electoral College type of arrangement for electing their chief executives but later made the transition to a statewide popular election. The historical record shows no proliferation of candidates, no 15% winners, and no break-down of the two-party system. If an Electoral College type of arrangement were essential for preventing a proliferation of candidates and presidential candidates being elected with as little as 15% of the vote, we would have seen evidence of these conjectured problems in these eight states.
- The two-party system does not owe its existence to the Electoral College or the winner-take-all method of awarding electoral votes. The two-party system first emerged at the national level in 1796. That was 32 years *before* a majority of the states adopted the winner-take-all method.
- Duverger's Law (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. To the contrary, plurality-vote elections sustain and support a two-party system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, speculates that a national popular vote would lead to a proliferation of candidates and Presidents who are elected with a tiny percentage of the vote:

> "[The National Popular Vote Compact] is not even looking for a minimum plurality. Thus, **a candidate could win with only 15 percent of votes nationwide**."[301] [Emphasis added]

Ross has also stated:

> "The most likely consequence of a change to a direct popular vote is the **breakdown of the two-party system**."[302] [Emphasis added]

Hans von Spakovsky of the Heritage Foundation has written:

> "NPV could destabilize America's two-party system."[303]

If an Electoral College type of arrangement were essential for avoiding these conjectured outcomes, we should see evidence of this outcome in elections that do not employ it.

Evidence from plurality-vote popular elections for state chief executive

A nationwide campaign for President would have the same political dynamics as existing campaigns for state chief executive. In both cases, every voter is equal, and the winner is the candidate receiving the most popular votes from the jurisdiction served by the office.

When state chief executives are elected in statewide plurality-vote popular elections, there is no evidence of a proliferation of candidates, candidates winning with 15% of the vote (or any similar small percentage), or a breakdown of the two-party system.

In the 1,027 general elections for Governor in the United States between 1946 and 2015:

- 88% of the winners received more than 50% of the vote (908 out of 1,027).
- 97% of the winners received more than 45% of the vote (1,001 out of 1,027).
- 99% of the winners received more than 40% of the vote (1,013 out of 1,027).
- 100% of the winners received more than 35% of the vote.[304]

Table 9.27 shows the 26 general elections (out of 1,027) for Governor between 1946 and 2014 in which the winner received less than 45% of the popular vote.

As a practical matter, it is generally easier for a minor-party or independent candidate to launch a gubernatorial campaign in a smaller state than a larger state. Indeed, more than half (14 of 26) of the Governors who were elected with less than 45% of the vote in table 9.27 were in states with only three or four electoral votes (Alaska, Hawaii, Idaho,

---

[301] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[302] *Ibid.*

[303] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. Page 9. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[304] FairVote. 2015. *Plurality in Gubernatorial Elections.* http://www.fairvote.org/plurality-in-gubernatorial-elections

Table 9.27 The 26 general elections for Governor between 1946 and 2014 (out of 1,027) 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
40.7%	Gina Raimondo	Rhode Island	2014
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

Maine, New Hampshire, Rhode Island, and Vermont). That fact suggests that there would be fewer such winning candidacies in a larger (that is, nationwide) election.

Evidence from states that made the transition from an electoral college to popular election for Governor

At the time when the U.S. Constitution came into effect in 1789, Governors were elected by popular vote in only five of the original 13 states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).[305]

Seven of the original states had an Electoral College type of arrangement for electing their chief executive—either by means of specially elected gubernatorial electors or an election in which state legislators acted as an electoral college.[306]

---

[305] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Pages xix and xx.

[306] In Pennsylvania, the office of Governor was not created until 1790. Once the office was created in 1790, it was popularly elected.

In six of these seven original states, there was a transition before the Civil War from an Electoral College type of arrangement for electing the state's chief executive to statewide popular elections.[307]

In addition, Kentucky was admitted to the Union in 1792 and subsequently made the transition from an Electoral College type of arrangement for selecting its Governor to popular elections.

These transitions provide further evidence concerning the incorrectness of speculations about popular elections resulting in a proliferation of candidates, candidates being elected with 15% or other small percentages of the popular vote, and the breakdown of the two-party system.

Let's examine what happened in these transitions from an Electoral College type of arrangement to popular elections.

Under the 1792 Kentucky Constitution, the Governor was elected by a state-level electoral college. Seats in the lower house of the legislature were apportioned among the counties on the basis of population.[308] Every four years, the voters of each county were entitled to vote for a number of gubernatorial electors equal to the county's number of members of the legislature's lower house. Each voter[309] was allowed to vote for all of his county's gubernatorial electors—that is, the election of electors was conducted on a countywide winner-take-all basis.[310] The winning gubernatorial electors then met two weeks later to choose the Governor.[311] This state-level electoral college was used to elect the Governor in 1792 and 1796.

When Kentucky's constitution was revised in 1799, the gubernatorial electoral college was abolished and replaced by a statewide popular election for Governor starting in 1800.[312]

Were there any 15% governors after Kentucky transitioned from a gubernatorial electoral college to a popular election for Governor?

In 81% of the subsequent pre-Civil-War gubernatorial elections in Kentucky (that is, 13 of 16 elections), the winning candidate for Governor received more than 50% of the statewide popular vote. The winners of the other three elections received 49%, 39%, and 33%.[313]

---

[307] South Carolina did not make its transition to popular election of the Governor until after the Civil War. South Carolina began popular elections for Governor in its 1865 Reconstruction Constitution. Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 268.

[308] Article I, section 6 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[309] Voters in Kentucky at the time meant "free male inhabitants above the age of 21years."

[310] Article I, section 10 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[311] Article II, section 1 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[312] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 68.

[313] In the 1820 Kentucky gubernatorial race, the winner (John Adair) received 32.8%, and his three opponents received 31.9%, 20.0%, and 15.3%. Curiously, this unusual four-way gubernatorial race occurred at the same time as the so-called "First Party System" at the national level was collapsing and being replaced and by the "Second Party System." The First Party System was characterized by competition between the Federalist

That is, there were no 15% winners after the abolition of Kentucky's electoral college for choosing the Governor. During this period, nine of the 16 elections were two-person races; three were three-person races; two were four-person races; and there was no competition at all in two races.

In Delaware, the transition occurred in 1792. After Delaware's transition, 91% of the pre-Civil-War gubernatorial races (21 of 23) were two-person races, and the winning candidate received between 50.1% and 55.2% of the popular vote. In the two three-person races, the winners each received 48% of the popular vote.[314] That is, there was no proliferation of candidates, and there were no 15% winners.

After Georgia's transition in 1825, 100% of the 18 winners in the pre-Civil-War gubernatorial races received more than 50% of the vote. There were 16 two-person races and two three-person races. Again, there was no proliferation of candidates, and there were no 15% winners.[315]

After North Carolina's transition in 1836, 100% of the 13 winners of the pre-Civil-War gubernatorial races received more than 50% of the vote. All of these general-election races were two-person races (usually between Democrats and Whigs).[316]

After Maryland's transition in 1838, 100% of the six winners of the pre-Civil-War gubernatorial races received more than 50% of the vote.[317] These general-election races were all two-person races (all between Democrats and Whigs).[318]

After New Jersey's transition in 1844, 100% of the seven winners of the pre-Civil-War gubernatorial races received more than 50% of the vote. These general-election races were all two-person races (all between Democrats and Whigs).[319]

After Virginia's transition in 1851, 100% of the three winners of the pre-Civil-War gubernatorial races received more than 50% of the vote.[320] These general-election races were all two-way races.[321]

Table 9.28 shows that 94% of the 86 gubernatorial winners received more than 50% of the vote in the seven states that transitioned from an Electoral College type of arrangement for electing the Governor to statewide popular elections before the Civil War.

Party of John Adams and Alexander Hamilton and the Democratic-Republican Party of Thomas Jefferson, James Monroe, and James Madison. The Second Party System was characterized by competition between the Democratic Party of Andrew Jackson and the Whig Party. The transition between the two regimes manifested itself at the national level in 1824 by the multi-candidate presidential race in which Andrew Jackson received 41% of the recorded national popular vote; John Quincy Adams received 31%; Henry Clay received 13%; and William Crawford received 11%. See Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas.

[314] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Pages 26–28.

[315] *Ibid*. Pages 30–45.

[316] *Ibid*. Pages 181–189.

[317] *Ibid*. Pages 96–98.

[318] *Ibid*. Pages 181–189.

[319] *Ibid*. Pages 96–98.

[320] *Ibid*. Pages 96–98.

[321] *Ibid*. Pages 283–286.

Table 9.28 Winning percentages in gubernatorial races in the seven states that transitioned from an Electoral College type of arrangement to statewide popular election before the Civil War

State	Year	Number of races	Number of winners with less than 50% of popular vote	Number of winners with more than 50% of popular vote	Percentage of winners with more than 50% of popular vote
Delaware	1792	23	2	21	91%
Georgia	1825	18	0	18	100%
Kentucky	1800	16	3	13	81%
Maryland	1838	6	0	6	100%
New Jersey	1844	7	0	7	100%
North Carolina	1836	13	0	13	100%
Virginia	1851	3	0	3	100%
Total		**86**	**5**	**81**	**94%**

Note that this 94% percentage is even higher than the percentage of post-World-War-II gubernatorial races in which the winner won with more than 50% of the popular vote that we mentioned earlier in this section.

In the five races where no candidate received more than 50% of the popular vote, the winning candidates received 48% and 48% in the two Delaware races and 49%, 39%, and 33% in the three Kentucky races. There were no 15% winners.

Table 9.29 shows that 87% of the gubernatorial races were two-person races:

- 2% of the races were uncontested;
- 87% of the races had two candidates;
- 8% of the races had three candidates;
- 2% of the races had four candidates; and
- no races had more than four candidates.

Table 9.29 Number of candidates in gubernatorial races in the seven states that transitioned from an Electoral College type of arrangement to statewide popular election before the Civil War

State	Year	Number of races	Number of races with 1 candidate	Number of races with 2 candidates	Number of races with 3 candidates	Number of races with 4 candidates	Percent of races with 2 candidates
Delaware	1792	23		21	2		87%
Georgia	1825	18		16	2		89%
Kentucky	1800	16	2	9	3	2	56%
Maryland	1838	6		6			100%
New Jersey	1844	7		7			100%
North Carolina	1836	13		13			100%
Virginia	1851	3		3			100%
Total		**86**	**2**	**75**	**7**	**2**	**87%**

The above pattern also applies to the one state that transitioned from an Electoral College type of arrangement to statewide popular election after the Civil War—South Carolina. All of South Carolina's nine gubernatorial elections between 1865 and 1882 were two-person races (so that the winning candidate received more than 50% of the popular vote).[322]

The two-party system does not owe its existence to the Electoral College or the winner-take-all method of awarding electoral votes.

The two-party system first emerged at the national level in 1796—32 years *before* a majority of the states adopted the winner-take-all method of awarding electoral votes.

There were no political parties at the national level in the nation's first and second presidential elections in 1789 and 1792 when George Washington won 100% of the votes in the Electoral College. See sections 2.2 and 2.4.

Because of inevitable differences of opinion on various policy issues, this unanimity ended with the first election in which Washington was not a candidate.

In the 1796 election, the congressional caucus of the Federalist Party and the caucus of the Democratic-Republican Party nominated candidates for President and Vice President. Both national parties ran slates of presidential electors at the state level supporting their nominees (section 2.5).

Given that only three states had winner-take-all laws in the 1789, 1792, and 1796 elections, it can hardly be argued that the Electoral College—much less the winner-take-all method of awarding electoral votes—created the two-party system in the United States.

Duverger's Law

After studying election systems around the world, the French sociologist Maurice Duverger observed and explained the tendency of plurality-vote elections to prevent a proliferation of candidates and to sustain a two-party system.[323]

Duverger observed that voters tend to shy away from parties or candidates who have no chance of winning. Indeed, the effect of voting for a splinter candidate who cannot win is usually to help a candidate whose views are diametrically opposite to the voter's own views.

For example, 97,488 Floridians voted for Green Party presidential candidate Ralph Nader in 2000. George W. Bush carried Florida by a mere 537 popular votes. The votes cast for Nader enabled George W. Bush to win the electoral votes of Florida and thereby win the presidency.[324]

---

[322] After 1882, Jim Crow laws resulted in many general elections for Governor in South Carolina having either one unopposed candidate or one candidate (that is, the Democratic nominee) who received an overwhelming number of votes. In any case, there was no proliferation of candidates, and there were no 15% Governors.

[323] Duverger, Maurice. Political Parties: The Organization and Activity in the Modern State. 1959. New York, NY: John Wiley & Sons. Translated by Barbara and Robert North.

[324] Similarly, in New Hampshire in 2000, Ralph Nader received considerably more votes than the margin between George W. Bush and Al Gore (the second-place candidate in the state).

Similarly, in 2008, votes cast for Bob Barr (the Libertarian presidential candidate) enabled Barack Obama to win North Carolina's electoral votes.[325] In 2008, votes cast for Ralph Nader enabled John McCain to win Missouri's electoral votes.[326]

In 2020, Libertarian presidential candidate Jo Jorgensen received considerably more popular votes in Arizona, Georgia, and Wisconsin than Biden's margin over Trump in these states, as shown in table 9.30.

Table 9.30 Libertarian vote in Arizona, Georgia, and Wisconsin in 2020

State	Electoral Votes	Biden	Trump	Jorgensen	Biden margin over Trump
Arizona	11	1,672,143	1,661,686	51,465	10,457
Georgia	16	2,473,633	2,461,854	62,229	11,779
Wisconsin	10	1,630,866	1,610,184	38,491	20,682
Total	**37**	**5,776,642**	**5,733,724**	**152,185**	**42,918**

Specifically, Jorgensen received more than three times as many votes (152,185) as Biden's combined margin over Trump in the three states (42,918). These three states together possessed 37 electoral votes. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[327]

Because of the severe penalty that plurality voting imposes on third-party and independent candidates, political groups with broadly similar platforms tend to coalesce behind one candidate in order to enable that candidate to win the most votes—and thereby get elected to office.

The result of Duverger's worldwide study of voting systems is often called "Duverger's Law."

9.10.2. MYTH: Spoiler candidates are quarantined by the current system.

QUICK ANSWER:

- Far from quarantining spoiler candidates, the current state-by-state winner-take-all method of awarding electoral votes amplifies the payoff to spoilers and therefore increases the incentive to launch such campaigns.
- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a problem that applies equally to both the current system and the Compact.

[325] In North Carolina in 2008, Bob Barr (the Libertarian candidate) received considerably more votes than the margin between Barack Obama and John McCain (the second-place candidate in the state).

[326] In Missouri in 2008, Ralph Nader received considerably more votes than the margin between John McCain and Barack Obama (the second-place candidate in the state).

[327] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

MORE DETAILED ANSWER:

It has been claimed that:

> "The current system quarantines … spoilers … within a small number of states."[328]

In fact, far from quarantining spoiler candidates, the current state-by-state winner-take-all method of awarding electoral votes greatly increases the payoff to potential spoilers and, therefore, increases their incentive to launch such campaigns.

The current system offers a potential spoiler the alluring prospect of finding one or more states where the spoiler's narrow appeal can flip all of a state's electoral votes and thereby possibly flip the national outcome.

In 2000, for example, George W. Bush won a 537-vote plurality in Florida. Ralph Nader's 97,488 popular votes in Florida in 2000 were more than sufficient to flip all of the state's electoral votes to Bush and thereby decide the presidency in an election in which 105,396,627 votes were cast nationally.[329]

In 2020, Libertarian presidential candidate Jo Jorgensen received considerably more popular votes in Arizona, Georgia, and Wisconsin than Biden's margin over Trump in these states, as shown in table 9.30. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[330]

Segregationist Strom Thurmond had a strong regional appeal and won 38 electoral votes in 1948 by carrying Alabama, Louisiana, Mississippi, and South Carolina.[331] Similarly, segregationist George Wallace won 46 electoral votes in 1968 by carrying Alabama, Arkansas, Georgia, Louisiana, and Mississippi.

In 2024, an NBC News story entitled "Operatives with GOP ties are helping Cornel West get on the ballot in a key state" said:

> "Democrats fear West's potential to siphon votes from President Joe Biden in places where he is on the ballot in a close election, and some Republicans are publicly discussing ways to boost West and other minor candidates like Robert F. Kennedy Jr. and the Green Party's Jill Stein in the hopes of splitting the anti-Donald Trump coalition."[332]

---

[328] One of the authors of this book peer-reviewed an article submitted to an academic journal containing this claim. After receiving the reviewer's comments, the author of the article decided that this claim was false and removed it from the article that was eventually published.

[329] Nader was the most prominent minor-party nominee in the 2000 election. He received far more votes nationally and in Florida than any other minor-party candidate. The Reform Party (whose nominee was Pat Buchanan) was the minor-party that received the second-largest number of votes nationally and in Florida. However, the Reform Party nominee received only 17,484 votes in Florida.

[330] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

[331] In 1948, Thurmond received 37 electoral votes by carrying the four states along with one additional electoral vote from a Democratic elector in Tennessee (section 3.7.6).

[332] Seitz-Wald, Alex. 2024. Operatives with GOP ties are helping Cornel West get on the ballot in a key state. *NBC News*. June 7, 2024. https://www.nbcnews.com/politics/2024-election/operatives-gop-ties-are-helping-cornel-west-get-ballot-key-state-rcna153110

Under the current system, minor-party and independent candidates have significantly affected the outcome in 42% (eight out of 19) of the presidential elections between the end of World War II and 2020 by switching electoral votes from one major-party candidate to another, including:

- Henry Wallace in 1948
- Strom Thurmond in 1948
- George Wallace in 1968
- John Anderson in 1980
- Ross Perot in 1992 and 1996
- Ralph Nader in 2000
- Ralph Nader in 2008
- Bob Barr in 2008
- Gary Johnson in 2016
- Jill Stein in 2016
- Jo Jorgensen in 2020.

The current system also entices potential spoilers with another disproportionate payoff, namely denying an absolute majority of the electoral votes to any candidate. That result would either throw the choice of President into the U.S. House of Representatives or enable the spoiler to use his or her presidential electors to bargain with the major parties. This latter prospect has proven especially alluring to regional candidates, such as segregationist Strom Thurmond (who won 39 electoral votes in 1948 with only 2.4% of the national popular vote) and segregationist George Wallace (who won 46 electoral votes in 1968 with 13.5%).

The National Popular Vote Compact eliminates the possibility of a presidential election being thrown into Congress (section 1.6).

9.11. MYTHS ABOUT EXTREMIST AND REGIONAL CANDIDATES

9.11.1. MYTH: Extremist candidates and radical politics would proliferate under a national popular vote.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential to prevent the election of extremist candidates, then large numbers of extremists would win elections that do not employ an Electoral College type of arrangement (which, of course, includes virtually every other election for public office in the United States).
- After more than two centuries of gubernatorial elections and more than one century of direct election of U.S. Senators, we see no evidence of the emergence of extremist candidates in elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated that the National Popular Vote Compact:

> "could also radicalize American politics."[333]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted that if the President were elected by a national popular vote,

> "extremist candidates could more easily sway an election."[334]

If an Electoral College type of arrangement were essential to prevent the election of extremist candidates, then large numbers of extremists would win elections that do not employ an Electoral College type of arrangement (which, of course, includes virtually every other election for public office in the United States).[335]

At the time the U.S. Constitution came into effect in 1789, Governors were popularly elected in five states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).

Today, all Governors are chosen in elections in which every vote is equal and in which the winner is the candidate receiving the most popular votes.

After over two centuries of actual experience in over 5,000 statewide elections for state chief executive, the radicalization of politics predicted by von Spakovsky and Ross has yet to materialize.

Similarly, U.S. Senators were elected by state legislatures under the original U.S. Constitution. However, since ratification of the 17th Amendment in 1913, U.S. Senators have been elected by the people.

As Neil Peirce wrote in his seminal 1968 book *The People's President: The Electoral College in American History and Direct-Vote Alternative*:

> "If a direct vote really did lead to increased class antagonisms, ideologically oriented campaigns, and a lack of political moderation, we should have seen these factors at work already in the states, where every Governor is chosen today by direct vote of the people. The major states especially could be said to be microcosms of the entire nation. … Yet direct vote has not led to extremism in the states; indeed, the overwhelming majority of U.S. Governors have tended to be practical problem-solvers rather than ideological zealots. Nor has the U.S. Senate become a stomping group for extremists in the wake of the 17th Amendment, which shifted the selection of Senators from state legislatures to direct vote of the people."[336]

Candidates who attempt to win an election have a strong incentive to capture "the

---

[333] Von Spakovsky, Hans. Popular vote scheme. *The Foundry*. October 18, 2011.

[334] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[335] We know of only one other office in the United States that is filled using an Electoral College type of arrangement, namely the Mayor of Richmond Virginia (section 9.9.1).

[336] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 257.

middle" of their electorate. Counting the votes on a nationwide basis (instead of a statewide basis) would not change this imperative.

Given this historical record, there is no reason to expect the emergence of some new and currently unseen political dynamic if the President were elected in the same manner as virtually every other public official in the United States.

Nonetheless, 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 messages to appeal to those 'swing voters,' who by definition are not strong partisans** and thus open to either side."[337] [Emphasis added]

Singal also overlooks the fact that there are millions of "voters in the middle of the political spectrum" in the states that get no attention at all under the current state-by-state winner-take-all method of awarding electoral votes. He provides no reason why these "voters in the middle" would not be similarly "crucial" if the President were elected from a nationwide electorate. What is the justification for making "voters in the middle" in today's spectator states less important than the like-minded voters in battleground states?

The current Electoral College system has produced the same winner as a national popular vote in 54 of the nation's 59 presidential elections. Which of these 54 national popular vote winners were radicals and extremists?

9.11.2. 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.
- After more than two centuries of gubernatorial elections and more than one century of direct election of U.S. Senators, we see no evidence of the emergence of regional candidates or parties in statewide elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes.

---

[337] Singal, Daniel J. The genius of the Electoral College. *Democrat and Chronicle*. Rochester, New York. August 23, 2012.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, raises the following question:

> "What if voters in New York and Massachusetts throw all their weight behind one regional candidate?"[338]

If an Electoral College type of arrangement were essential for avoiding Ross' concern, we would see evidence of regional candidates or parties in elections that do not employ an Electoral College.

When the chief executives of states (that is, Governors) are chosen in elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes, we do not see the emergence of, for example, an Eastern Shore Party in Maryland, an Upper Peninsula Party in Michigan, a Philadelphia Party in Pennsylvania, a Sierra Party in California, an Upstate Party in New York, or a Panhandle Party in Florida.

Similarly, we do not see regional parties nominating candidates to run for the U.S. Senate.

In fact, plurality voting *discourages* the formation of regional parties. The reason is that a vote for a niche candidate usually produces the politically counter-productive effect of electing a candidate whose views are diametrically opposite to those of the voter, as discussed in more detail in the section on Duverger's Law (section 9.10.1).

Ross' criticism of the National Popular Vote Compact concerning regional candidates is an example of a criticism that actually applies more to the current state-by-state winner-take-all method of awarding electoral votes than to a national popular vote for President.

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 every vote is equal and in which the winner is the candidate who receives the most popular votes in the entire jurisdiction involved.

In 1948, Henry Wallace (a leftist candidate for President) and South Carolina Governor Strom Thurmond (a pro-segregation candidate for President) each received 1.2 million popular votes. However, Strom Thurmond (who carried four southern states) won 39 electoral votes in 1948, whereas Henry Wallace (whose support was distributed more evenly throughout the country and therefore carried no states) received no electoral votes.

Ross Perot's percentage of the national popular vote in 1992 was twice the percentage received in 1968 by Alabama Governor George Wallace (a pro-segregation candidate). However, Perot's support was distributed fairly evenly across the country, and he therefore won no electoral votes in 1992. In contrast, George Wallace won 46 electoral votes in 1968 by carrying five southern states (Alabama, Arkansas, Georgia, Louisiana, and Mississippi).

In short, the current state-by-state winner-take-all method of awarding electoral votes perversely discriminates against minor-party and independent candidates who have a broad national base of support, while encouraging regional minor-party candidates.

It gives regional candidacies such as Strom Thurmond and George Wallace the opportunity to affect the national outcome by carrying certain states outright as well as shifting

---

[338] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

electoral votes of other states from one major-party candidate to another. The current system also gives regional candidates the hope of being able either to throw the presidential election into the U.S. House of Representatives or to use their presidential electors to bargain with the major-party candidates before the Electoral College meeting in December.

9.11.3. MYTH: The current system prevents the election of a candidate with heavy support in one region while being strongly opposed elsewhere.

QUICK ANSWER:

- There is nothing in the state-by-state winner-take-all method of awarding electoral votes that prevents the election of a candidate with heavy support in one region while being strongly opposed elsewhere. Indeed, in 1860, Abraham Lincoln won a majority in the Electoral College (and, therefore, the presidency) after receiving 1,855,993 popular votes from the North and a mere 1,887 popular votes from the South.

MORE DETAILED ANSWER:

University of Denver Sturm College of Law Professor Robert Hardaway, author of *The Electoral College and the Constitution: The Case for Preserving Federalism*,[339] has written:

> "**The Electoral College was designed** to ensure that support for any presidential candidate was broad as well as deep; **to prevent, for example, the election of a president who gained an insuperable popular vote margin in but one region of the country**—say the South—even while being opposed in all other regions of the country.[340] [Emphasis added]

There is no federal constitutional or statutory requirement concerning the regional distribution of votes necessary for election to the presidency.

The regional distribution of popular votes among the states is not a precondition for awarding electoral votes under any state's winner-take-all law.

This fact was dramatically illustrated in the 1860 presidential election, when Lincoln received no popular votes (and, of course, no electoral votes) from nine southern states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Texas).[341] Lincoln received a mere 1,887 popular votes from Virginia in 1860.[342]

---

[339] Hardaway, Robert M. 1994. *The Electoral College and the Constitution: The Case for Preserving Federalism*. Westport, CT: Praeger.

[340] Hardaway, Robert M. 2017. The French election shows the risk of abolishing the Electoral College. May 21, 2017. http://historynewsnetwork.org/article/165928

[341] In 1860, South Carolina (the first state to secede from the Union) was the only state in the country where the legislature selected the state's presidential electors. However, if South Carolina voters had been allowed to vote for President, it is unlikely that Lincoln would have received any substantial number of popular votes in that hotbed of secessionism—much less any electoral votes.

[342] Community pressure was the reason why Lincoln received so few popular votes in the southern states. Until the 1890s, voting in the United States was not secret. Moreover, there were no government-printed ballots. Thus, community pressure significantly influenced voting in the days before the secret ballot (the so-called "Australian ballot"). Votes were cast in various ways, including *viva voce* or by the voter depositing a paper

Table 9.31 1860 election results

	Lincoln (R)	Douglas (D)	Breckinridge (SD)	Bell (CU)	EV-R	EV-ND	EV-SD	EV-CU
AL	0	13,618	48,669	27,835			9	
AR	0	5,357	28,732	20,063			4	
FL	0	223	8,277	4,801			3	
GA	0	11,581	52,176	42,960			10	
LA	0	7,625	22,681	20,204			6	
MS	0	3,282	40,768	25,045			7	
NC	0	2,737	48,846	45,129			10	
SC	0	0	0	0			8	
TN	0	11,281	65,097	69,728				12
TX	0	0	47,548	15,438			4	
VA	1,887	16,198	74,325	74,481				15
CA	38,733	37,999	33,969	9,111	4			
CT	43,486	17,364	16,558	3,337	6			
DE	3,822	1,066	7,339	3,888			3	
IL	172,171	160,215	2,331	4,914	11			
IN	139,033	115,509	12,295	5,306	13			
IA	70,302	55,639	1,035	1,763	4			
KY	1,364	25,651	53,143	66,058				12
ME	62,811	29,693	6,368	2,046	8			
MD	2,294	5,966	42,482	41,760			8	
MA	106,684	34,370	6,163	22,331	13			
MI	88,450	64,889	805	405	6			
MN	22,069	11,920	748	0	4			
MO	17,028	58,801	31,362	58,372		9		
NH	37,519	25,887	2,125	412	5			
NJ	58,346	62,869	0	0	4	3		
NY	362,646	312,510	0	0	35			
OH	221,809	187,421	11,303	12,193	23			
OR	5,344	4,131	5,074	212	3			
PA	268,030	16,765	178,871	12,776	27			
RI	12,244	7,707	0	0	4			
VT	33,808	8,649	1,866	217	5			
WI	86,113	65,021	888	161	5			
	1,855,993	**1,381,944**	**851,844**	**590,946**	**180**	**12**	**72**	**39**

Table 9.31 shows that Lincoln received almost no popular votes and no electoral votes from the 11 southern states that later seceded from the Union. The four candidates in that election were:

- Abraham Lincoln (Republican)
- Stephen A. Douglas (northern Democrat)
- John C. Breckenridge (southern Democrat)
- John Bell (Constitutional Union).

The table is arranged so that the 11 Confederate states are at the top. Lincoln won the most popular votes nationwide.

"ticket" (typically printed by the voter's political party in the party's distinctive color) into a glass bowl or ballot box in the full view of observers. See figures 3.6 and 3.7 for examples of such party tickets. See section 3.10 for a discussion of the introduction of government-printed ballots.

He also won the required absolute majority of the electoral votes. The final electoral-vote count was:

- Lincoln (Republican)–180
- Douglas (Northern Democrat)–12
- Breckenridge (Southern Democrat)–72
- Bell (Constitutional Union)–39.

Moreover, almost all presidential elections—both before and after the Civil War—have had a pronounced regional pattern, including most modern presidential elections (as discussed further in the next section).

9.11.4. 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 method of awarding electoral votes does not protect against regionalism.
- In 1888, the state-by-state winner-take-all method of awarding electoral votes gave the presidency to one *regional* candidate (Republican Benjamin Harrison) who received fewer popular votes nationwide rather than another *regional* candidate (Democrat Grover Cleveland) who received more popular votes nationwide.

MORE DETAILED ANSWER:

One of the shortcomings of the state-by-state winner-take-all method of awarding electoral votes is that it is possible for a candidate to win the presidency without winning the most popular votes nationwide.

Of the 59 presidential elections between 1789 and 2020, there have been five elections in which the candidate with the most popular votes nationwide did not win the presidency (table 1.1).

The election of 1888 between Democrat Grover Cleveland and Republican Benjamin Harrison was one such election.

Trent England, Executive Director of Save Our States, 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."[343] [Emphasis added]

Figure 9.7 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 portions of the map represent territories that were not states in 1888.

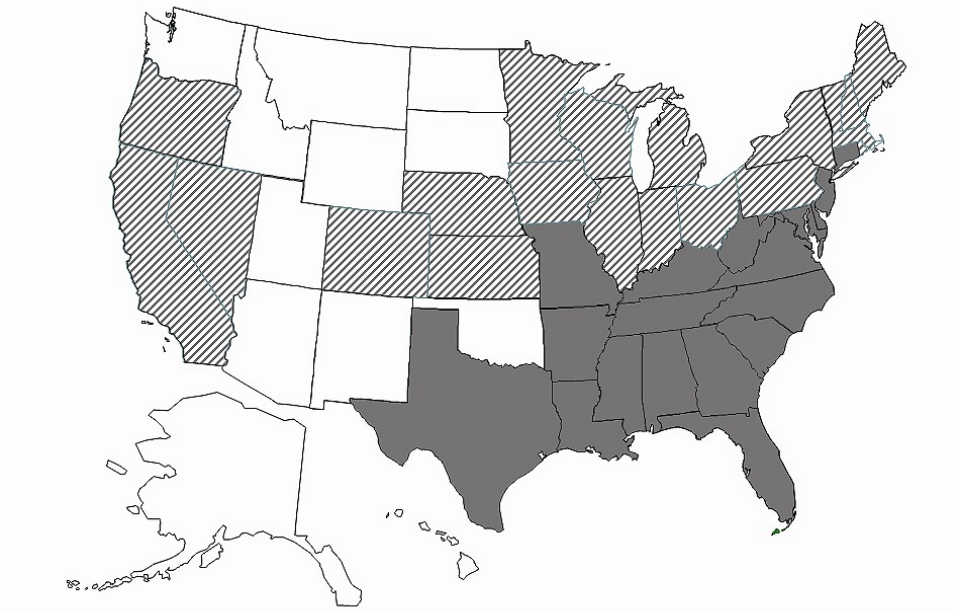


Figure 9.7 Results of 1888 election

It is certainly true that this map shows a regional concentration of states (in black) carried by Grover Cleveland—the candidate who received the most popular votes nationwide.

However, this same map shows a regional concentration of support for the loser of the national popular vote—Benjamin Harrison.

How is "the genius of the Electoral College" demonstrated by giving the presidency to a *regional* second-place candidate (Benjamin Harrison), in preference to a *regional* first-place candidate (Grover Cleveland)?

Moreover, let's look closer at England's assertion that Cleveland was the regional candidate in the 1888 election. Cleveland carried two northern states (namely New Jersey and Connecticut), whereas Harrison carried no southern or border states. That is to say, of the two candidates, Harrison did a manifestly poorer job than Cleveland of reaching across the geographic divisions reminiscent of the recently concluded Civil War.

---

[343] 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/.

As to the actual history of the situation, Cleveland failed to win the Electoral College in 1888 because he lost one state (New York with 36 electoral votes) by the slender margin of 14,373 popular votes. He lost New York because of his intra-party feud with Tammany Hall.

England's claims about the "genius" of the Electoral College are incorrect for an additional reason. Indeed, England did not mention that Cleveland ran for President three times and won the same southern states in all three races.

Cleveland won the presidency in 1884 and then lost it in 1888 solely because of narrow margins in one decisive state—New York.

In 1892, he won the presidency, thanks to winning New York and some other states.

If the "genius" of the state-by-state winner-take-all system is praiseworthy for denying Cleveland the presidency in one election (1888), why does England not criticize that same system for handing him the presidency in two other elections (1884 and 1892)?

Moreover, the regional pattern of the presidential election immediately *before* Cleveland's three runs (that is, 1880) was almost identical to that of the 1888 election.

In figure 9.8, 1880 Democrat Winfield Hancock's states are shown in black, and Republican James Garfield's states are thatched.

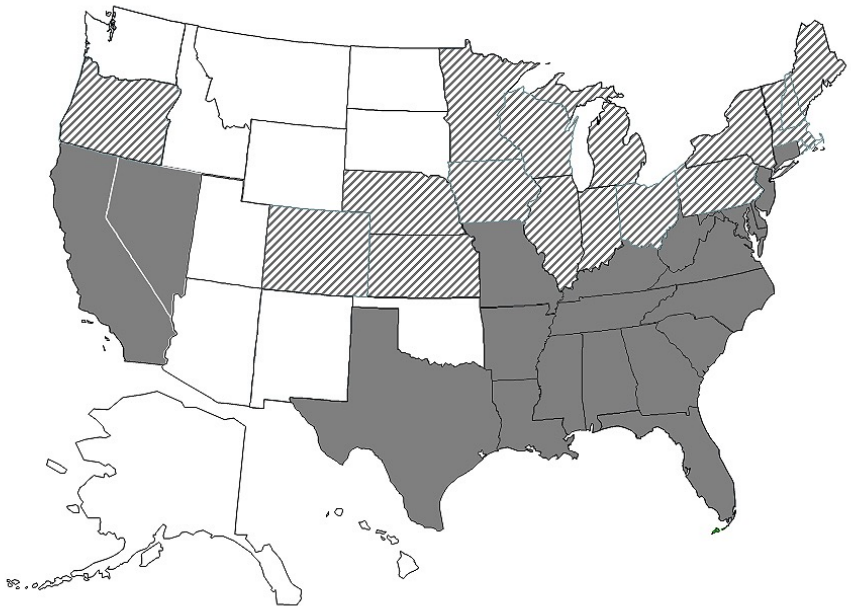


Figure 9.8 Results of 1880 election

How is Trent England's claim that "the Electoral College works as a check against regionalism" illustrated by the election in 1880 of Garfield—a manifestly regional candidate?

In fact, most *pre*-Civil-War elections, starting with the nation's first competitive election in 1796, exhibited a distinctly regional pattern.

Moreover, most *post*-Civil-War elections evidenced a regional pattern similar to that of the 1880 and 1888 elections.

In fact, a comparison of the map for the 2012 presidential election with the maps for 1880 and 1888 shows that regionalism was alive and well in the nation's 57th presidential election.

In figure 9.9, the states that Barack Obama won in 2012 are shown in black, and Republican Mitt Romney's states are thatched.

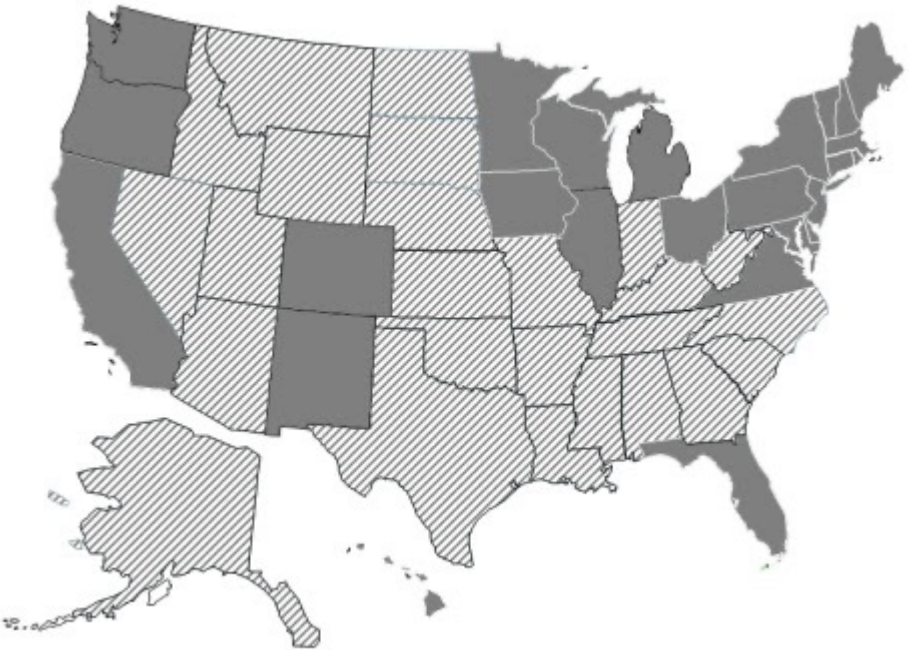


Figure 9.9 Results of 2012 election

Trent England's claim that "the Electoral College works as a check against regionalism" was not true *during* the Gilded Age when Cleveland ran, was not true *before* the Gilded Age, and is not true today.

Finally, let's return to England's claim about radicalism:

> "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**."[344]

Does anyone know of any credible historian or political observer who regards Grover Cleveland as a radical?

[344] *Ibid.*

9.12. MYTHS ABOUT MOB RULE, DEMAGOGUES, AND TYRANNY OF THE MAJORITY

9.12.1. 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 since 1880. If anyone is inclined to use the term "mob" to characterize the American electorate, it is a long-settled fact that the mob already determines the winners in American presidential elections.
- The issue presented by the National Popular Vote Compact is not whether the mob will rule in presidential elections, but whether the mob's votes will be tallied on a state-by-state basis versus a nationwide basis—that is, whether the mob in a handful of closely divided battleground states should be more influential than the mob 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 all the states since 1880.[345]

If anyone is inclined to use the term "mob" to characterize the American electorate, it is a long-settled fact that the mob rules in American presidential elections.

The issue presented by the National Popular Vote Compact is not whether the "mob" will rule in presidential elections, but whether the mob's votes will be tallied on a state-by-state basis versus a nationwide basis.

The National Popular Vote Compact is concerned with the relative importance of popular votes cast in different states for presidential electors. Under the current system, presidential candidates concentrate their attention in the general-election campaign on voters in a handful of closely divided battleground states, while ignoring voters in the remaining states.

The Compact would address this shortcoming 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 rule but whether the mob in a dozen-or-so battleground states should be more important than the mob in the remaining states.

---

[345] In fact, starting with the 1836 election, no more than one state failed to allow the voters to vote for presidential electors. Between 1836 and 1860, South Carolina was the one state whose legislature chose the state's presidential electors. In 1868, the Florida legislature chose the state's presidential electors. The last time presidential electors were chosen by any state legislature was 1876 in Colorado.

9.12.2. MYTH: The Electoral College acts as a buffer against popular passions.

QUICK ANSWER:

- The Electoral College has never operated as a deliberative body or as a buffer against popular passions in its choice for President.
- 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 method of awarding electoral votes or the national popular vote.

MORE DETAILED ANSWER:

This myth apparently originates from the failure (by some) to realize that the Electoral College has never acted as a buffer against popular passions.

It is true that the Founding Fathers envisioned that the Electoral College would consist of "wise men" (and they meant *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."[346] [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**."[347] [Emphasis added]

The vision of the Founding Fathers for a deliberative Electoral College was never realized in practice—primarily because the Founders did not anticipate the emergence of political parties.

In the nation's first two presidential elections (1789 and 1792), the Electoral College *did not* act as a deliberative body or as a buffer against popular passions. Instead, it acted in harmony with the virtually unanimous nationwide consensus favoring George Washington as President.

---

[346] The Powers of the Senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

[347] Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

As soon as George Washington announced that he would not run for a third term as President in 1796, a competition for power emerged between two parties holding opposing views about how the country should be governed.

As a result, in 1796, the Federalists and the Republicans nominated presidential candidates at caucuses composed of each party's members of Congress.

Given that the President and Vice President were to be elected by the Electoral College, as soon as there were centrally designated nominees, each party presented the public with its list of candidates for presidential elector. These elector candidates made it known that they intended to act as willing rubber stamps for their party's nominees. They made their intentions known by means of advertisements in newspapers, public statements, and having their names appear on their party's printed lists of elector candidates.

In short, neither party wanted the Electoral College to act as a deliberative body in 1796, because each wanted to elect their nominees for President and Vice President (section 2.5).

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 their political party (section 3.7).

That is, the Electoral College does not, as a practical matter, act as a deliberative body or 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 presidential electors are elected on the basis of the state-by-state winner-take-all rule or the national popular vote.

9.12.3. MYTH: The Electoral College would prevent a demagogue from coming to power.

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the position 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—regardless of whether its members are elected under the state-by-state winner-take-all method of awarding electoral votes or a national 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:

A Georgia state legislator wrote one of his constituents in 2023:

> "The reason for the creation of the Electoral College by our founding fathers and its inclusion in the constitution is to have a means of preventing a populist

> 'man on a horse,' who makes wild appeals to the emotions of the voters of the nation from becoming the President of the United States. It is a safeguard that our founders felt to be most important. I agree with them."[348]

There is nothing about the state-by-state winner-take-all method of awarding electoral votes that favors or impedes demagogues.

Presidential electors are loyal supporters of the nominee of their political party.

There is no reason to think that presidential electors nominated by a demagogue's political party would be less loyal to their party's nominee than a presidential elector representing a non-demagogic candidate. If anything, presidential electors nominated by a demagogue's party would probably likely be more fiercely loyal to their candidate.

Thus, it is unlikely that the current Electoral College system could prevent a demagogue from being elected President—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.

The National Popular Vote Compact would not abolish the position of presidential elector or the Electoral College. Thus, there would be no reduction in whatever protection (if indeed there is any) that the current structure of the Electoral College might offer in terms of preventing a demagogue from coming to power.

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. However, if they were to do so, there is no reason to think that the Electoral College or winner-take-all method of awarding electoral votes would save the voters from themselves.

Likewise, there is no reason to think that a nationwide popular vote would necessarily save the voters from themselves.

Ultimately, it is the responsibility of the voters to ensure that no demagogue becomes President of the United States.

9.12.4. MYTH: Hitler came to power by a national popular vote.

QUICK ANSWER:

- Adolf Hitler did not come to power in Germany as a result of winning the nationwide popular vote or by winning a majority of seats in Parliament.

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 Electoral College method of electing the President would prevent a similar demagogue from coming to power in the United States.[349]

---

[348] Email forwarded to National Popular Vote by a Georgia voter. May 11, 2023.

[349] 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, D.C. The debaters included Vermont State Representative Chris Pearson, Professor Curtis Gans, and Dr. John R. Koza (chair of National Popular Vote).

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 margin when he ran for the presidency of the Weimar Republic in 1932.

Specifically, in the March 13, 1932, election for President, the results were:

- Hindenburg (the incumbent)—49.6%
- Hitler (National Socialist)—30.1%
- Thälmann (Communist)—13.2%
- Duesterberg (Nationalist)—6.8%.[350]

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%
- Thälmann (Communist)—10.2%.

On July 31, 1932, parliamentary elections were held in Germany. At that time, 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 parliamentary majority.

On November 6, 1932, another parliamentary election was held, and Hitler's party lost ground. Its number of seats was reduced to 196 seats out of 608 in the Reichstag.

Despite the voters' rejection of Hitler in the April 1932 presidential election, despite their rejection of his party in the July 1932 parliamentary elections, and despite the decline of his party in the November 1932 parliamentary elections, a backroom political deal was orchestrated in January 1933 by power brokers who (quite mistakenly) thought they could control Hitler.

As part of this deal, President Hindenburg appointed Adolf Hitler as Chancellor of Germany on January 30, 1933.

Once in power as Chancellor, Hitler quickly used his position (and, in particular, the control over the police that he acquired as part of the deal) to establish a one-party dictatorship in Germany.

9.12.5. MYTH: The current system 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."

---

[350] Shirer, William L. 1960. *The Rise and Fall of the Third Reich.* New York, NY: Simon and Shuster.

- 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.
- It is impossible to discern any specific threat of "tyranny of the majority" that was posed by the first-place candidates in the five elections in which the Electoral College elevated the second-place candidate to the presidency (1824, 1876, 1888, 2000, and 2016).

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation 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."[351]

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**."[352] [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.

---

[351] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[352] 41 *Annals of Congress* 169. February 3, 1824. https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=041/llac041.db&recNum=2

In each of the six presidential elections between 2000 and 2020, the current system prevented 44% to 46% of the nation's voters from helping their candidate in the decisive stage of the selection process—that is, in the Electoral College. For example, in 2020, the winner-take-all rule resulted in 68,942,639 voters being zeroed out at the state level—44% out of the nation's 158,224,999 voters. This issue is discussed in greater detail in section 1.7.

Five elections in which the second-place candidate became President

If the winner-take-all rule protects the nation against a "tyranny of the majority," it would be appropriate to inquire as to what specific threat of "tyranny" was posed by the first-place candidate in the five elections in which the Electoral College elevated the second-place candidate (1824, 1876, 1888, 2000, and 2016).

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)?

If Andrew Jackson presented the threat of "tyranny" in 1824 (when the Electoral College system denied him the presidency), why did he not present an equal threat in 1828 and 1832 (when he *was* elected by the Electoral College)?

Constitutional protections against tyranny of the majority

The U.S. Constitution provides multiple protections against a "tyranny of the majority."

First, there are numerous protections of individual rights contained in specific clauses of the Constitution, such as 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. Numerous additional protections were added by the Bill of Rights.

Second, an independent judiciary provides significant protection against "tyranny of the majority."

Third, the division of the federal government into three independent branches (legislative, executive, and judicial) provides additional protection against a "tyranny of the majority."

Fourth, 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 explained 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."[353] [Emphasis added]

[353] 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.*

In the words of President Theodore Roosevelt:

> "If the minority is as powerful as the majority, there is no use of having political contests at all, for there is no use in having a majority."[354]

9.13. MYTHS ABOUT CAMPAIGNS

9.13.1. MYTH: Campaign spending would skyrocket if candidates had to campaign in every state.

QUICK ANSWER:

- Presidential candidates make every effort to raise as much money for their campaigns as they can from donors throughout the country. The total amount of money that is spent on presidential campaigns is controlled by the amount of money that is available—not by the (virtually unlimited) number of opportunities to spend money.
- 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 three out of four states and three out of four voters get virtually no attention.
- 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 could. The mere existence of three dozen additional states where a candidate should campaign in order to win a nationwide election would not, in itself, generate any additional money. However, in a nationwide election, candidates would have to allocate the available money among all the states rather than to just a dozen-or-so closely divided battleground states.

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.

---

[354] Theodore Roosevelt, Address to the Federal Club, New York City, March 6, 1891. In Hagedorn, Hermann (editor). 1926. *The Works of Theodore Roosevelt*. Volume 14. Page 129.

Second, after a campaign organization ascertains how much money it has available, it engages in a resource-allocation process in order to decide how to spend the money in the most advantageous way.

Today, the controlling factor in allocating resources is the state-by-state winner-take-all method of awarding electoral votes. Under the current system, campaigns concentrate their spending on a handful of closely divided states and ignore the remaining 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.

For example, under the current system:

- 98% of the ad spending in 2012 was spent in 12 states (table 1.12).
- 99.75% of the ad spending in 2008 was spent in 16 states (table 1.16).

The National Popular Vote Compact would not increase the total number of dollars available from donors.

Under both the current state-by-state system and a national-popular-vote system, candidates would raise as much money as they possibly could from donors throughout the country.

However, once the money is raised, the resource-allocation process would be very different in a nationwide presidential election than under the current system. The reason is that every voter in every state and the District of Columbia would matter in a nationwide election. The available money would necessarily be allocated much more broadly than is the case today. Of course, for any given amount of available money, it would be impossible to run a campaign in every state at the same per-capita level of intensity as recent campaigns in the dozen-or-so battleground states.

Consider Ohio and Illinois in 2008. Both states had 20 electoral votes at the time. However, Ohio was a closely divided state at the time, while Illinois was a safely Democratic state. Ohio received $16,845,415 in advertising (table 1.16), whereas Illinois received only $53,896 in advertising. Ohio also received 62 of the 300 general-election campaign events (table 1.15), while Illinois received none. That is, under the current state-by-state winner-take-all system, Illinois was almost totally ignored, while Ohio received an enormous amount of attention in the general-election campaign.

In contrast, in a nationwide vote for President, it would be suicidal for a presidential campaign to ignore Illinois. Some of the available pool of money would necessarily be reallocated to Illinois, because a voter in Illinois would be just as valuable as a voter in Ohio under the Compact. The likely result would be that Ohio and Illinois would receive approximately equal attention, 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 battleground states, because people in those states know that their votes and those of their neighbors matter. However, in the spectator states, there is no significant grassroots campaigning for President under the current system (except for the relatively small number of people who make phone calls into battleground states or physically travel to battleground states in order to campaign). Under a national popular vote, campaigning would become worthwhile in every state. Increased volunteer activity could partially counter the effect of large donations in political campaigns.

9.13.2. MYTH: The length of presidential campaigns would increase if candidates had to travel to every state.

QUICK ANSWER:

- Critics of a national popular vote for President argue that the length of the general-election campaign for President would have to be increased if candidates had to "travel to 50 states to court voters."
- In fact, there is plenty of time between the late-summer nominating conventions and Election Day to conduct a nationwide campaign for President. For example, in 2016, the major-party presidential and vice-presidential candidates conducted 399 general-election campaign events. Because of the current state-by-state winner-take-all method of awarding electoral votes, the candidates allocated two-thirds of these 399 visits to just seven states. The effect of the National Popular Vote Compact would be that candidates would have to allocate their campaigning time differently from how they do under the current system. Every voter in every state would be equally important in a nationwide presidential election. When every voter is equally important, those same 399 visits could be—and necessarily would be—spread over the entire country.

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."[355] [Emphasis added]

As Hickey correctly points out, the National Popular Vote Compact would force presidential candidates to "travel to 50 states to court voters."

Indeed, we view that as a highly desirable feature—not a bug—of a national popular vote for President.

In 2016, the major-party presidential and vice-presidential candidates conducted 399 general-election campaign events.[356] Because of the current state-by-state winner-take-all method of awarding electoral votes, almost four-fifths (79%) of all the campaign events (315 of 399) took place in eight states:

---

[355] Hickey, 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 .

[356] Because of the COVID pandemic, there was an unusually low number (212) of general-election campaign events in 2020.

- Florida–71 events
- North Carolina–55 events
- Pennsylvania–54 events
- Ohio–48 events
- Virginia–23 events
- Michigan–22 events
- Iowa–21 events
- New Hampshire–21 events.

There is no reason that candidates could not have distributed these 399 campaign visits across all 50 states, instead of concentrating them in a small number of states. Planes, trains, and automobiles enable candidates to easily travel to any part of the county.

In fact, on a typical day during the fall general-election campaign, presidential candidates typically travel from one end of the country to the other in order to maximize the number of appearances (and attendant local media coverage) on a given day.

More than a half century ago, during the 1960 general-election campaign, Vice President Richard M. Nixon personally campaigned in all 50 states, and Senator John F. Kennedy did so in 43 states in the period between August 1 and November 7 (as shown in table 1.30).

The effect of a national popular vote for President would be that candidates would have to allocate their campaigning visits differently from how they do under the current system.

Every voter in every state would be equally important in every presidential election under the National Popular Vote Compact. If every voter were equally important, those same 399 visits could be—and necessarily would be—allocated throughout the entire country.

Although one cannot predict exactly how a future presidential campaign might unfold under the National Popular Vote Compact, it is likely that presidential candidates would distribute their limited number of campaign events among the states roughly in proportion to population (as shown in table 8.38 and figure 8.11).

9.13.3. MYTH: It is physically impossible to conduct a campaign in every state.

QUICK ANSWER:

- The average number of general-election campaign events in the six presidential elections between 2000 and 2020 was 339.
- There is no physical reason why presidential candidates could not allocate the number of visits that they currently make to include all 50 states.

MORE DETAILED ANSWER:

Nevada Senator Keith Pickard told the Nevada Senate Committee on Legislative Operations and Elections on April 24, 2019, that it is:

> "impossible physically to do a 50-state campaign."

Table 8.37 shows the number of general-election campaign events for the major-party nominees for President and Vice President for the six presidential elections between 2000 and 2020. The average number of general-election campaign events in these six presidential elections was 339.[357]

Planes, trains, and automobiles enable candidates to easily travel to any part of the country. There is no physical reason why presidential and vice-presidential candidates could not visit all 50 states during the general-election campaign period starting after the national nominating conventions.

Let's suppose that a future presidential campaign consists of the same number of general-election campaign events as 2016 (that is, 399).

If the country's population (331,449,281 according to the 2020 census) is divided by 399, the result is one general-election campaign event for every 830,700 people.

In a nationwide popular vote for President, every vote would be equal, and the candidate receiving the most votes would win. Thus, a voter in one state would be just as important as a voter in any other state.

Table 8.38 and figure 8.11 show how 399 campaign events would be distributed among the states if candidates were to allocate their campaign events on the basis of population. That is, the number of campaign events for each state (shown in column 3) is obtained by dividing each state's population by 830,700 and rounding off. For purposes of comparison, column 4 shows the actual distribution of 399 general-election campaign events that each state received in 2016 under the current state-by-state winner-take-all system.

As can be seen in the figure and table, every state would receive some attention in a nationwide campaign with 399 general-election campaign events—that is, there would be a 50-state campaign for President.

9.13.4. MYTH: The effects of hurricanes and bad weather are minimized by the current system.

QUICK ANSWER:

- Under the current state-by-state winner-take-all system, 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 would be unlikely to materially affect the outcome of a nationwide vote for President.
- A national popular vote for President would reduce the likelihood of bad weather changing the national outcome of a presidential election.

[357] Note that this six-election average of 339 general-election campaign events reflects the impact of the COVID pandemic, which substantially reduced the number of campaign events in 2020 to only 212—about half of the 399 events in 2016.

MORE DETAILED ANSWER:

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**."[358] [Emphasis added]

The current state-by-state winner-take-all system does indeed ensure that a state affected by turnout-depressing weather (such as a hurricane) would nonetheless cast its *full number* of electoral votes in the Electoral College.

However, under the winner-take-all system, those electoral votes may be cast in a very different way because of the changed turnout.

Under the current system, a small difference in turnout (caused by bad weather or any other factor) in one part of a closely divided state can potentially flip the state's electoral-vote outcome—and thereby also potentially determine the national outcome of a presidential election.

In contrast, a localized reduction in turnout in one part of one state would be 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 Chicago and Detroit on Election Day in 1960. As 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."[359] [Emphasis added]

Similarly, bad weather in a part of a closely divided state frequently affects which candidate carries the state in a state or federal 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 were to occur on or shortly before Election Day.

For example, the disposition of North Carolina's entire bloc of 15 electoral votes was decided by President Obama's statewide plurality of 14,177 popular votes in 2008.

Table 9.32 shows that 14 of the 17 counties on North Carolina's Atlantic coast voted heavily Republican in the 2008 presidential election. As can been seen from the table, John

---

[358] Dobracki, Thaddeus. *The Morning Call*. September 21, 2012. http://discussions.mcall.com/20/allnews/mc-electoral-college-madonna-young-yv--20120920/10?page=2

[359] White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 7.

Table 9.32 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**

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 bloc of 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 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—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 2012.[360]

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. It was the site of the 2012 Republican National Convention. Hurricanes frequently hit Florida's west coast. In the November 2000 presidential election, George W. Bush received 180,794 votes in Hillsborough County, compared 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

[360] See the tabulation of statewide polls at the web site using the Gott-Colley median method of analyzing poll statistics at http://www.colleyrankings.com/election2012/

had even slightly depressed turnout in Hillsborough County on Election Day in November 2000, all of Florida's electoral votes would have gone to Al Gore (giving him all of Florida's 25 electoral votes and making him President).

Conversely, if bad weather were to depress turnout in the more Democratic counties (such as Miami-Dade, Broward, and Palm Beach) in southeastern Florida, the Republican presidential nominee would benefit.

It does not take an event as dramatic as a hurricane to change the outcome of a presidential election. For example, there is evidence that rain in part of Florida decided the national outcome of the 2000 presidential election (section 1.3.3).

9.13.5. MYTH: Plutocrats could cynically manipulate voter passions under the Compact.

QUICK ANSWER:

- Plutocrats can fund and manipulate election campaigns regardless of whether electoral votes are awarded on a state-by-state winner-take-all basis or a nationwide basis.

MORE DETAILED ANSWER:

Bill Cibes submitted written testimony to a Connecticut legislative committee in 2013, saying:

> "The NPV Compact would greatly enhance the influence of plutocrats who can afford to buy national advertising to cynically manipulate the passions of a nationwide electorate. Rich individuals, corporations and businesses, under the *Citizens United* decision, can now fund ideological propaganda that can sway the national popular vote."[361]

Plutocrats can fund and manipulate campaigns regardless of whether electoral votes are awarded on a state-by-state winner-take-all basis or a nationwide basis.

9.13.6. MYTH: Presidential campaigns would become media campaigns because of the Compact.

QUICK ANSWER:

- All presidential campaigns will be predominantly media campaigns, regardless of whether the target audience consists of the 60 to 95 million people living in the handful of closely divided battleground states or the 330 million people living in the entire country.
- A national popular vote for President might somewhat reduce the media's role, because it would make grassroots activity worthwhile in the 38-or-so states

[361] Cibes, Bill. 2013. Testimony at hearing of Connecticut Committee on Government, Administration, and Elections. February 25, 2013.

that are totally ignored under the current state-by-state winner-take-all method of awarding electoral votes.

- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a problem that applies equally to both the current system and the Compact.

MORE DETAILED ANSWER:

David Davenport, a defender of the current state-by-state winner-take-all method of awarding electoral votes, wrote in the *Washington Examiner* in 2018:

> "How would [candidates] campaign if there were only a national popular vote? They … **appear on popular media**. It is hard to say that this is a preferable campaign."[362] [Emphasis added]

Curtis Gans and Leslie Francis wrote in 2012:

> "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 grassroots activity.**[363] [Emphasis added]

These criticisms of a national popular vote for President ignore the fact that, in a country with 330 million people, all presidential campaigns will be predominantly media campaigns.

This will be the case regardless of whether the target audience consists of the 60 to 95 million people living in the handful of closely divided battleground states or the 330 million people living in the entire United States.

Gans and Francis say that there would be "little impetus for grassroots activity" in a national popular vote for President. However, a nationwide campaign for President would make grassroots activity worthwhile in the spectator states that are ignored under the current state-by-state winner-take-all system. Thus, a national popular vote for President would slightly reduce the media's role in the campaign.

---

[362] Davenport, David. 2018. Connecticut joins the quiet campaign to undermine constitutional presidential elections. *Washington Examiner*. May 21, 2018. https://www.washingtonexaminer.com/opinion/connecticut-joins-the-quiet-campaign-to-undermine-constitutional-presidential-elections

[363] Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

9.13.7. MYTH: Candidates would concentrate on metropolitan markets because of lower television advertising costs.

QUICK ANSWER:

- The cost per impression of television advertising (the costliest component of presidential campaigns) is generally considerably 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**."[364] [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."[365] [Emphasis added]

The arguments made by both Samples and Uhlmann are contrary to the facts.

The cost of television advertising (by far the costliest component of presidential campaigns) is generally considerably *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.

---

[364] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 12. https://www.cato.org/policy-analysis/critique-national-popular-vote

[365] 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 currently Executive Director of Save Our States). The event was moderated by Sutherland President Paul T. Mero.

Table 9.33 Television ads in New York City—the nation's No. 1 media market—averaged 5.19 cents per impression.

Station	Time	Program	Rating	Share	Gross rating points	Cost	Cost per 1,000
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	Sat 8–11	ABC College Football	1	3.8%	2	$24,011	$74.53
WABC	Sun 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	Sat 9–10	Dateline	1	3.6%	2	$15,007	$49.02
WNBC	Sun 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	Sta 9–10	Average	2.2	7.9%	4.4	$13,006	$19.40
WCBS	Sun 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	Sat 8–10	Friends	0.2	0.9%	0.4	$17,008	$223.68
WPIX	Sun 8–10	Seinfeld	0.3	0.9%	0.6	$17,008	$173.47
		Total			**155.8**	**$1,241,558**	**$51.90**

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 9.33 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 rating,[366] share, and gross rating points (GRP), respectively, for adults 18 and older. Column 7 shows the

[366] The Nielsen "Live+3" ratings track both live airings and DVR playback (through 3:00 A.M.). Based on November 2011 DMA.

Table 9.34 Television ads in Indianapolis—the nation's No. 26 media market—averaged 3.98 cents per impression.

Station	Time	Program	Rating	Share	Gross rating points	Cost	Cost per 1,000
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	Sat 8–11	Saturday Movie	2.7	7.1%	5.4	$4,802	$42.86
WRTV	Sun 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 of Interest–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	Sun 9–10	The Good Wife	7	11.7%	14	$7,003	$23.81
WTTV+S2	M–Sun 8–11	Average	1.2	2.6%	16.8	$7,003	$19.23
		Total			**215.2**	**$178,480**	**$39.80**

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—that is, 5.19 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.

Table 9.34 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—3.98 cents per impression.

Table 9.35 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 is $30.84 per 1,000 impressions—3.084 cents per impression.

Soliciting every available vote is a strategic necessity when the winner of an election is the candidate who receives the most popular votes.

Table 9.35 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 1,000
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
	Sun 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 Suspect–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	How I Met Your Mother–CBS/ 2 Broke Girls–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 of Interest–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	Sat 9–10	48 Hour Mystery	4.5	12.7%	9	$1,000	$19.23
KFSM	Sun9–10	The Mentalist	6.5	15.8%	13	$1,901	$25.68
		Total			**193.8**	**$34,435**	**$30.84**

An NPR story entitled "Ads Slice Up Swing States with Growing Precision" reported on presidential campaigning in small media markets:

> "'**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."
>
> "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.'"[367] [Emphasis added]

[367] 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

9.14. MYTHS ABOUT FAITHLESS PRESIDENTIAL ELECTORS

9.14.1. MYTH: Faithless presidential electors would be a problem under the Compact.

QUICK ANSWER:

- Faithless electors have never changed the outcome of a presidential election. There have been 24,068 electoral votes cast for President in the nation's 59 presidential elections between 1789 and 2020. Samuel Miles' vote in 1796 for Thomas Jefferson was the only instance when a presidential elector might have thought—at the time that he cast his vote—that he might affect the national outcome for President.
- To the extent that anyone believes that faithless electors are a practical problem, the U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that the states have constitutional authority to remedy it. In fact, many states have adopted the Uniform Faithful Presidential Electors Act or versions of it. Moreover, the major political parties have been more diligent than ever (particularly since 2016) in nominating reliable presidential electors.
- The National Popular Vote Compact would virtually eliminate the (already small) possibility of faithless electors actually affecting the outcome of a presidential election, because the Compact would typically generate a significant exaggerated margin of victory in the Electoral College for the national popular vote winner.
- This myth about faithless electors is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is at least equal (and arguably superior) to the current system.

MORE DETAILED ANSWER:

The Founding Fathers envisioned that the presidential electors would be outstanding citizens who would exercise independent judgment in choosing the best person to become President.

However, the Founders' expectations were almost immediately dashed with the emergence of political parties in the nation's first contested presidential election in 1796.

Since 1796, presidential electors have been party stalwarts nominated by their party to cast their vote in the Electoral College for their party's nominee. That is, presidential electors are willing rubber stamps for their party's nominee for President (section 2.5).

Faithless electors have never changed the outcome of a presidential election. There have been 24,068 electoral votes cast for President in the nation's 59 presidential elections between 1789 and 2020.

Samuel Miles' vote in the Electoral College for Thomas Jefferson in 1796 was the only instance when a presidential elector might have thought—at the time that he cast his vote—that his vote might affect the national outcome for President (section 3.7.7).

As the U.S. Supreme Court said in *Chiafalo v. Washington*:

> "Faithless votes have never come close to affecting an outcome."[368]

Nonetheless, the theoretical possibility of faithless electors exists under *both* the current system and the National Popular Vote Compact.[369]

To the extent that anyone believes that faithless electors are a practical problem, the U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that the states have constitutional authority to remedy it.

In fact, many states have adopted the Uniform Faithful Presidential Electors Act or versions of it—both before and since *Chiafalo*.

Moreover, the major political parties have been more diligent than ever (particularly since 2016) in nominating reliable presidential electors.[370]

The National Popular Vote Compact is actually superior to the current system in that it reduces the likelihood that a wayward elector would ever impact the ultimate outcome. Under the Compact, the national popular vote winner would generally receive an exaggerated margin of the votes in the Electoral College in any given presidential election. 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 would receive at least 270 electoral votes from the states belonging to the Compact. Then, beyond that guaranteed minimum bloc of 270 electoral votes, the national popular vote winner would generally receive *additional* electoral votes from whichever non-compacting states he or she happened to carry (under existing statutes in those states).

For example, if the compacting states were to possess 270 electoral votes, and if the 268 electoral votes possessed by the non-compacting states were equally divided between the two major-party candidates, the national popular vote winner could receive an additional 134 electoral votes (that is, a grand total of 404 out of 538 electoral votes). The cushion created by these additional electoral votes would make it even less likely that faithless electors could affect the outcome of a presidential election.

9.14.2. MYTH: It might be difficult to coerce presidential electors to vote for the nationwide 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) results in the election to the

---

[368] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 17 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

[369] For example, in September 2012, three Republican electors (who had favored Ron Paul during that year's fight for the party's nomination) publicly raised doubt as to their loyalty to Mitt Romney, the eventual Republican presidential nominee. See Baker, Mike. Three Electoral College members may pass on GOP ticket. *Associated Press*. September 12, 2012.

[370] Washington State passed a version of the Uniform Faithful Presidential Electors Act in 2019—that is, after the 2016 election, but before the U.S. Supreme Court case decided in July 2020.

> Electoral College of presidential electors who are avid supporters of the national popular vote winner. The Compact does not depend on any presidential elector voting contrary to his or her own preference and conscience.

MORE DETAILED ANSWER:

In a 2022 article, William Josephson, an opponent of the National Popular Vote Compact, raised the following question based on the hypothesis that the Compact was in effect for the 2024 presidential election and that Donald Trump was a candidate:

> "Assume that new NPV states are added to the existing NPV states to constitute an elector majority. Further assume that President Trump runs for President as the Republican candidate in 2024 and wins the popular vote but not an elector majority. **How likely is it that electors in Blue NPV states**, like California and New York, all of which probably would not have voted for President Trump, would, as required by the NPV, **actually cast their elector votes for President Trump**?"[371] [Emphasis added]

Josephson's scenario is based on a total misunderstanding of how the Compact would operate.

The U.S. Constitution says:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[372]

The National Popular Compact is a state law that expresses the state's choice as to the "manner" of appointing its presidential electors.

The Compact specifies that the winning candidates for presidential elector in each member state will be the persons who have been nominated in that state *in association with* the national popular vote winner.

That is, a state's presidential electors will be from the same political party as the candidate who won the most popular votes in all 50 states and the District of Columbia.

Thus, all the presidential electors in states belonging to the Compact will be avid supporters of the national popular vote winner and will, therefore, gladly vote for that candidate.

Let's assume that the Republican presidential nominee wins the national popular vote and that the Compact is in effect. Under the terms of the Compact, all the presidential electors from California (and all other states belonging to the Compact) would be the persons *nominated by each state's Republican Party.* That is, they would all be Republican party activists. The bloc of (at least) 270 presidential electors appointed under the Compact

---

[371] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 774. https://repository.law.miami.edu/umlr/vol76/iss3/5/

[372] U.S. Constitution. Article II, section 1, clause 2.

would reflect the decision of the voters nationwide in favor of the Republican presidential nominee.

Thus, none of these 270 (or more) Republican presidential electors would be asked to vote contrary to his or her own political inclinations or conscience. Instead, each of them would vote in harmony with their own strongly held personal choice, namely the Republican presidential nominee who had just won the national popular vote.

Under the Compact, presidential electors in the member states 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 the district-wide choice in Maine and Nebraska).

Josephson mistakenly thinks that the presidential electors from California would be Democratic Party activists. That is not how the Compact would operate.

9.14.3. MYTH: Presidential electors might succumb to outside pressure and abandon the national popular vote winner.

QUICK ANSWER:

- Presidential electors are loyal party activists who were nominated for that position precisely because they can be relied upon to act as willing rubber stamps for their party's presidential nominee.
- The unlikelihood 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 believed (then and now) that the President should be the candidate who wins the national popular vote. Instead, all 271 Republican presidential electors dutifully voted for their party's nominee in accordance with the universal understanding of the system that was in effect at the time.

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 winner (and instead 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 system for electing the President, and hence there would be a vast pool of people to apply pressure on presidential electors.
- The presidential electors supporting the presidential candidate who had just won the national popular vote, under laws that were in place on Election Day, would care about—much less succumb to—pressure from people supporting the opposing party's candidate.

The reality is that there would be no substantial pressure in the first place. The public simply does not favor the current state-by-state winner-take-all method for awarding electoral votes (section 9.22).

The environment in which this hypothetical scenario would arise has the following four elements:

- In polls since 1944, a substantial majority 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. Far from being attached to the state-by-state winner-take-all method of awarding electoral votes, the public strongly opposes it.
- The legislature of the state involved has responded to the wishes of its own voters and enacted the National Popular Vote Compact.
- States possessing a majority of the electoral votes (essentially half the population of the country) have similarly enacted the Compact, and the Compact has taken effect nationally.
- 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 and expecting that the winner of the national popular vote will, in accordance with laws in effect at the time, become President.

The hypothetical scenario is based on the notion that when the Electoral College meets in December, the 270 (or more) presidential electors (who are avid supporters of their own party's presidential candidate who had just won the national popular vote) would respond to the preferences of supporters of the losing party.

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.

Moreover, there is evidence from recent experience against the hypothesized scenario.

In November 2000, Al Gore won the national popular vote by a margin of 543,816 votes. However, there were 271 Republican presidential electors (just one more than the 270 needed to elect a President) who had just been selected under the laws in place at the time. None of the 271 Republican presidential electors in 2000 voted for Al Gore despite the fact that Gore had received the most popular votes nationwide and despite the fact that the American public overwhelmingly believed that the President should be the candidate who wins the national popular vote. Nonetheless, all 271 Republican presidential electors voted for their party's nominee. They did so in accordance with the universal understanding of the system that was in effect at the time.

Similarly, in 2016, Hillary Clinton won the national popular vote by a margin of 2,868,518 votes over Donald Trump. On Election Day, 306 Republican presidential electors were elected. Although two Republican presidential electors from Texas defected from Donald Trump when the Electoral College met in December, their reason for not voting for their own party's nominee had nothing to do with the fact that Trump did not win the most popular votes nationwide. Instead, both questioned Trump's fitness for office and voted for

a prominent Republican in lieu of Trump (section 3.7.6). Meanwhile, 304 of the 306 Republican presidential electors voted for their party's nominee.

9.14.4. MYTH: The decision-making power of presidential electors would be unconstitutionally usurped by the Compact.

QUICK ANSWER:

- The National Popular Vote Compact would operate in the same way as the current system. That is, it would appoint presidential electors who have been nominated in association with a particular presidential candidate. The Compact then leaves it to the states to decide on the appropriate way, if any, to regulate presidential electors.

MORE DETAILED ANSWER:

Shawn M. Flynn, a former special assistant U.S. attorney for the Eastern District of Virginia, wrote in the *Washington Times* in 2022 that the National Popular Vote Compact:

> "could undermine elector voting rights since the 12th Amendment does not prohibit 'faithless electors,' and an interstate compact could usurp elector voting decision-making power."[373]

Flynn is incorrect for two reasons.

First, states do have the power to control their presidential electors. The U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that:

> "Nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington [State] does."[374]

Second, the National Popular Vote Compact says nothing about the decision-making power of presidential electors.

Instead, the Compact would operate on the basis of the same principles as the current system. That is, each political party would nominate passionate party activists for the ceremonial position of presidential elector under existing state laws. Each party would select its nominees for presidential elector precisely because they are avid supporters of the party's presidential candidate and because they can be relied upon to act as willing rubber stamps for the party's nominee.

Then, both the Compact and the current system let the states decide on whether to further regulate presidential electors.

---

[373] Flynn, Shawn M. 2022. Undermining the Electoral College to delegitimize the draft Dobbs decision. *Washington Times*. May 16, 2022. https://www.washingtontimes.com/news/2022/may/16/undermining-the-electoral-college-to-delegitimize-/

[374] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

Under both the Compact and the current system, the states are free to enact laws addressing the question of how presidential electors vote in the Electoral College, including:

- giving their presidential electors discretion as to how to vote in the Electoral College;
- telling their presidential electors how they *should* vote, but providing no penalty if they deviate from expectations;
- telling their presidential electors how they *must* vote and penalizing them if they do not vote as expected;
- telling their presidential electors how they *must* vote and invalidating the vote of a faithless elector during the Electoral College meeting, immediately removing the faithless elector from office, and immediately replacing the faithless elector with a compliant person.

States currently use all four approaches, as discussed in section 3.7.

9.15. MYTHS ABOUT PRESIDENTIAL POWER AND MANDATE

9.15.1. MYTH: The President's powers would be dangerously increased (or dangerously hobbled) by a national popular vote.

QUICK ANSWER:

- The National Popular Vote Compact is state legislation. It does not change anything in the U.S. Constitution. As such, it does not increase or decrease any power given to the President by the U.S. Constitution.

MORE DETAILED ANSWER:

The actual effect of the National Popular Vote Compact would be to change the boundaries of the "district" from which presidential electors are elected.

- Under the current system, state boundary lines define the "districts" from which presidential electors are elected. Although it is usually not described in this way, presidential electors today are elected from U.S. senatorial districts. The only exception is that two presidential electors in Maine and three in Nebraska are elected by congressional district.
- Under the National Popular Vote Compact, presidential electors would be elected from a single nationwide "district."

Changing these "district" boundaries would not change anything in the U.S. Constitution nor increase or decrease any power given to the President by the Constitution.

9.15.2. MYTH: The exaggerated lead produced by the Electoral College enhances an incoming President's ability to lead.

QUICK ANSWER:

- The current system does not reliably give an incoming President a larger percentage share of the electoral vote than his share of the national popular vote. Sometimes it does, but sometimes it does not.

- There is no historical evidence that Congress, the media, the public, or anyone else has been more deferential to an incoming President who received a larger percentage of the electoral vote than his percentage of the popular vote.
- If anyone believes that an exaggerated margin in the Electoral College helps the President to lead, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.
- Every Governor in the United States is currently elected without the advantage of an Electoral College type of arrangement. Yet, no one would seriously argue that Governors are hobbled in the execution of their offices because they do not have the assistance of a state-level electoral college to exaggerate their margin of victory and create an illusory mandate.

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**."[375] [Emphasis added]

At the Commonwealth Club in San Francisco, Lowenstein said:

> "What the Electoral College tends to do is to make majorities that wouldn't exist in the popular vote. … In … these close elections … the **people think of that person as somebody who won by a majority** [because] he did in the Electoral College. And I think that **helps the President to govern**."[376] [Emphasis added]

In fact, there is no historical evidence that Congress, the media, or the public has been more deferential to an incoming President after an election in which he received a larger percentage in the Electoral College than his percentage of the popular vote.

- In 1992, Bill Clinton received 370 electoral votes (69% of the total) while receiving only 43% of the popular vote. We are not aware of any plausible line of reasoning—much less anything resembling evidence—that Clinton's exaggerated margin in the Electoral College yielded him any deference or mandate or helped him to lead. In fact, he encountered stiff resistance from Congress on many of his early policy initiatives, and many of them (e.g., gays in the military, health care) were defeated.
- In 1968, Richard Nixon received 301 electoral votes (56% of the total) while receiving only 43.4% of the popular vote. In 1960, John F. Kennedy received

---

[375] 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 .

[376] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008. Timestamp 0:20. https://www.youtube.com/watch?v=ec9-vGUQkmk

303 electoral votes (56% of the total) while receiving only 49.7% of the popular vote. We are not aware of any plausible argument or evidence that Nixon's or Kennedy's exaggerated margin in the Electoral College helped them to lead or govern.

If anyone believes that an exaggerated margin in the Electoral College helps a President to lead and govern, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.

In fact, under the Compact, the nationwide winning candidate would almost always receive an exaggerated margin in the Electoral College. The Compact guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would receive at least a majority of the electoral votes (270 of 538) from the states belonging to the Compact. Then, in addition to this guaranteed minimum, the national popular vote winner would generally receive *some additional* electoral votes from whichever non-member states he or she happened to carry.

Suppose, for example, that the non-compacting states were to split equally and that the compacting states were to supply only the very minimum of 270 electoral votes. In that case, the national popular vote winner would receive an exaggerated margin of about 75% of the votes in the Electoral College—that is, about 404 of the 538 electoral votes.

Even if the national popular vote winner were to receive only a quarter of the electoral votes from non-compacting states, he or she would receive 337 electoral votes—that is, slightly more than Obama's 332 electoral votes in 2012 and considerably more than received by George W. Bush in 2000 and 2004, by Donald Trump in 2016, or by Joe Biden in 2020.

If anyone believes that an exaggerated margin in the Electoral College helps an incoming President to lead, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.

Of course, the current state-by-state winner-take-all method of awarding electoral votes does not reliably produce a larger percentage share of the electoral vote in the Electoral College than the candidate's share of the national popular vote.

Even worse, the current system frequently confers the presidency on a candidate who fails to win the most popular votes nationwide (section 1.1.1).

Finally, it should be noted that every Governor in the United States is currently elected without the advantage of an Electoral College type of arrangement. Yet, no one would seriously argue that Governors are hobbled in the execution of their offices because they do not have the assistance of a state-level electoral college to exaggerate their margin of victory and create an illusory mandate.

9.16. MYTH THAT THE ELECTORAL COLLEGE PRODUCES GOOD PRESIDENTS.

9.16.1. MYTH: The Electoral College produces good Presidents.

QUICK ANSWER:

- Attempts to link the Electoral College and the state-by-state winner-take-all method of awarding electoral votes with the production of good Presidents are based on selective use of data.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein has argued that there are "11 good reasons"[377] not to change the current system of electing the President to a nationwide popular election:

> "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."[378]

Although these 11 Presidents were indeed distinguished, Lowenstein does not offer any argument connecting the ascension of these 11 individuals to the presidency with the Electoral College or the current state-by-state winner-take-all method of awarding electoral votes.

Lowenstein starts his list with George Washington. However, it was universally recognized at the 1787 Constitutional Convention that Washington would be the first President, and he was elected unanimously in both 1789 and 1792. Washington would have become President under virtually any election system, including a nationwide election.

Lowenstein's remarks were made in a debate about whether to change the current state-by-state winner-take-all system to a nationwide popular election.

However, Washington was 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 method of awarding electoral votes when George Washington was elected in 1789 and 1792.[379]

Lowenstein credits the Electoral College with success when it resulted in the election of "good Presidents" such as Thomas Jefferson. However, he does not criticize the Electoral College for failing to elect Jefferson on two of the three occasions when he ran (1796 and 1800).[380]

Moreover, the single time (1804) when the Electoral College elected Jefferson occurred *before* the era when the state-by-state winner-take-all rule became widespread.[381]

Lowenstein includes two Presidents on his list of 11 good Presidents who were *defeated* in the Electoral College after receiving the most popular votes nationwide, namely Andrew Jackson in 1824 and Grover Cleveland in 1888. Why does Lowenstein credit the

---

[377] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008. Timestamp 2:16. https://www.youtube.com/watch?v=ec9-vGUQkmk

[378] 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

[379] New Hampshire, Maryland, and Pennsylvania used the winner-take-all rule in the nation's first presidential election (1789) and in the second election (1792). All three of these states repealed their winner-take-all laws by the time of the 1800 election.

[380] In 1800, the Electoral College handed Jefferson a tie, throwing the election into the U.S. House of Representatives, where 36 ballots were required to elect Jefferson. In any case, only two states (Rhode Island and Virginia) conducted a popular election using the state-level winner-take-all method of awarding electoral votes in the 1800 election.

[381] In 1804, only seven states (Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, and Virginia) conducted a popular election using the state-level winner-take-all method of awarding electoral votes.

Electoral College with success when it elected Jackson in 1828 and Cleveland in 1884 and 1892, but not criticize it for failing to elect Jackson in 1824 and Cleveland in 1888?[382]

Moreover, another "good President" on Lowenstein's list, namely Theodore Roosevelt, won the Electoral College on one occasion when he ran (in 1904), but lost the Electoral College on the other occasion when he ran (in 1912).

Lowenstein also credits the winner-take-all rule for producing Harry Truman and Theodore Roosevelt, even though they both became President as the result of the death of their predecessors.

More importantly, Lowenstein does not offer any argument as to why several Presidents on his list (or other equally talented individuals) could not have risen to the presidency in the absence of the Electoral College or the winner-take-all method of awarding electoral votes.

How, specifically, was the Electoral College or winner-take-all method of awarding electoral votes essential to the emergence of, say, Lincoln, Franklin Roosevelt, Eisenhower, or Reagan? All of them won both the most popular votes nationwide as well as the Electoral College on each occasion when they ran.

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.

Finally, and perhaps most tellingly, Lowenstein's list of 11 good Presidents fails to account for the 35 other Presidents produced by the Electoral College.

In particular, Lowenstein does not mention the pantheon of not-so-good Presidents produced by the Electoral College, including those who:

- were totally ineffectual when the country faced a major economic crisis (e.g., Van Buren and Hoover);
- were ineffectual, if not downright harmful, as the country hurtled down the road to civil war (e.g., Buchanan, Pierce, Taylor, and Fillmore);
- ran exceedingly corrupt administrations (e.g., Grant and Harding);
- was a traitor (i.e., Tyler); and
- were so thoroughly mediocre and forgettable that they cannot be named here because the authors of this book cannot recall their names.[383]

---

[382] Lowenstein includes Thomas Jefferson on his list even though the Electoral College defeated Jefferson in 1796.

[383] For a discussion about various bad Presidents, see C-SPAN's *Presidential Historians Survey 2021* at https://www.c-span.org/presidentsurvey2021/?page=overall. Also see Rottinghaus, Brandon and Vaughn, Justin S. 2018. *Official Results of the 2018 Presidents & Executive Politics Presidential Greatness Survey*. https://sps.boisestate.edu/politicalscience/files/2018/02/Greatness.pdf. Also see Dvorak, Petula. 2018. The 10 worst presidents: Besides Trump, whom do scholars scorn the most? *Washington Post*. February 20, 2018. https://www.washingtonpost.com/news/retropolis/wp/2018/02/20/the-10-worst-presidents-besides-trump-who-do-scholars-scorn-the-most/?utm_term=.0396a77d6ebf.

9.17. MYTHS ABOUT NON-CITIZEN VOTING

9.17.1. MYTH: A state could pass a law allowing non-citizens to vote for President.

QUICK ANSWER:

- Existing federal law makes it unlawful for any non-citizen (properly documented or not) to vote in any election for President, U.S. Senator, or U.S. Representative.
- If it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would exist independently of whether electoral votes are awarded under the current state-by-state winner-take-all method or on a nationwide basis. Moreover, if it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would be more serious under the current winner-take-all system, because a relatively small number of votes in a closely divided battleground state could more easily affect the national outcome than they would in a nationwide vote for President.
- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a concern—if it had any validity at all—that would apply equally to both the current system and the Compact.

MORE DETAILED ANSWER:

Writing in the *Union County Georgia GOP Blog*, Dale Allison wrote that under national popular vote:

> "We would be turning our elections over to the states and large cities who allow non-citizens to vote."[384]

Michigan State Representative Rachelle Smit's office issued a statement on March 7, 2023 (the date of a hearing before the House Elections Committee on HB 4156) saying:

> "With a national popular vote, radical left-wing states can and will inflate their voter rolls with illegal immigrants to create invincible majorities."

At a hearing of the Missouri Senate Judiciary Committee on March 30, 2016, Jeremy Cady of the Missouri Alliance for Freedom criticized the National Popular Vote bill (SB 1048) by claiming that some states could let non-citizens vote for President—thereby diluting Missouri's votes.

In fact, no state may allow non-citizens (properly documented or not) to vote for President, because existing federal law prohibits them from voting for President, U.S. Senator, or U.S. Representative. Federal law provides:

> "It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice Presi-

[384] Allison, Dale. 2016. Say 'No' to National Popular Vote. March 15, 2016. http://ucgop.us/2016/03/15/say-no-to-national-popular-vote/#

> dent, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia …"[385]

It is important to note that *if* it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would exist independently of whether electoral votes are awarded under the current state-by-state winner-take-all method or on a national-popular-vote basis.

Moreover, if it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would be more serious under the current winner-take-all system, because a relatively small number of votes in a closely divided battleground state could more easily affect the national outcome than they would in a nationwide vote for President.

9.17.2. MYTH: The Motor Voter Registration law in California (and elsewhere) allows non-citizens to vote.

QUICK ANSWER:

- The Motor Voter Registration law in California (and other states with similar laws) does not allow non-citizens (properly documented or not) to vote.
- California law requires that an applicant to vote attest to their eligibility (including U.S. citizenship) and provides significant penalties for false statements. The requirements and penalties apply equally regardless of how a person signs up to vote—whether in-person, by mail, online, on-the-street during voter registration drives, on Election Day (in states allowing same-day registration), or at an office of the Department of Motor Vehicles.
- Moreover, existing federal law makes it unlawful for any non-citizen (properly documented or not) to vote in any election for President, U.S. Senator, or U.S. Representative.
- Any risk arising from non-citizen voting exists independently of whether electoral votes are awarded using the current state-by-state winner-take-all method or on the basis of the national popular vote. Moreover, that risk would be more serious under the current winner-take-all system, because a relatively small number of popular votes in a closely divided battleground state could potentially affect the national outcome by flipping a substantial bloc of electoral votes.

MORE DETAILED ANSWER:

It is sometimes suggested that the Motor Voter Registration law in California (and other states with similar laws) allows non-citizens (properly documented or not) to vote.[386]

In fact, California law makes U.S. citizenship a requirement for voting.

---

[385] United States Code. Title 18. Section 611.

[386] Richardson, Valerie. California motor-voter law will flood rolls with noncitizens, critics predict. *The Washington Times*. October 11, 2015. https://www.washingtontimes.com/news/2015/oct/11/critics-predict-new-california-motor-voter-law-wil/https://www.washingtontimes.com/news/2015/oct/11/critics-predict-new-california-motor-voter-law-wil/

> "A person entitled to register to vote shall be a **United States citizen**, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election."[387] [Emphasis added]

In addition, California law imposes penalties for illegally registering to vote.

> "Every person who willfully causes, procures, or allows himself or herself or any other person to be registered as a voter, knowing that he or she or that other person is not entitled to registration, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months or two or three years, or in a county jail for not more than one year."[388]

In addition, California's Motor Voter Registration law requires applicants for voter registration to attest to their citizenship.

> "(b) (1) The department [of Motor Vehicles] shall provide to the Secretary of State, in a manner and method to be determined by the department in consultation with the Secretary of State, the following information associated with each person who submits an application for a driver's license or identification card pursuant to Section 12800, 12815, or 13000 of the Vehicle Code, or who notifies the department of a change of address pursuant to Section 14600 of the Vehicle Code:
>
> "(A) Name.
>
> "(B) Date of birth.
>
> "(C) Either or both of the following, as contained in the department's records: (i) Residence address, (ii) Mailing address.
>
> "(D) Digitized signature, as described in Section 12950.5 of the Vehicle Code.
>
> "(E) Telephone number, if available.
>
> "(F) Email address, if available.
>
> "(G) Language preference.
>
> "(H) Political party preference.
>
> "(I) Whether the person chooses to become a permanent vote by mail voter.
>
> "(J) Whether the person affirmatively declined to become registered to vote during a transaction with the department.
>
> "(K) **A notation that the applicant has attested that he or she meets all voter eligibility requirements, including United States citizenship, specified in Section 2101**."[389] [Emphasis added]

---

[387] California Elections Code Section 2101.

[388] California Elections Code Section 18100(a).

[389] California Elections Code Section 2263.

This requirement for attestation of eligibility (including U.S. citizenship) and the significant penalties for violations are *identical* whether the person registers to vote in-person, by mail, online, on-the-street during voter registration drives, on Election Day (in states allowing same-day registration), or at an office of the Department of Motor Vehicles.

Moreover, existing federal law (Section 611 of 18 United States Code) prohibits non-citizens (either legal resident aliens or undocumented persons) from voting for President, U.S. Senator, or U.S. Representative:

> "It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia …"

If a person is willing to risk significant criminal penalties in order to register to vote, the nature of the evidence needed to obtain a conviction is *identical* regardless of whether the person registered at the Department of Motor Vehicles or elsewhere.

As a practical matter, legal aliens are generally very careful about complying with the law, because a violation would jeopardize their ability to stay in the country in addition to imposing significant criminal penalties.

Undocumented aliens are even more cautious, because any official interaction with government carries the risk of deportation in addition to the election law's significant penalties.

Indeed, both types of aliens are among the least likely persons to risk so much in order to cast a vote for a distant politician.

It is important to note that any risk arising from alien voting arising from any state's Motor Voter Registration law exists independently of whether electoral votes are awarded using the current state-by-state winner-take-all method or on a nationwide basis.

Under the current state-by-state winner-take-all method of awarding electoral votes, a relatively small number of popular votes in a closely divided state could potentially affect the national outcome by flipping a substantial bloc of electoral votes.

9.17.3. MYTH: Only citizens impact the allocation of electoral votes under the current system.

QUICK ANSWER:

- The U.S. Constitution requires that the census count all "persons"—including non-citizens (both legal resident aliens and undocumented persons) for the purpose of apportioning electoral votes among the states. Thus, even though non-citizens cannot vote for President, they count 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 preferred presidential candidate. That is, the voting power of the *legal* voters is increased because of the presence of non-citizens in their state.

- Overall, the Democrats had a net 10 electoral-vote advantage in the 2012, 2016, and 2020 presidential elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.
- 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. It 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.

MORE DETAILED ANSWER:

Under federal law, non-citizens (whether legal resident aliens or undocumented persons) cannot vote in presidential elections.

Nonetheless, non-citizens significantly impact presidential elections, because they affect the allocation of electoral votes among the states.

In an interview on March 18, 2024, with Don Lemon, Elon Musk stated:

> "A disproportionate number of illegal immigrants go to blue states, they amplify the effect of a blue state vote. … The Democrats would lose approximately 20 seats in the House if illegals were not counted in the census, and that's also 20 less electoral votes for President. So, illegals absolutely affect who controls the House and who controls the presidency."[390,391]

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 Representatives plus two (representing the state's two U.S. Senators).

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."[392,393] [Emphasis added]

---

[390] Don Lemon Interview of Elon Musk. *YouTube*. March 18, 2024. Timestamp 24:00. https://www.youtube.com/watch?v=hhsfjBpKiTw&t=1399s

[391] See section 4.1.8 for a lengthier quotation from this interview.

[392] 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.

[393] 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, and/or income. Moreover, the

Thus, a state with a disproportionally large number of non-citizens (whether legal resident aliens or undocumented persons) acquires additional U.S. House seats and, hence, additional electoral votes.

Then, the voting power of citizens who vote in such states is increased because of the presence of those non-citizens in their state.[394]

To the extent that non-citizens disproportionately live in states that vote Democratic, the Democrats win a certain number of electoral votes because of the presence of non-citizens in those states (even though those non-citizens do not vote).

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. It 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.

9.18. MYTH ABOUT VOTING BY 17-YEAR-OLDS

9.18.1. MYTH: There would be a mad political rush by states to give the vote to 17-year-olds under the Compact.

QUICK ANSWER:

- Lowering the voting age to 17 would have only a marginal effect on the electorate. Seventeen-year-olds represent only about 1.2% of the U.S. population. Only about a third of 17-year-olds would be likely to vote if permitted. A third of 1.2% is only 0.4%. If a candidate had a three-to-two lead among 0.4% of the electorate (that is, a lead of 0.24% to 0.16%), that would translate into a net lead of 0.08% in favor of that candidate.
- There is little political support for giving the vote to 17-year-olds. For example, in a statewide vote in 2020, California voters defeated a constitutional amendment to allow 17-year-olds who would become 18 by the time of the next general election to vote in primary elections and special elections.
- The ratification in 1971 of the 26th Amendment (lowering the voting age to 18) did not have any noteworthy political effect in the 1972 presidential election.

MORE DETAILED ANSWER:

It is unlikely that a nationwide vote for President would result in a mad rush by states to lower the voting age to 17.

---

requirements for voting were often more stringent for the upper house of the state legislature than for the lower house.

[394] See section 4.1.8 for details of an analysis by Professor Leonard Steinhorn and the Center for Immigration Studies.

In any event, lowering the voting age to 17 would have only a marginal effect on the electorate.

For one thing, 17-year-olds represent only about 1.2% of the U.S. population.

More importantly, relatively few young people vote, compared to the rest of the population.

Table 9.36 shows the percentage of the U.S. population who voted in the November 2020 general election.[395]

Table 9.36 Percentage of population who voted in 2020, by age

Age	Percentage who voted in 2020
18 years	40%
19 years	47%
20 years	49%
21 years	46%
22 years	51%
23 years	53%
24 years	51%
25 to 34 years	54%
35 to 44 years	57%
45 to 54 years	62%
55 to 64 years	68%
65 to 74 years	73%
75 years and over	70%
Total	**61%**

As can be seen from the table, the percentage of older Americans who voted in the November 2020 general election was:

- 70% for those aged 75 and over
- 73% for those aged 65–74
- 68% for those aged 55–64.

The percentage of younger Americans was considerably lower, and the percentage declined sharply by age:

- 49% for those aged 20
- 47% for those aged 19
- 40% for those aged 18.

This sharp decline from age 20 to 19, and from age 19 to 18, suggests that considerably fewer than 40% of 17-year-olds would be likely to vote if they were permitted to do so.

If, for the sake of argument, a third of the 1.2% of the population whose age is between 17 and 18 were to vote, that would increase the electorate by 0.4%.

If a candidate had a three-to-two lead among this 0.4% sliver of the electorate (that

[395] U.S. Census Bureau. Reported Voting and Registration, by Sex and Single Years of Age: November 2020. https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html

is, a lead of 0.24% to 0.16%), that would translate into a net lead of 0.08% in favor of that candidate.

Moreover, as a practical matter, there is little support for giving the vote to 17-year-olds in the first place. For example, in a statewide vote in 2020, California voters rejected a constitutional amendment to allow 17-year-olds who would become 18 by the time of the next general election to vote in primary elections and special elections.[396]

The 26th Amendment (lowering the voting age from 21 to 18) was ratified by the states in 1971. However, the newly enfranchised voters (aged 20, 19, and 18) did not have any noteworthy effect in the 1972 presidential election. As the *Washington Post* noted:

> "In the end, Nixon wound up getting nearly half of the vote of the young first-time voters."[397]

Although the 26th Amendment does not prevent states from lowering their voting age below 18, there is little reason to expect that to happen, and even less reason to be concerned if it did.

9.19. MYTHS ABOUT THE OPERATION OF THE COMPACT

9.19.1. MYTH: The New Hampshire primary and Iowa nominating caucuses would be eliminated by the Compact.

QUICK ANSWER:

- New Hampshire's "First in the Nation" presidential primary and the Iowa caucuses are part of the process of selecting delegates to the national party conventions that nominate presidential candidates.
- The National Popular Vote Compact would not affect any state's laws or any political party's procedures for nominating the President. The Compact is concerned only with the November *general-election* for President.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[398] has written:

> "An NPV scheme would mean … The Iowa and New Hampshire primaries would never be held again."[399]

---

[396] *Ballotpedia*. California Proposition 18, Primary Voting for 17-Year-Olds Amendment (2020). https://ballotpedia.org/California_Proposition_18,_Primary_Voting_for_17-Year-Olds_Amendment_(2020)

[397] Frommer, Frederic J. 2022. Americans under 21 first voted 50 years ago. It didn't go as expected. *Washington Post*. October 29, 2022. https://www.washingtonpost.com/history/2022/10/29/nixon-mcgovern-1972-young-voters/

[398] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[399] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roankoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

The New Hampshire "First in the Nation" primary and the Iowa caucuses are part of the process of selecting delegates to the national party conventions that nominate presidential candidates.

The National Popular Vote Compact is concerned only with the November *general election* for President. In particular, the Compact is concerned with the process of selecting the presidential electors who attend the Electoral College in mid-December.

The National Popular Vote Compact does not affect any state's laws or any political party's procedures for nominating the President.

The New Hampshire primary and Iowa caucuses are creations of state laws and nominating procedures established by the political parties.

For example, in 2024, the Democratic National Committee altered the role of the New Hampshire presidential primary and the Iowa caucuses in the nominating process. This action by the DNC had nothing to do with the National Popular Vote Compact.

9.19.2. MYTH: The Compact is a copy of the flawed French presidential election system.

QUICK ANSWER:

- The 2002 and 2022 French presidential system was widely (and justifiably) criticized because it resulted in voters being presented with the unpalatable choice of a right-wing and far-right-wing candidate in the final round of the election. This anomalous result occurred because all of the left-wing candidates were eliminated in a multi-party primary that was used to nominate the two candidates for the final round of the election.
- The existing American system for nominating presidential candidates for the final general election in November does not have the flaws of the French system. The National Popular Vote Compact would not change the existing American system for nominating presidential candidates.

MORE DETAILED ANSWER:

Professor Norman Williams of Willamette University incorrectly equates the National Popular Vote Compact with France's flawed 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.**"[400] [Emphasis added]

Williams' statement is false. Specifically:

- The existing American system for nominating presidential candidates for the general election in November is nothing like the French system for nominating candidates.
- The existing American system for nominating presidential candidates for

[400] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 204.

the final general election in November does not have the flaws of the French system.

- The National Popular Vote Compact would not change the existing American system for nominating presidential candidates.

Here are the facts about the French presidential election system.

The French presidential election system starts with a *multi-party* primary (the first round) in which candidates *from different parties* are forced to compete for one of two spots in the final general election (the second round). Then, the two candidates nominated in the primary (the first round) become the nominees who compete for the presidency in the final general-election (the second round).

Consequently, there is no guarantee in the French presidential election system that the final general election will include a candidate representing the main left-wing political party and a candidate representing the main right-wing political party.

In early 2002 in France, Jacques Chirac was the leading right-wing candidate, and Lionel Jospin was the leading left-wing candidate. Polls showed a very close race in the expected match-up of Chirac and Jospin in the final general election. In fact, 32 separate national polls in the month preceding the primary (the first round) showed both Chirac and Jospin with support in the narrow range of 48%–52% in the final general election.[401]

It was widely expected that Chirac and Jospin would come in first and second in the multi-party primary in April, and that they would then run against one another in the final general election in May.[402]

These expectations were upset, because there were numerous prominent left-wing candidates in the primary (including an independent socialist, a Green, a Trotskyist, and others in addition to Jospin), while the conservative vote in the primary was divided between only two candidates—Jacques Chirac and the ultra-conservative Jean-Marie Le Pen.

In the primary in 2002, Chirac came in first place (with 5.6 million votes), and ultra-conservative Le Pen (with 4.8 million votes) edged out the leftist Jospin (with 4.6 million votes) for second place.

Thus, voters were forced to choose in the final general election between a conservative (Chirac) and an ultra-conservative (Le Pen).

Left-wing voters (who would have enthusiastically voted for Jospin over Chirac) were forced to make the unpalatable choice of voting for one of the conservatives or not voting in the final general election.

The result was that the general election was a runaway in which the conservative (Chirac) won an unprecedented 82% of the nationwide popular vote.

The French presidential election system was widely (and justifiably) criticized for denying the voters any real choice in the final general election.

Contrary to Williams' statement, the National Popular Vote Compact is not a copy of the flawed French system.

---

[401] *Wikipedia*. Opinion polling for the 2002 French presidential election: Jospin–Chirac. Accessed April 26, 2022. https://en.wikipedia.org/wiki/Opinion_polling_for_the_2002_French_presidential_election#Jospin%E2%80%93Chirac

[402] Prior to 2002, one right-wing candidate and one left-wing candidate had emerged from the first round of every presidential election since France's adoption of its current system in 1958.

In particular, U.S. presidential candidates are not nominated in a French-style *multi-party* primary. The National Popular Vote Compact does not alter the existing American system for nominating presidential candidates in any way—much less "import" the French system.

Under the existing system for nominating presidential candidates in the United States, a Democratic presidential nominee emerges after competing against other Democrats in state-level primaries and caucuses. A Republican candidate emerges *separately* after competing against fellow Republicans in state-level primaries and caucuses. Similarly, the presidential nominees of minor parties emerge after competing against other members of their party for their party's nomination.

Then, after the nominating process is over, the eventual Democratic nominee, the eventual Republican nominee, and various minor-party nominees compete in the November general election.

Moreover, the general election for President in the United States is not limited to two candidates (as it is in France).

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 and no minor-party alternatives in the November general election.

French voters were faced with a similar situation in 2022. Two right-of-center candidates (incumbent President Emmanuel Macron and ultra-conservative Marine Le Pen, daughter of the 2002 candidate) received 28% and 23% of the vote in the multi-party primary, respectively. Meanwhile, Jean-Luc Mélenchon, the leading left-of-center candidate received only 22% of the vote in the primary and therefore did not win a spot in the final general election. The result was that French voters were again forced to choose between two right-of-center candidates in the final general election in 2022.

> "Most of the voters [for radical left candidate Jean-Luc Mélenchon] detest Macron's policies and most of them abhor his persona. … In the words of some Mélenchon voters, it is a case of 'choosing between plague and cholera.'"[403]

A post-election poll showed that more Mélenchon supporters had abstained than voted for Macron in the final general election in France (and virtually none supported Le Pen).[404]

The top-two system in Louisiana, Washington, and California

Louisiana has long used a top-two nominating process that is essentially the same as the French presidential system. In recent years, both Washington and California have adopted top-two systems.

The multi-party primaries in these states often produce undesirable situations in the

---

[403] Marlière, Philippe. 2022. The left in France must vote against Le Pen – but Macron isn't making it easy. *The Guardian*. April 23, 2022. https://www.theguardian.com/commentisfree/2022/apr/23/france-vote-le-pen-macron-tv-debate-far-right

[404] See "How did people vote" graph in Crisp, James. 2022. How Marine Le Pen could win the next French election. *The Telegraph*. April 25, 2022. https://www.telegraph.co.uk/world-news/2022/04/25/marine-le-pen-could-win-next-french-election/

final general election that are similar to those produced by the French presidential election, namely two right-wing or two left-wing candidates win the top-two primary, and the electorate is presented with a very limited choice in November.

For example, the primary in California's heavily Republican 4th state Senate district (the Sierra Nevada area) in June 2022 featured six Republicans and two Democrats. The two Democrats on the ballot got 23% and 20%, while the six Republicans got 17%, 15%, 15%, 5%, 3%, and 2%.[405] Because only the top two candidates from the primary advance to the general-election ballot (with write-ins not allowed), voters in this heavily Republican district were forced to choose between two Democrats. The result was that a heavily Republican district was represented in Sacramento by a Democrat.

Similarly, the primary in California's heavily Democratic 31st congressional district in June 2012 included a multiplicity of prominent Democrats (including San Bernardino Council member Pete Aguilar), but only two prominent Republicans (Gary G. Miller and Bob Dutton). Because of the fragmentation of the Democratic vote in the primary, the two Republicans emerged from the top-two primary—with Democrat Aguilar running third. The result was that a heavily Democratic district was represented in Congress by a Republican.

Similar situations occurred in California's 76th state Assembly district in 2018, the 38th state Assembly district in 2020,[406] and the 4th state Senate district in 2022.[407] As *Ballot Access News* reported in 2023:

> "**The problem that the majority party might be kept off the general election ballot is so well-known that** ever since California voters voted for a top-two system in 2010, **no other state has put it into place**. Voters have defeated top-two systems since then in Arizona in 2012, Oregon in 2014, and South Dakota in 2016."[408] [Emphasis added]

In any case, the National Popular Vote Compact would not import France's flawed top-two presidential election system into the United States.

9.19.3. MYTH: The Compact cannot handle changes that might arise from a future census.

QUICK ANSWER:

- The National Popular Vote Compact only governs a particular presidential election if its member states cumulatively possess a majority of the electoral votes on July 20 of a presidential election year. If that condition is not satisfied in a particular presidential election year, the Compact hibernates for that election.

---

[405] California Secretary of State. 2022. *Primary Election Results*. June 7, 2022. https://electionresults.sos.ca.gov/returns/state-senate/district/4

[406] Winger, Richard. 2022. California Bill to Repeal Top-two Introduced. *Ballot Access News*. July 1, 2022. Page 2.

[407] Winger, Richard. 2022. Report Review: In-Depth Analysis of California's Top-two Election System. *Ballot Access News*. July 1, 2023. Page 3.

[408] *Ibid.*

MORE DETAILED ANSWER:

An absolute majority of the electoral votes is required to elect a President in the Electoral College.

William Josephson, a New York attorney who opposes the National Popular Vote Compact, wrote:

> "**An Electoral College majority is not static, but NPV seems to assume that it is.** If the NPV states ever constitute an elector majority, demographic changes will almost certainly alter it. **Yet, NPV ignores that**, even though it must know that the allocation of electors among the states changes, as a result of reapportionment of House. of Representatives seats after the Census every ten years. **If any NPV member's Electoral College majority is no longer an elector majority, what happens to NPV?** Is it suspended until it regains a majority? **NPV does not say**."[409] [Emphasis added]

Contrary to what Josephson asserts, the National Popular Vote Compact was specifically designed to deal with this contingency (and several other related contingencies, as discussed in section 6.2.3).

Article III, clause 9 of the Compact states:

> "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."

Thus, for example, if the compact were to go into effect with states possessing 270 or more electoral votes, but then the compacting states collectively were to end up with fewer than 270 votes on July 20 of some subsequent presidential-election year (perhaps because of a census), the Compact would simply hibernate until such time as its members again collectively possessed at least 270 votes. That is, the Compact would remain in effect, but it would not "govern" that year's presidential election.

If subsequent enactments of the Compact were to raise the number of electoral votes possessed by the compacting states above the required majority by July 20 of an upcoming presidential election year, the ninth clause of Article III specifies that the Compact would again govern that election.

As a practical matter, this scenario could only arise if the number of electoral votes possessed by the compacting states were to hover very close to 270.

Moreover, changes in the number of electoral votes due to the census occur at a glacial pace.

For example, among the 15 jurisdictions that had enacted the Compact into law at the time of the 2020 census, California, Illinois, and New York each lost one electoral vote as a result of that census, while Colorado and Oregon each gained an electoral vote. The combined number of electoral votes possessed by compacting states at the time of the

---

[409] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 786. https://repository.law.miami.edu/umlr/vol76/iss3/5/

2020 census thus changed by only one electoral vote—from 196 to 195. As it turned out, even that small change was illusory. In the 2020 census, New York lost one electoral vote to Minnesota (which had not approved the Compact at the time).[410] However, Minnesota enacted the Compact in 2023. Thus, there was no *net* effect on the Compact's total number of electoral votes as a result of the 2020 census.

The next census will be in 2030, and the resulting allocation of electoral votes will apply to the 2032 election.

9.19.4. MYTH: Voters from states outside the Compact would not have an equal opportunity to influence the selection of the President.

QUICK ANSWER:

- The National Popular Vote Compact would include popular votes from *all* 50 states and the District of Columbia in computing the national popular vote total. All voters in all states would be treated equally under the Compact—regardless of whether their state is a member of the Compact.

MORE DETAILED ANSWER:

In an article entitled "Interstate Agreement Scheme to Elect President by Popular Vote Is Unconstitutional," attorney Paul Ballonoff wrote:

> "**The states that are parties to the agreement would effectively elect the president**. Amendment 12 of the Constitution states that **the votes of all states' electors are counted**, not just a select group of electors from select [states] that signs an interstate agreement."[411] [Emphasis added]

U.S. Senator Mitch McConnell (R–Kentucky) said the following about the National Popular Vote Compact:

> "Under NPV, **voters in states that haven't signed onto the compact will be treated differently than voters in states that have**."[412] [Emphasis added]

The National Popular Vote Compact includes popular votes from *all* 50 states and the District of Columbia in computing the national popular vote total—regardless of whether the state belongs to the Compact.

---

[410] Leib, David A. and Karnowski, Steve. 2021. Minnesota avoids losing House seat to New York by 89 people. April 26, 2021. *Associated Press*. https://apnews.com/article/census-2020-minnesota-government-and-politics-7cc6973f4a275aafcab3b1285845454a

[411] Ballonoff, Paul. 2018. Interstate Agreement Scheme to Elect President by Popular Vote Is Unconstitutional. *The Tenth Amendment Center Blog.* July 25, 2018. https://blog.tenthamendmentcenter.com/2018/07/interstate-agreement-scheme-to-elect-president-by-popular-vote-is-unconstitutional/

[412] McConnell, Mitch. The Electoral College and National Popular Vote Plan. Heritage Foundation Lecture. December 7, 2011. Washington, D.C. Timestamp 19:36.

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]

All voters in all states would be treated equally under the Compact—regardless of whether their state is a member.

Nothing in the Compact modifies the counting procedures of the 12th Amendment. In fact, the operation of the National Popular Vote Compact relies on the 12th Amendment's procedures for counting electoral votes:

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President … 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." [Emphasis added]

Note also that the political complexion of the particular states belonging to the National Popular Vote Compact would not affect the outcome of the presidential election.

The National Popular Vote Compact requires that all the electoral votes of all the states belonging to the Compact be awarded to presidential electors nominated in association with the winner of the national popular vote. When the Compact is in operation, the states belonging to the Compact would have at least a majority of the electoral votes—that is, enough electoral votes to elect a President. Thus, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would be assured sufficient electoral votes to be elected to the presidency.

9.19.5. MYTH: A state's popular vote count would matter only in the event of a nationwide tie in the popular vote.

QUICK ANSWER:

- Every voter's vote from every state would count in every presidential election in determining which candidate wins the national popular vote.

MORE DETAILED ANSWER:

With 158,224,999 votes having been cast in the 2020 presidential election, a tie in the national popular vote would be extraordinarily unlikely.

To deal with this unlikely contingency, the National Popular Vote Compact contains a tie-breaking procedure. Specifically, the sixth clause of Article III of the Compact states:

> "In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state."

That is, the Compact uses the statewide winner-take-all rule as its tie-breaking procedure.[413]

James David Dickson is Managing Editor of the news outlet of Mackinac Center for Public Policy. Note the word "only" (in bold below) in Dickson's erroneous op-ed in *The Hill* on April 1, 2023:

> "As the Michigan House Fiscal Agency found in its study of National Popular Vote, the state vote count would matter **only** in the event of a tie in the popular vote. That's all but a statistical impossibility.
>
> > 'In the event of a tie of the National Popular Vote winner, the governor would certify the slate of whichever candidate received the most votes in Michigan,'
>
> the nonpartisan agency wrote. In the name of 'one person, one vote,' state-level votes would be reduced from the deciding factor to a mere tiebreaker."[414] [Emphasis added]

First, Dickson inaccurately quotes the Michigan House Fiscal Agency's report. Here is everything that the Michigan House Fiscal Agency actually said about a nationwide tie:

> "In the case of a tie for the national popular vote winner, each member state would appoint electors pledged to the candidate that won the popular vote in that state. (This is the 'winner takes all' system currently used by most states.)"[415]

Second, the word "only" (in bold in Dickson's op-ed above) misrepresents what is actually contained in the National Popular Vote Compact.

The facts are that, under the Compact, every voter's vote in every state (including every voter's vote in Michigan) would count directly toward the national count of that individual voter's preferred presidential candidate. The votes of all voters in all 50 states and the District of Columbia would be added together to produce the "national popular vote total." The presidential candidate who received the largest "national popular vote total" would be designated as the "national popular vote winner." That candidate would receive all of the electoral votes of all of the member states. Because the member states would possess a majority of the electoral votes, that candidate would become President.

In short, every voter's vote from every state would count in every presidential election in determining which candidate wins the national popular vote.

---

[413] In the even more unlikely event of a tie in the national popular vote and a tie in the electoral votes computed by the Compact's tie-breaking procedure, there would be a contingent election in Congress.

[414] Dickson, James David. 2023. National Popular Vote is a return to politics of smoke-filled back rooms. *The Hill*. April 1, 2023. Page 2. Accessed April 4, 2023. https://thehill.com/opinion/campaign/3926499-national-popular-vote-is-a-return-to-politics-of-smoke-filled-back-rooms/

[415] Michigan House Fiscal Agency. 2023. Legislative Analysis: House Bill 4156 as introduced. March 7, 2023. http://www.legislature.mi.gov/(S(mnvc4tf3wdfnsazw3ltmdrz2))/mileg.aspx?page=GetObject&objectname=2023-HB-4156

9.19.6. MYTH: The Compact is flawed, because it conflicts with an existing state law.

QUICK ANSWER:

- Even if there were a conflict between the National Popular Vote Compact and Connecticut's existing law on ballot wording (and there is not), an interstate compact always takes precedence over a pre-existing state law.

MORE DETAILED ANSWER:

In speaking in opposition to the National Popular Vote Compact in Connecticut, State Representative Christopher Davis said during the House floor debate in 2018:

> "Currently when the citizens of Connecticut (and I believe every other state) go to the ballot, they are in fact casting ballots for electors of individuals. In fact, **our ballot in 2016 said 'presidential electors for'** and then you voted for that person. With the drafting of this language for this bill, it would be my interpretation that the ballot language would have to be changed and instead the citizens of Connecticut would not be voting for electors, but instead voting directly for those candidates."[416]
>
> "**If this law were to be passed and signed by the Governor, then this language would be conflicting to other state statutes.**"[417] [Emphasis added]

First, there is, in fact, no conflict between the National Popular Vote Compact and Connecticut's existing law on ballot wording.

Second, and more importantly, even if there were a conflict, it wouldn't matter, because an interstate compact always takes precedence over a pre-existing state law.

Concerning the first point, Connecticut voters will cast their vote for "presidential electors" under the Compact in the same way that they now do.

Connecticut, like all other states, uses the so-called "short presidential ballot" that enables voters to vote for the presidential and vice-presidential candidates (section 2.14). The voter's vote is then "deemed" to be a vote for each of the seven candidates for the position of presidential elector who were nominated in Connecticut in association with the voter's chosen presidential-vice-presidential slate. The Compact does not change Connecticut's use of the short presidential ballot. The Compact does not change the appearance or wording of Connecticut's ballot.

The Compact changes the way votes are counted to determine which presidential electors are declared elected in Connecticut.

Under Connecticut's current winner-take-all law, the state's seven presidential electors would be the presidential-elector candidates who were nominated by the party whose presidential nominee received the most popular votes inside the state of Connecticut.

In contrast, under the National Popular Vote Compact, the state's seven presidential

---

[416] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 62.

[417] *Ibid*. Page 63.

electors would be the presidential-elector candidates who were nominated by the party whose presidential nominee received the most popular votes in all 50 states and the District of Columbia.

In any case, there would be no need to modify the existing Connecticut law calling for the words "presidential electors for" to appear on ballots.

Concerning the second point, Representative Davis' argument would not be valid even *if* there were an actual conflict between a pre-existing Connecticut law and the National Popular Vote Compact.

Conflicts between provisions of an interstate compact and state law are always resolved in favor of the compact.

As the U.S. Court of Appeals for the Third Circuit wrote in *McComb v. Wambaugh*:

> "A Compact also takes precedence over statutory law in member states."[418]

9.20. MYTH ABOUT REPLACING DEAD, DISABLED, OR DISCREDITED PRESIDENTIAL CANDIDATES

9.20.1. MYTH: A major benefit of the current system is that it permits replacement of a dead, disabled, or discredited presidential candidate between Election Day and the Electoral College meeting.

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the Electoral College. Both the Compact and the current system would operate identically in terms of being able to replace a dead, disabled, or discredited presidential candidate in the 42-day period between Election Day in November and the Electoral College meeting in mid-December.
- Both major political parties have an established procedure for choosing a replacement for their nominees for President and Vice President.
- This myth is similar to many of the myths about the National Popular Vote Compact in this book in that the Compact deals with a hypothetical problem in a manner that is identical to the current system.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein points out that the existence of the Electoral College permits expeditious replacement of a dead, disabled, or discredited President-Elect in the brief 42-day period between Election Day in November and the Electoral College meeting in mid-December.[419]

---

[418] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

[419] Election Day is the Tuesday after the first Monday in November. Depending on the year, Election Day can be any date from November 2 to November 9. The meeting date of the Electoral College is the Tuesday after the second Wednesday in December under the Electoral Count Reform Act of 2022. It can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8). In every case, there are 42 days between Election Day and the meeting date of the Electoral College. For example,

Lowenstein says that this feature of the Electoral College is:

> "what might someday turn out to be the Electoral College's greatest benefit."[420]

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."[421]

Because the National Popular Vote Compact does not abolish the Electoral College, both the current state-by-state winner-take-all method of awarding electoral votes and the Compact would operate in identical ways in dealing with the contingency replacing a presidential or vice-presidential nominee who dies, becomes disabled, or is discredited during this particular 42-day period. That is, the Compact would not affect the ability of the Electoral College to perform the function envisioned by Professor Lowenstein.

Note that after selection of the President and Vice President (whether by the Electoral College or in a contingent election in Congress held on January 6), section 3 of the 20th Amendment (ratified in 1933) governs:

> "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."

Thus, because of the 20th Amendment, the period in which Lowenstein envisions the Electoral College could replace a nominee for President or Vice President is rather brief. There are 1,461 days in a President's four-year term. The 42 days between Election Day and the Electoral College meeting constitute less than 3% of that time. The original Constitu-

---

in 2024, Election Day will be Tuesday November 5, and the meeting date for the Electoral College will be Tuesday December 17.

[420] 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.

[421] *Ibid.*

tion, the 20th Amendment, and the 25th Amendment provide the procedure for 97% of the four-year period involved (that is, the Vice President would be the replacement).[422,423]

This myth is similar to many myths about the National Popular Vote Compact in this book in that the Compact deals with a hypothetical problem in a manner that is identical to the current system.

9.21. MYTHS ABOUT FRAUD

9.21.1. 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, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, made the following comment about fraud under the current state-by-state winner-take-all method of awarding electoral votes:

> "Fraud is minimized because it is hard to predict where stolen votes will matter."[424]

Contrary to what Ross asserts, there is no difficulty in determining where stolen votes will matter. Voters matter, and they only matter, in closely divided battleground states.

The battleground states are well-known to anyone who follows politics.

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.[425]

Two years before the 2012 presidential election, 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 decide the election.[426]

In June 2012, 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).[427]

---

[422] Procedural Rules for the 2020 Democratic National Convention. *Call for the 2020 Democratic National Convention*. August 25, 2018. Page 19. https://democrats.org/wp-content/uploads/2019/02/2020-Call-for-Convention-WITH-Attachments-2.26.19.pdf

[423] Rules of the Republican Party. Adopted August 24,2020. Amended April 14, 2022. https://prod-static.gop.com/media/Rules_of_the_Republican_Party_090921.pdf

[424] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[425] Already, Obama and McCain Map Fall Strategies. *New York Times*. May 11, 2008.

[426] Freedomworks debate on December 1, 2010, available at http://www.freedomworks.org/rnc.

[427] Peters, Jeremy W. Campaigns Blitz 9 Swing States in a Battle of Ads. *New York Times*. June 8, 2012.

In a July 2012 article describing his "3-2-1 strategy," Karl Rove identified the six states that would probably decide the 2012 election.[428]

In October 2000, the *New York Times* reported the following about Florida:

> "**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 maddeningly 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.'"[429] [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 popular votes
- Iowa—4,144 popular votes
- New Hampshire—7,211 popular votes
- New Mexico—366 popular votes
- Oregon—6,765 popular votes
- Wisconsin—5,708 popular votes.

If the 2000 election had been conducted on a nationwide basis, it would have been necessary to overturn a margin of 543,816.

It is far easier to fraudulently manipulate 537 votes in Florida (and thereby flip the outcome nationally), and do so without being detected, than to overturn a margin of 543,816.

9.21.2. 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:

- Executing electoral fraud without detection requires a situation in which a very small number of people can have a very large impact.

---

[428] 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.

[429] Rosenbaum, David E. The 2000 campaign: The Battlegrounds: Florida interstate's heavy campaign traffic. *New York Times*. October 25, 2000.

- Under the current state-by-state winner-take-all method of awarding electoral votes, there are huge incentives for fraud and mischief, because a small number of people in a closely divided battleground state can affect enough popular votes to swing all of that state's electoral votes. Under the current system, every vote in every precinct matters inside every battleground state.

MORE DETAILED ANSWER:

The 2012 Republican National Platform stated 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."[430]

Under the *current* state-by-state winner-take-all method of awarding electoral votes 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."

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 method of awarding electoral votes, there is a huge payoff for fraud and mischief, because a small number of popular votes in a closely divided battleground state can flip a substantial bloc of 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 2004, President George W. Bush had a nationwide lead of 3,012,179 popular votes. However, if 59,152 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 59,152 votes in Ohio than to manufacture 3,012,179 votes (51 times more votes) nationwide. Moreover, it would be far more difficult to conceal fraud involving three million votes.

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 where microscopic margins in one, two, or three states frequently decide the presidency.

As former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote:

> "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."[431]

---

[430] 2012 Republican National Platform adopted in Tampa, Florida, on August 28, 2012.

[431] Tancredo, Tom. Should every vote count? November 11, 2011. http://www.wnd.com/index.php?pageId=366929.

U.S. Senator Birch Bayh (D–Indiana) summed up the concerns about possible fraud in a 1979 Senate speech:

> "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 bloc, 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."[432] [Emphasis added]

9.22. MYTH THAT NATIONAL POPULAR VOTE IS UNPOPULAR

9.22.1. MYTH: National Popular Vote Is unpopular.

QUICK ANSWER:

- Polls conducted by different polling organizations over a number of years, using a variety of wordings of questions, all report high levels of support for a national popular vote.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation 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**."[433] [Emphasis added]

---

[432] *Congressional Record*. March 14, 1979. Page 5000. https://www.congress.gov/bound-congressional-record/1979/03/14/senate-section

[433] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

The National Popular Vote Compact would go into effect when enacted by states possessing a majority of the votes in the Electoral College.

Moreover, polls conducted by different polling organizations over a number of years, using a variety of wordings of questions, all report high levels of support for a national popular vote.

Pew Research Center's multi-year nationwide poll

The Pew Research Center has conducted periodic polls since 2000 on the question of how the President should be elected.

According to its June 2023 poll:

> "Nearly two-thirds of U.S. adults (65%) say the way the president is elected should be changed so that the winner of the popular vote nationwide wins the presidency."[434]

Figure 9.10 shows the course of public opinion on this issue between 2000 and 2023.

Concerning partisan support, the same June 2023 Pew poll showed:

> "47% support moving to a popular vote system. GOP support for moving to a popular vote is the highest it's been in recent years—up from 37% in 2021 and just 27% in the days following the 2016 election."

Figure 9.11 shows the course of partisan views on this issue between 2000 and 2023.

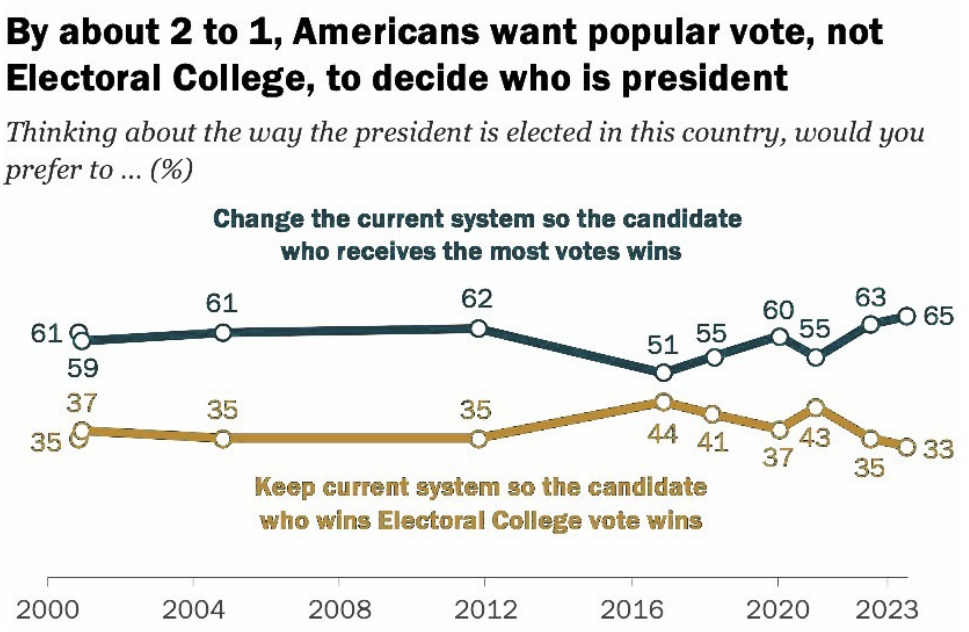


Figure 9.10 Pew poll results 2000–2023

[434] Kiley, Joselyn. 2023. Majority of Americans continue to favor moving away from Electoral College. *Pew Research Center*. September 25, 2023. https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/

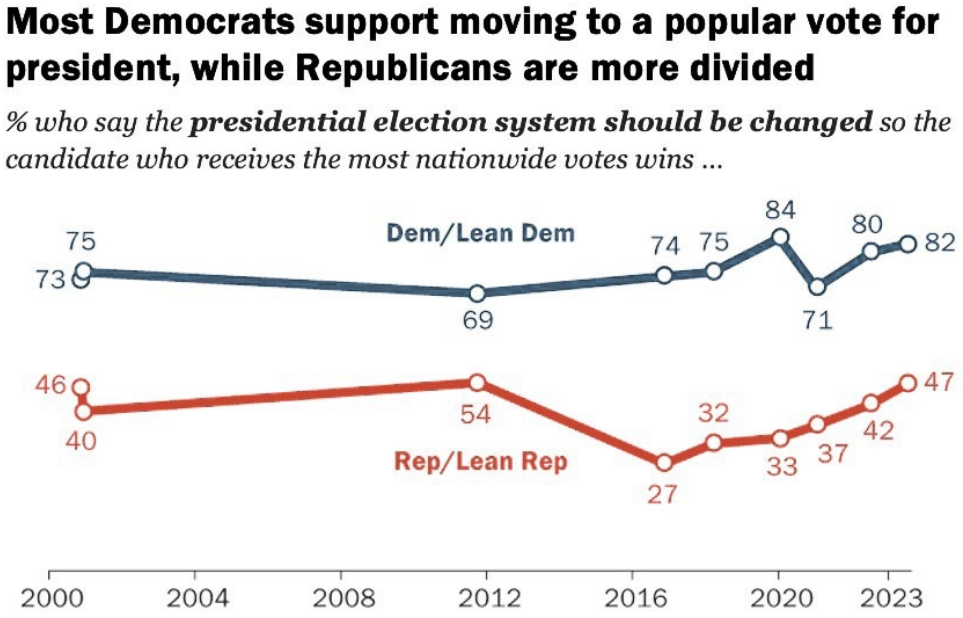


Figure 9.11 Pew poll results by party 2000–2023

The 2023 Pew report found that 63% of conservative Republicans favor the current system, while 63% of moderate and liberal Republicans support a national popular vote.

> "A clear majority—63%—of conservative Republicans prefer keeping the current system, while 36% would change it. The balance of opinion reverses among moderate and liberal Republicans (who make up a much smaller share of the Republican coalition). A majority of moderate and liberal Republicans (63%) say they would back the country moving to a popular vote for president."

Figure 9.12 shows the 2023 Pew results by ideology and party.

A person's position on the issue varies with their degree of political engagement. The 2023 Pew report found:

> "Political engagement—being interested in and paying attention to politics—is associated with views about the Electoral College, particularly among Republicans. Highly politically engaged Republicans overwhelmingly favor keeping the Electoral College: 72% say this, while 27% support moving to a popular vote system."

Figure 9.13 shows the 2023 Pew results by ideology and party.

As to age, the 2023 Pew poll found:

> "Younger adults are somewhat more supportive of changing the system than older adults. About seven-in-ten Americans under 50 (69%) support this. That share drops to about six-in-ten (58%) among those 65 and older."

Figure 9.14 Pew 2023 poll results by age.

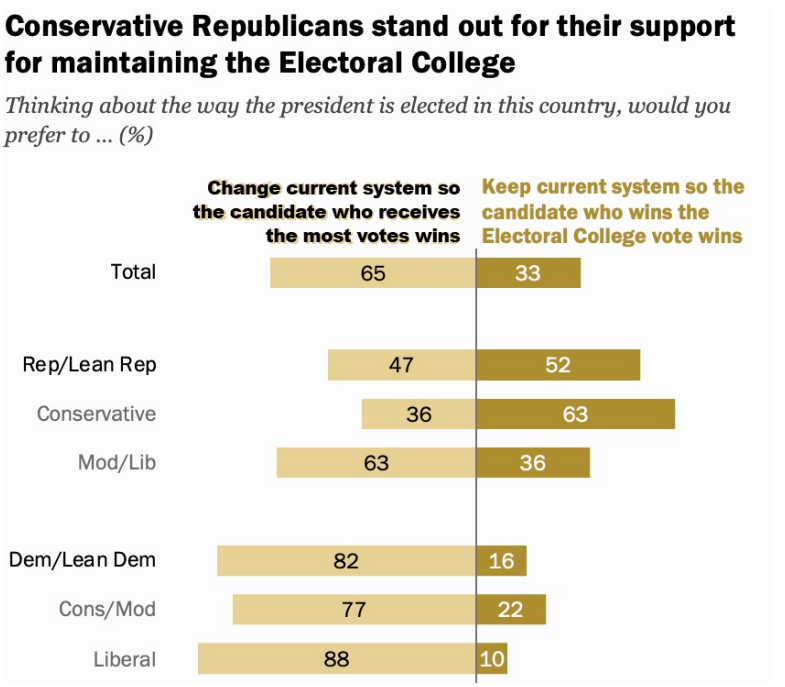


Figure 9.12 Pew 2023 poll results by ideology and party

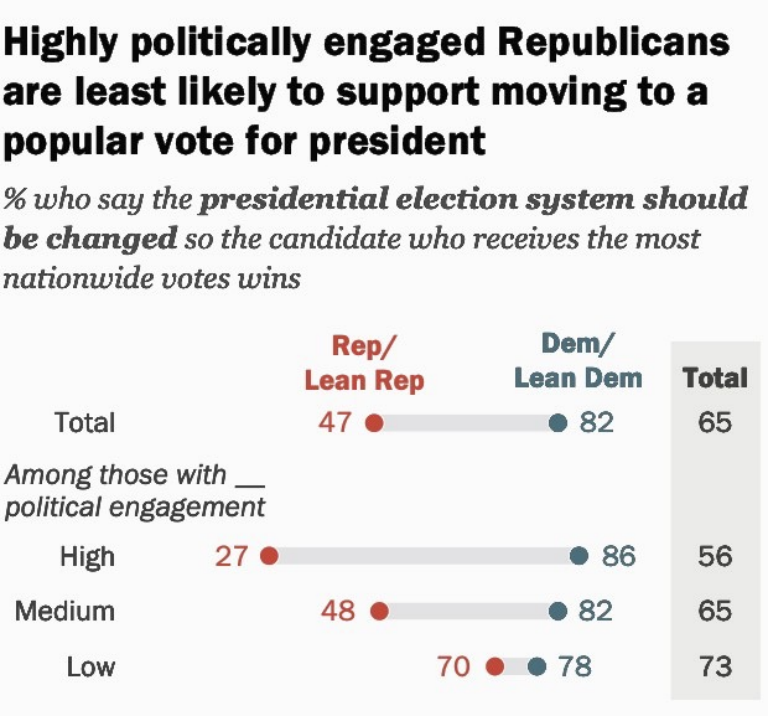


Figure 9.13 Pew 2023 poll results by political engagement

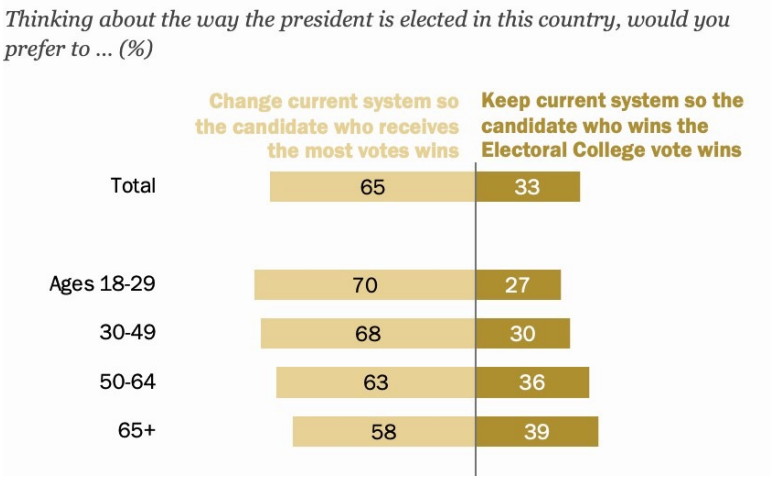


Figure 9.14 2023 poll results by political engagement

Nationwide polls starting in 1944

The public has strongly supported a nationwide popular election of the President for over six decades.

According to a Gallup report entitled "Americans Have Historically Favored Changing Way Presidents Are Elected," the first nationwide poll on the topic of direct election of the President is believed to have been a 1944 Gallup poll that asked:

> "It has been suggested that the electoral vote system be discontinued and Presidents of the United States be elected by total popular vote alone. Do you favor or oppose this proposal?"[435]

In a June 22–27, 1944, Gallup poll, 65% favored the proposal for a national popular vote for President; 23% disapproved; and 13% had no opinion.

In 1977 and 1980, the nationwide Gallup poll asked:

> "Would you approve or disapprove of an amendment to the Constitution which would do away with the Electoral College and base the election of a President on the total vote cast throughout the nation?"[436]

In a Gallup poll on January 14–17, 1977, 73% approved of the proposed constitutional amendment for a national popular vote for President; 15% disapproved; and 12% had no opinion.

In a November 7–10, 1980, Gallup poll, 67% approved of the proposed constitutional

---

[435] Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected.* November 10, 2000. Page 1. https://news.gallup.com/poll/2323/americans-historically-favored-changing-way-presidents-elected.aspx

[436] *Ibid.*

amendment for a national popular vote for President; 19% disapproved; and 15% had no opinion.[437]

The Gallup News Service has also reported:

> "The greatest level of support, 81%, was recorded after the 1968 election when Richard Nixon defeated Hubert Humphrey in another extremely close election."[438]

In 2007, the *Washington Post*, the Kaiser Family Foundation, and Harvard University conducted a nationwide poll that showed 72% support for direct nationwide election of the President.[439]

A 2010 nationwide poll prepared for the Aspen Institute by Penn Schoen Berland and released at the Aspen Ideas Festival found:

> "74 percent agree it is time to abolish the Electoral College and have direct popular vote for the president."[440]

State-level polls

State-level polls on the issue of a national popular vote for President have been conducted by a number of pollsters and organizations at various times.

In California in August 2007, Fairbank, Maslin, Maullin & Associates conducted a poll of 800 likely voters in California for Californians for the Fair Election Reform organization. Voters were asked about a:

> "proposal [that] would guarantee that the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia will win the presidency. Would you generally support or oppose switching to a system in which the presidency is decided by the actual votes in all 50 states combined?"

The results of this 2007 poll in California were that 69% would support a change to national popular vote; 21% would oppose the change; and 9% didn't know.

In California in October 2008, the Public Policy Institute of California (PPIC) conducted a telephone survey of 2,004 Californians that asked:

---

[437] Other Gallup polls on this subject are discussed in Carlson, Darren K. 2004. Public flunks electoral college system. November 2, 2004. *Gallup Daily News*. See http://www.gallup.com/poll/13918/Public-Flunks-Electoral-College-System.aspx. See also Saad, Lydia. 2011. Americans would swap electoral college for popular vote. *Gallup Daily News*. October 24, 2011.

[438] Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected*. November 10, 2000. Page 2. https://news.gallup.com/poll/2323/americans-historically-favored-changing-way-presidents-elected.aspx

[439] The Washington Post-Kaiser Family Foundation-Harvard University: Survey of Political Independents. 2007. Page 12. https://www.washingtonpost.com/wp-srv/politics/interactives/independents/post-kaiser-harvard-topline.pdf

[440] Time Aspen Ideas Festival 2011 full report. http://www.slideshare.net/PennSchoenBerland/time-aspen-ideas-festival-2011-full-report

> "For future presidential elections, would you support or oppose changing to a system in which the president is elected by direct popular vote, instead of by the Electoral College?"[441]

The results of the 2008 PPIC poll in California were that 70% would support a change to a national popular vote; 21% would oppose the change; and 10% didn't know.

In New York in October 2008, the Global Strategy Group conducted a poll on the National Popular Vote Compact and reported:

> "Voters in New York are largely in favor of switching to a system that elects the President of the United States according to vote totals in all 50 states. Two-thirds of voters (66%) currently support the proposal, while just a quarter (26%) is in opposition to it. Support for the proposal is broad across demographics as a majority of each subgroup is in favor of it."

Polls conducted by Public Policy Polling in various years for the National Popular Vote organization reported high levels of public support for a national popular vote for President in battleground states, spectator states, small states, southern states, border states, and elsewhere.

Table 9.37 shows the results, by party, from these polls.[442]

The poll in Nebraska is noteworthy because that state awards three of its five electoral votes by congressional district under a law first used in the 1992 election. In 2008, Barack Obama won Nebraska's 2nd congressional district (the Omaha area), thereby winning one of the state's electoral votes. In 2020, Joe Biden also won the 2nd district.

A survey of 977 Nebraska voters conducted on January 26–27, 2011, contained a comparative question about a national popular vote, Nebraska's current congressional-district method, and the statewide winner-take-all method.

Voters were first 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?"

The survey showed 67% overall support for a national popular vote for President. On this first question, support for a national popular vote by political affiliation was 78% among Democrats, 62% among Republicans, and 63% among others. By congressional district, support for a national popular vote was 65% in the 1st congressional district, 66% in the 2nd district (which voted for Obama in 2008), and 72% in the 3rd district. By gender, support for a national popular vote was 76% among women and 59% among men. By age, support for a national popular vote was 73% among 18–29-year-olds, 67% among 30–45 year-olds, 65% among 46–65 year-olds, and 69% among those older than 65. By race, support for a national popular vote was 68% among whites and 63% among others.

---

[441] *PPIC Statewide Survey: Californians and Their Government*. October 2008.

[442] Cross-tabs and other details about these polls (and other polls) are available at https://www.nationalpopularvote.com/polls

Table 9.37 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%**

Voters were then asked to choose among three alternative methods of awarding Nebraska's electoral votes:

- 16% favored a statewide winner-take-all method of awarding electoral votes;
- 27% favored Nebraska's current congressional-district method of awarding electoral votes; and
- 57% favored a national popular vote.

Table 9.38 shows the results of this second question by political affiliation.

Table 9.38 Nebraska results, by political affiliation, on three alternative methods of electing the President.

Method	Democrat	Republican	Other
Candidate who gets the most votes in all 50 states	65%	53%	51%
Nebraska's current district system	26%	27%	32%
Statewide winner-take-all system	9%	20%	17%

Table 9.39 shows the results of this second question by congressional district. Note that the 2nd district was the district carried by Obama in 2008.

Table 9.39 Nebraska results, by political affiliation, on three alternative methods of electing the President.

Method	First district	Second district	Third District
Candidate who gets the most votes in all 50 states	53%	58%	59%
Nebraska's current district system	26%	31%	26%
Statewide winner-take-all system	21%	12%	15%

See section 9.37.1 for a discussion of polls in Utah, Connecticut, and South Dakota in which voters were asked a push question that highlighted the fact that the state's electoral votes would be awarded to the winner of the national popular vote in all 50 states under the National Popular Vote Compact—rather than the winner of the statewide popular vote.

9.23. MYTHS ABOUT CONGRESSIONAL CONSENT

9.23.1. MYTH: The Compact is flawed, because Congress did not consent to it prior to its consideration by state legislatures.

QUICK ANSWER:

- The U.S. Supreme Court has ruled that the Constitution imposes no requirement as to when congressional consent to an interstate compact is obtained. If a particular compact requires congressional consent, it can be obtained before, during, or after the period when the compact is being considered by the states. Most commonly, Congress considers a compact after the requisite combination of states has approved it.

MORE DETAILED ANSWER:

The U.S. Supreme Court stated in *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**."[443] [Emphasis added]

[443] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

Thus, congressional consent is not required prior to a state legislature's consideration of an interstate compact.

If a particular compact requires congressional consent, Congress can consider the matter before, during, or after the period when the states are considering it.

Sometimes Congress gives its consent in advance to a particular compact or a broad category of compacts.

For example, Congress gave its consent in advance to compacts in the Low-Level Radioactive Waste Policy Act of 1980, the Tobacco Control Act of 1936, the Crime Control Consent Act of 1934, and the Weeks Act of 1911 (section 5.19).

When Congress granted its consent in 1921 to a Minnesota–South Dakota compact relating to criminal jurisdiction over boundary waters, it simultaneously granted its advance consent in case Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin were to adopt a similar compact (section 5.19).

9.23.2. MYTH: The National Popular Vote Compact is flawed, because it fails to mention congressional consent in its text.

QUICK ANSWER:

- The absence of a mention of Congress in the text of a particular interstate compact provides no guidance as to whether Congress must give its consent in order for the compact to become effective. Because every interstate compact is subordinate to the U.S. Constitution, compacts typically do not specifically mention congressional consent in their text—even if the particular compact clearly requires congressional consent and even if the compacting states intend to seek it.

MORE DETAILED ANSWER:

Some interstate compacts require congressional consent, whereas others do not (as discussed in detail in the next section of this chapter).

Because every interstate compact is subordinate to the U.S. Constitution, compacts typically do not specifically mention congressional consent in their text—even if the particular compact clearly requires congressional consent and even if the compacting states intend to seek it.

The absence of a mention of Congress in the text of a particular interstate compact provides no guidance as to whether Congress must give its consent prior to the compact becoming effective.

For example, the text of the Multistate Tax Compact was silent as to the role of Congress. It simply said that the compact would go into effect when seven states approved it.

The states involved initially sought congressional consent. However, they encountered ferocious opposition in Congress by lobbyists for business interests that would be subjected to the compact's audit provisions.

Relying on the Supreme Court's 1893 decision in *Virginia v. Tennessee*[444] and its 1976

[444] *Virginia v. Tennessee*. 148 U.S. 503 at 520. 1893.

decision in *New Hampshire v. Maine*,[445] the compacting states then decided to implement the compact without congressional consent (as discussed in detail in the next section of this chapter).

U.S. Steel challenged the states' power to do so.

In 1978, the U.S. Supreme Court ruled that the Multistate Tax Compact did not require congressional consent.[446]

If U.S. Steel had won in the Supreme Court, the compacting states would, of course, have been forced to return to Congress and try to overcome the opposition.

Similarly, the text of the 1921 Agreement of New York and New Jersey establishing the Port Authority was silent as to the role of Congress. Relying on the 1893 case of *Virginia v. Tennessee*, New York and New Jersey did not originally intend to seek congressional consent. The compact simply said that it would take effect when approved by both states.

When the Port Authority sought to borrow money—a novelty at the time for interstate authorities—it found that bankers and potential investors were hesitant to purchase bonds in the absence of congressional consent. The two states then decided to seek, and quickly obtained, congressional consent for their compact.[447]

The silence of most interstate compacts as to the steps required to bring them into effect are analogous to the texts of most bills passed by state legislatures and Congress.

The steps required to bring a proposed piece of legislation into effect are specified by a state's constitution (for state legislation) and by the U.S. Constitution (for federal laws), respectively.

Thus, the texts of state and federal legislative bills do not recite all the steps required to bring them into effect. They do not explicitly state, for example, that a legislative bill must be presented to the chief executive for approval or veto, and they do not itemize the procedures for overriding a veto if the executive does not approve.

9.23.3. MYTH: Congressional consent is required before the National Popular Vote Compact can take effect.

QUICK ANSWER:

- Some interstate compacts require congressional consent in order to take effect, while others do not.
- 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." The U.S. Supreme Court has also repeatedly ruled that states have "exclusive" and "plenary" power to choose the method of appointing their presidential electors.
- Because the choice of manner of appointing presidential electors is exclusively a state decision, there is no federal power—much less federal supremacy—

---

[445] *New Hampshire v. Maine*. 426 U.S. 363. 1976.

[446] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. 1978.

[447] Zimmerman, Joseph F. 1996. *Interstate Relations: The Neglected Dimension of Federalism*. Westport, CT: Praeger.

to encroach upon. Therefore, under established compact jurisprudence, congressional consent would not be necessary for the National Popular Vote Compact to become effective.

- No court has ever invalidated an interstate agreement for lack of congressional consent.
- Opponents of the National Popular Vote Compact have stated that they intend to litigate the question of whether it requires congressional consent after it is approved by the requisite combination of states. Therefore, the National Popular Vote organization has been working to obtain support in Congress for the Compact.

MORE DETAILED ANSWER:

The Compacts Clause of the U.S. Constitution (Article I, section 10, clause 3) provides:

> "No state shall, without the consent of Congress, … enter into any agreement or compact with another state…."[448]

In 2023, the Congressional Research Service summarized the judicial precedents concerning congressional consent of interstate compacts:

> "One of the most common questions to arise under the Compact Clause is whether congressional consent is required for a particular state commitment. A literal reading of the Compact Clause would require congressional approval for any interstate compact, but the Supreme Court has not endorsed that approach in interstate compacts cases. Instead, the Court adopted a functional interpretation in which **only interstate compacts that increase the political power of the states while undermining federal sovereignty require congressional consent**.[449] [Emphasis added]

Early 19th-century federal and state court decisions concerning congressional consent

Although it was not until 1893 that the U.S. Supreme Court explicitly ruled that some interstate compacts can go into effect without congressional consent, the Supreme Court in 1808 accepted the validity of an interstate compact that had gone into effect without congressional consent.

In their seminal article on interstate compacts, Felix Frankfurter (later a Justice of the U.S. Supreme Court) and James Landis identified the Virginia and Tennessee Boundary Agreement of 1803 as the earliest example of an interstate compact that went into effect without congressional consent.

---

[448] The full wording of clause 3 is: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[449] Congressional Research Service Legal Sidebar. 2023. Interstate Compacts: An Overview, June 15, 2023. Page 2. https://crsreports.congress.gov/product/pdf/LSB/LSB10807

> "The agreement was ratified by Virginia on January 22, 1803, and by Tennessee on November 3, 1803. In *Robinson v. Campbell* (1808, U.S.) 3 Wheat. 212,[450] **the Supreme Court assumed the validity of the compact**."[451] [Emphasis added]

Frankfurter and Landis also identified the Georgia and Tennessee Agreement of 1837 as the earliest example of a compact (other than a boundary compact) that went into effect without congressional consent.

> "By the Act of January 24, 1838, Tennessee granted a railroad company the privilege of a right of way through the State, on condition that upon the extension of its line through Georgia the latter State would give it the same privileges. By the Act of December 23, 1847, Georgia granted the railroad the same privileges.
>
> "In *Union Bridge R. R. Co. v. E.T. & Ga. R. R. Co.* (1853) 14 Ga. 327,[452] **the Court held that this was not such a compact as required the assent of Congress in order to make it valid**."[453] [Emphasis added]

Concerning section 10 of Article I of the U.S. Constitution, the Georgia Supreme Court wrote:

> "This prohibition applies only to such an 'agreement or compact' … as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government."[454]

Frankfurter and Landis also identified other compacts that went into effect, with court approval but without congressional consent during the 19th century.[455]

Virginia v. Tennessee in 1893

In 1893, the U.S. Supreme Court first provided an explicit test for deciding whether a particular interstate compact requires congressional consent in order to become effective.

The two states involved in the case of *Virginia v. Tennessee* had never obtained congressional consent for a boundary agreement that they had reached earlier in the 19th century.

The Court observed:

> "**There are many matters upon which different states may agree that can in no respect concern the United States.** If, for instance, Virginia

---

[450] *Robinson v. Campbell*, 16 U.S. 212, 3 Wheat. 212, 4 L. Ed. 372 (1818). https://cite.case.law/us/16/212/

[451] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Pages 749–750. May 1925.

[452] *Union Branch Rail Road v. East Tennessee & Georgia R. R.*, 14 Ga. 327 (1853) https://cite.case.law/ga/14/327/

[453] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Page 752. May 1925.

[454] 14 Ga. 327 at 339.

[455] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Page 752. May 1925.

> should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land."
>
> "If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of congress before it could contract with New York for the transportation of the exhibits through that state in that way."
>
> "If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session."[456] [Emphasis added]

Having established that congressional consent is not necessarily required for every interstate compact, the Court then reframed the question in the case:

> "If, then, the terms 'compact' or 'agreement' in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of congress must be obtained**, to what compacts or agreements does the constitution apply**?"[457] [Emphasis added]

The Court then answered:

> "**We can only reply by looking at the object of the constitutional provision**, and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. '*Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words; and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.
>
> "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 com-**

---

[456] *Virginia v. Tennessee*. 148 U.S. 503 at 518. 1893.

[457] *Ibid*.

> **bination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."**[458] [Emphasis added]

Developments between 1893 and 1978

Relying on the Supreme Court's decision in *Virginia v. Tennessee* in 1893, the legislatures of New York and New Jersey did not submit the Palisades Interstate Park Agreement of 1900 to Congress for its consent.[459]

In the same vein, the legislatures of New Jersey and New York originally had no intention of submitting the 1921 Port of New York Authority Compact to Congress. The compact simply specified that it would become effective:

> "when signed and sealed by the Commissioners of each State as hereinbefore provided and the Attorney General of the State of New York and the Attorney General of New Jersey."[460]

This compact broke new ground by establishing a new governmental entity that was separate from the administration of each state and administered by its own governing body.

The newly created Authority's bankers and bond counsels advised the Authority that potential investors might be hesitant to lend money to the then-unprecedented entity in the absence of congressional consent. Thus, the two states sought, and quickly obtained, congressional consent for the compact.[461]

In the 1950s, the U.S. House of Representatives approved a bill granting consent to the Southern Regional Education Compact; however, the Senate did not concur, because it concluded that the subject matter of the compact—education—was entirely a state prerogative.[462] That compact then went into effect without congressional consent.

In *New Hampshire v. Maine* in 1976, the Supreme Court reaffirmed its 1893 ruling in *Virginia v. Tennessee* that not all interstate agreements require congressional consent.[463]

U.S. Steel Corporation v. Multistate Tax Commission in 1978

The case of *U.S. Steel Corporation v. Multistate Tax Commission* in 1978[464] is the most important recent judicial precedent on the issue of whether congressional consent is nec-

---

[458] *Ibid.* Page 519.

[459] A subsequent compact, the Palisades Interstate Park Compact of 1937, received congressional consent in 1937. https://ballotpedia.org/Palisades_Interstate_Park_Compact

[460] Agreement of New York and New Jersey establishing Port of New York Authority. 1921. *Laws of 1921*. Chapter 154. Article XXII. Section 2. http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:

[461] Zimmerman, Joseph F. 1996. *Interstate Relations: The Neglected Dimension of Federalism*. Westport, CT: Praeger.

[462] Barton, Weldon V. 1967. *Interstate Compacts in the Political Process*. Chapel Hill, NC: University of North Carolina Press. Pages 132–133.

[463] *New Hampshire v. Maine*. 426 U.S. 363. 1976.

[464] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452, 454. 1978.

essary for interstate compacts. In that case, the U.S. Supreme Court reaffirmed its 1893 holding in *Virginia v. Tennessee*.[465]

The Multistate Tax Compact addressed issues relating to multistate taxpayers and uniformity among state tax systems. The compact created a commission empowered to conduct audits of multistate businesses and gave such businesses a choice of formulas for calculating their state taxes.[466]

Like many others, the compact was silent as to congressional consent, even though the compacting parties originally intended to seek it. The compact simply stated:

> "This compact shall enter into force when enacted into law by any seven states."[467]

By 1967, the requisite number of states had approved the compact, and it was submitted to Congress for consent.

However, the compact languished in Congress because of the fierce opposition of business interests that were concerned about the multi-million-dollar tax audits that the compact was certain to generate.

The frustrated states then decided to rely on the 1893 judicial precedent in *Virginia v. Tennessee*. They proceeded with the implementation of the compact without congressional consent.

Led by U.S. Steel, businesses opposed to the compact challenged the constitutionality of the states' action.

The Supreme Court's 1978 decision in *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.

Justice Powell wrote the Court's opinion, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

In holding that the Multistate Tax Compact could go into effect without congressional consent, the Court wrote:

> "**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*.[468] His conclusion [was] that the Clause could not be read literally** [and the Supreme Court's 1893 decision has been] approved in sub-

---

[465] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[466] Additional history and information about this compact is described in *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. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[467] The web site of the Multistate Tax Commission is at https://www.mtc.gov The Multistate Tax Compact is at https://compacts.csg.org/compact/multistate-tax-compact/

[468] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

sequent 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*,[469] 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.**"[470] [Emphasis added]

The Court ruled that:

"**the test is whether the Compact enhances state power *quaod*** [with regard to] **the National Government**."[471] [Emphasis added]

The Court also noted that the compact did not:

"authorize the member states to exercise any powers they could not exercise in its absence."[472]

The National Popular Vote Compact does not encroach upon federal supremacy and hence does not require congressional consent.

The power of each state to choose the manner of awarding its electoral votes is specified in Article II, section 1, clause 2 of the Constitution:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[473]

In *McPherson v. Blacker* in 1892, the Supreme Court ruled:

"**The appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[474] [Emphasis added]

The absence of federal power—much less federal supremacy—over the choice of method of appointing presidential electors is made especially clear by comparing the constitutional provision dealing with *presidential* elections in Article II with the parallel provision concerning *congressional* elections in Article I.

Article I, section 4 of the Constitution concerning congressional elections 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**

---

[469] *New Hampshire v. Maine*, 426 U.S. 363. 1976.

[470] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459–460. 1978.

[471] *Ibid*. Page 473.

[472] *Ibid*. Page 473.

[473] U.S. Constitution. Article II, section 1, clause 2.

[474] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

> **Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators." [Emphasis added]

Article I gives states *primary*—but not *exclusive*—control over congressional elections. At any time, Congress can "make or alter" any state law regarding the manner of conducting congressional elections.

In contrast, Article II concerning presidential elections gives the states *exclusive* control over the manner of appointing presidential electors.

The National Popular Vote Compact does 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.

There is simply no federal power—much less federal supremacy—to encroach upon.

An opponent of the National Popular Vote Compact, Professor Michael T. Morley at the Florida State University College of Law, wrote in 2020:

> "Perhaps the most obvious objection to the National Popular Vote Compact is that it is invalid under the Compact Clause unless and until Congress consents to it. **Under the Court's longstanding interpretation of the Clause, however, congressional approval is likely unnecessary.** In any event, if states collectively holding 270 or more electoral votes joined the Compact, Congress would likely grant its approval at some point, perhaps when Democrats controlled both Congress and the Presidency. Thus, **at most, the Compact Clause reflects a potential constitutional speed bump, not an impenetrable barrier.**"[475]

In discussing the "speed bump," it appears that as soon as *either* political party wins control of both houses of Congress and the presidency, the filibuster procedure in the U.S. Senate is likely to be abolished.[476,477]

Other opponents of the National Popular Vote Compact, such as Professor Derek Muller, have vigorously argued that it does require congressional consent.[478,479] Other scholars have reached the opposite conclusion.[480]

In any event, opponents of the National Popular Vote Compact have stated that they intend to litigate the question of whether it requires congressional consent after it is ap-

---

[475] Morley, Michael T. 2020. The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact. *Harvard Law & Policy Review*. Volume 15. Issue 1. Page 100. https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2021/08/HLP109.pdf

[476] Willick, Jason. 2024. Sinema predicts the Senate filibuster's unfortunate demise. *Washington Post*. May 9, 2024. https://www.washingtonpost.com/opinions/2024/05/09/sinema-filibuster-congress-american-decline/

[477] Hulse, Carl. 2024. Is the End of the Filibuster Near? *New York Times*. March 13, 2024. https://www.nytimes.com/2024/03/13/us/politics/filibuster-senate-manchin-sinema.html

[478] Muller, Derek T. 2007. The compact clause and the National Popular Vote Interstate Compact. *Election Law Journal*. Volume 6. Number 4. Pages 372–393. https://www.liebertpub.com/doi/10.1089/elj.2007.6403

[479] Muller, Derek T. 2008. More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks. *Election Law Journal*. Volume 7. Number 3. Pages 227–232. https://www.liebertpub.com/doi/abs/10.1089/elj.2008.7307

[480] Hendricks, Jennifer S. 2008. Popular election of the president: Using or abusing the Electoral College? *Election Law Journal*. Volume 7. Pages 218–226. https://www.liebertpub.com/doi/10.1089/elj.2008.7306

proved by the requisite combination of states. Therefore, the National Popular Vote organization has been working to obtain support in Congress for the Compact.

A mere federal "interest" does not constitute a threat to federal supremacy.
In discussing whether the National Popular Vote Compact requires congressional consent, Tara Ross, a lobbyist against the Compact who works closely with Save Our States, has argued that the federal government has an "interest" in the matter.

> "**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."[481] [Emphasis added]

As discussed at length in section 9.1.1, the National Popular Vote Compact would not change "the presidential election procedure described in the Constitution." Indeed, no state law 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.

The winner-take-all method of appointing presidential electors 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) had 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.

These state winner-take-all laws may be changed in the same manner as they were adopted—that is, by passage of a new state law changing the state's method of appointing its presidential electors.

Thus, the National Popular Vote Compact does not interfere with any federal "interest" in protecting the constitutional amendment process.

More importantly, the Supreme Court specifically addressed the question of whether the mere existence of a federal "interest" is sufficient to require that a compact obtain congressional consent. In responding to a point raised in the dissenting opinion, the seven-member majority of the Supreme Court stated (in footnote 33 of its opinion):

> "**The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.'** It dwells at some length 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,'

[481] 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.

> 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."[482] [Emphasis added]

The U.S. Supreme Court subsequently repeated the point that it made in 1978 in footnote 33 of its decision in *U.S. Steel Corporation v. Multistate Tax Commission* concerning the irrelevance of the existance of a "federal interest." In overturning a lower court decision in 1981, the Court cited footnote 33 in *Cuyler v. Adams*:

> "The [lower] Court stresses the federal interest in the area of extradition, ante, at 442, n. 10, but, for Compact Clause purposes, **'[a]bsent a threat of encroachment or interference through enhanced state power, the exis-**

[482] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452 at 479. 1978.

> **tence of a federal interest is irrelevant**.' *Multistate Tax Comm'n*, supra, at 480, **n. 33**."[483] [Emphasis added]

Dissenting opinion in *Multistate Tax Commission* concerning impact on non-member states

In their dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission*, Justices Byron White and Harry Blackmun argued that courts should consider the possible adverse effects of a compact on non-compacting states in deciding whether congressional consent is necessary for a particular compact. They wrote:

> "A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States."[484]

The Court majority addressed the argument raised by the dissent 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**.

---

[483] *Cuyler v. Adams*, 449 U.S. 433, 452. 1981.

[484] *U.S. Steel Corp. v. Multistate Tax Commission*. 434 U.S. at 494. 1978.

> 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 constitutional 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."[485] [Emphasis added]

In 1985, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court considered 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:

> "[did] not see how the statutes in question … enhance the political power of the New England states at the expense of other States."[486]

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."[487]

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.**"[488] [Emphasis added]

Concerning Ross' first point, the National Popular Vote Compact 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."

In *Cuyler v. Adams* in 1981, the Supreme Court discussed the potential impact on non-member states of a compact that allows every state to join:

---

[485] *Ibid.* Pages 477–478.

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

[487] 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.

[488] *Ibid.* Page 40.

> "In light of our recent decisions, however, it cannot seriously be contended that the Detainer Agreement constitutes an 'agreement or compact' as those terms have come to be understood in the Compact Clause. In *New Hampshire v. Maine*, 426 U.S. 363 (1976), we held that the 'application of **the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'** *Id.*, at 369, quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). This rule was reaffirmed in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978), where the Court ruled that **the quoted test 'states the proper balance between federal and state power with respect to compacts and agreements among States.'** Certainly nothing about the Detainer Agreement threatens the just supremacy of the United States or enhances state power to the detriment of federal sovereignty. **As with the 'compact' in Multistate Tax Comm'n, any State is free to join the Detainer Agreement, so it cannot be considered to elevate member States at the expense of nonmembers.** See *Id.*, at 477–478."[489] [Emphasis added]

Ross' second point concerning constitutional amendments was discussed earlier in this section.

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 does not confer any advantage on states belonging to it, 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 influence of votes cast in their states created by the winner-take-all method of awarding electoral votes—while simultaneously arguing that disadvantaged or altruistic states have no right to exercise their *independent* constitutional power over the method of awarding their electoral votes with the aim of creating equality.

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 closely divided battleground states plainly diminishes the political value of the votes cast by citizens in non-battleground states.

It is inherent in the grant by the U.S. Constitution, to each state, of the *independent* power to choose the method of appointing its presidential electors that one state's decision can enhance the political value of votes cast in its state—thereby impacting (and diminishing) the influence of votes cast in other states. This is a direct consequence of federalism and the fact that the Constitution gives each state the independent power to decide the method of appointing its presidential electors.

---

[489] *Cuyler v. Adams*. 449 U.S. 433, 450–451. 1981.

Indeed, maximization of Virginia's political clout was the candidly stated purpose of the adoption of winner-take-all in 1800 by Jefferson's supporters, as discussed in section 2.6.1 and as explained in their nine-page broadside entitled "A Vindication of the General Ticket Law" (appendix C).

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, say, the whole-number proportional method for awarding electoral votes (section 4.2), presidential candidates would pay almost no attention to that state, because only one electoral vote would be at stake in most cases. 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 importance of voters in other 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 counterbalance the political effects of that decision (and, arguably, create a better overall system in the process).

In any case, the electoral votes of the non-compacting states would, under the National Popular Vote Compact, 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, the non-compacting states would continue to cast their votes for the winner of the statewide popular vote (or perhaps the district-wide popular vote in Nebraska and Maine) 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 Wyoming politically irrelevant in presidential elections. Indeed, a vote in California and a vote in 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 subsequent widespread adoption by the states of the winner-take-all rule. 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 votes 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 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 most electoral votes (43). Delaware argued that New York's decision to use the winner-take-all rule effectively disenfranchised voters in Delaware and the other 11 plaintiff states. New York's (defendant) brief is especially pertinent.[490] 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.[491]

In 1968, the constitutionality of the winner-take-all rule was challenged in *Williams v. Virginia State Board of Elections*.[492] A federal court in Virginia upheld the winner-take-all rule. The U.S. Supreme Court affirmed this decision in a *per curiam* decision in 1969.[493] See section 9.1.7.

Developments since 1978

In 2003, Michael S. Greve reported:

> "No court has ever voided a state agreement for failure to obtain congressional consent."[494]

In 2007, the *Harvard Law Review* reported:

> "No court has ever invalidated an interstate agreement for lack of such consent."[495]

In the period since the Supreme Court's decision in *U.S. Steel Corporation v. Multistate Tax Commission* in 1978, numerous compacts that did not receive congressional consent have been challenged in the courts, and none has been invalidated because of lack of congressional consent.

In 1983, *McComb v. Wambaugh* involved the Interstate Compact on Placement of

---

[490] Delaware's brief in the 1966 case may be found at https://www.nationalpopularvote.com/elevenplaintiffs. New York's brief may be found at https://www.nationalpopularvote.com/newyorkbrief. Delaware's argument in its request for a re-hearing may be found at https://www.nationalpopularvote.com/delawarebrief.

[491] *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

[492] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, ED Virginia 1968.

[493] *Williams v. Virginia State Board of Elections*. 393 U.S. 320 (1969) (*per curiam*).

[494] Greve, Michael S. 2003. Compacts, Cartels, and Congressional Consent. *Missouri Law Review*. Spring 2003. Volume 68. Pages 285–387. See page 289 and also footnote 15 regarding work of David E. Engdahl in 1965. https://scholarship.law.missouri.edu/mlr/vol68/iss2/

[495] *Harvard Law Review*. 2007. The Compact Clause and the Regional Greenhouse Gas Initiative. *Harvard Law Review*. Volume 120. Page 1958. See page 1960. https://harvardlawreview.org/wp-content/uploads/pdfs/the_compact_clause.pdf

Children. That compact had become effective without congressional consent,[496] and it contained a provision that delayed a state's withdrawal for two years. The U.S. Court of Appeals for the Third Circuit held that no encroachment on federal supremacy occurred, because the subject of the compact concerns:

> "areas of jurisdiction historically retained by the states."[497]

In 1983, *Breest v. Moran*[498] involved the New England Interstate Corrections Compact allowing for the transfer of prisoners among detention facilities in the New England states.

In 2002, *Star Scientific, Inc. v. Beales* concerned the Master Settlement Agreement that resolved the lawsuit between states and major tobacco companies and established an administrative body to determine compliance with the agreement. The U.S. Court of Appeals for the Fourth Circuit concluded:

> "The Master Settlement Agreement does not increase the power of the States at the expense of federal supremacy and that, therefore, it is not an interstate compact requiring congressional approval under the Compact Clause."[499]

As Michael S. Greve wrote in 2003:

> "After *U.S. Steel* one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at least also, running afoul of other independent constitutional obstacles."[500]

9.23.4. MYTH: The topic of elections 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 it must be among the powers that states are permitted to exercise.
- The U.S. Supreme Court has repeatedly stated that the Constitution gives each state the "exclusive" and "plenary" power to choose the manner of appointing

---

[496] The 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 providing: "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.

[497] *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991).

[498] *Breest v. Moran*, 571 F.Supp. 343 (D.R.I. 1983).

[499] *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002).

[500] Greve, Michael S. 2003. Compacts, Cartels, and Congressional Consent. *Missouri Law Review*. Spring 2003. Volume 68. Pages 285–387. Page 308. https://scholarship.law.missouri.edu/mlr/vol68/iss2/

its presidential electors. Thus, the subject matter of the National Popular Vote Compact is among the powers that the states are permitted to exercise.

MORE DETAILED ANSWER:

The U.S. Constitution places no restriction on the subject matter of an interstate compact other than the implicit limitation that it must be among the powers that states are permitted to exercise.

The National Popular Vote Compact concerns the method of appointment of a state's presidential electors.

The U.S. Constitution explicitly gives each state the power to select the method of appointing its presidential electors:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[501]

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 provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."[502] [Emphasis added]

Thus, the subject matter of the National Popular Vote Compact is a state power.

There is currently no other interstate compact concerned specifically with elections. Nonetheless, 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 uniform durational residency requirements in presidential elections.

He also 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**

---

[501] U.S. Constitution. Article II, section 1, clause 2.

[502] *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

> **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."**[503] [Emphasis added]

The states have used interstate compacts in increasingly creative ways—especially since the 1920s. The judiciary has been repeatedly asked to consider the validity of various novel compacts. Nonetheless, we are aware of no case in which the courts have invalidated any interstate compact.[504]

Moreover, in recent years, the courts have accorded even greater deference to the power of states and even wider and freer use of interstate compacts by them.

The 10th Amendment provides an additional argument in favor of a state power:

> **"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]

Article II, section 1 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 a federal appointee as presidential elector.

9.23.5. MYTH: The Compact requires congressional consent, but Congress cannot give it.

QUICK ANSWER:

- It is a fact that the choice of method for appointing presidential elections is an exclusive state power. Thus, Congress could not pass, for example, a federal law requiring that presidential electors be appointed on the basis of the national popular vote for President.
- It is a fact that the courts have ruled that congressional consent "converts" an interstate compact into federal law for the purpose of ascertaining whether the courts should interpret a given compact as state or federal law.
- However, no "Catch-22" is created by the above two statements, because the U.S. Supreme Court has specifically ruled that the subject matter of a compact that is to be converted into federal law must be "an appropriate subject for congressional legislation."

---

[503] *Oregon v. Mitchell.* 400 U.S. 112 at 286–287. 1970.

[504] There have been cases where a higher court has reversed 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. https://supreme.justia.com/cases/federal/us/341/22/

MORE DETAILED ANSWER:

Ian J. Drake, an assistant professor of political science and law at Montclair State University, claims that there is a "Catch-22" that prevents Congress from giving its consent to the National Popular Vote Compact.

Drake believes that the National Popular Vote Compact requires congressional consent before it can come into effect—a belief that we separately discussed in section 9.23.3.

For the sake of argument in this section, let's say that the National Popular Vote Compact *does* require congressional consent.

Drake argues that the National Popular Vote Compact is "manifestly unconstitutional,"[505] because Congress does not have the power to give its consent:

> "Even if Congress wanted to approve the NPV, it would be unconstitutional to do so. The Supreme Court has held that **Congress' approval of an interstate compact converts the agreement into federal law**. Although **the Constitution leaves the appointment of electors up to the states**—a point NPV proponents repeatedly make—**the submission of the NPV compact to Congress puts Congress in the position of approving a measure that Congress would be prohibited from enacting by itself**. The Constitution does not allow Congress to create a popular vote system on its own initiative. Therefore, how could Congress approve a state-based plan that does the same?"[506] [Emphasis added]

In fact, there is no "Catch-22" here, because Drake has ignored a key element of the Supreme Court's ruling in *Cuyler v. Adams* in 1981:

> "[W]here Congress has authorized the States to enter into a cooperative agreement **and the subject matter of that agreement is an appropriate subject for congressional legislation**, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question."[507] [Emphasis added]

Drake's argument also misinterprets what it means to "convert" an interstate compact into federal law. The effect of this conversion is to ascertain whether the courts are to interpret a compact under state or federal law—something that is clear from the history leading up to the decision in *Cuyler v. Adams* (covered in section 5.10).

Needless to say, Congress cannot acquire the power to exercise a power that the Constitution assigns exclusively to the states through the legerdemain of approving legislation already passed by the states.

---

[505] Drake, Ian J. 2014. New York adding to federal problem. *Albany Times Union*. May 6, 2014. https://www.timesunion.com/opinion/article/N-Y-adding-to-federal-problem-5457487.php

[506] Drake, Ian J. 2016. An alternative to the Electoral College. *Oxford University Press blog*. November 20, 2016. http://blog.oup.com/2016/11/alternative-electoral-college-vote/#comment-2958352

[507] *Cuyler v. Adams*, 449 U.S. 433, 434–435. 1981.

9.23.6. MYTH: The National Popular Vote Compact requires congressional consent because of its withdrawal procedure.

QUICK ANSWER:

- The test established by the U.S. Supreme Court in 1978 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 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. In 1991, this compact was upheld in *McComb v. Wambaugh* despite its withdrawal procedure.

MORE DETAILED ANSWER:

In 2023, the Congressional Research Service stated:

> "In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*,[508] the Supreme Court addressed a constitutional challenge to a system of reciprocal state legislation that limited acquisition of banks in Massachusetts and Connecticut. The Court determined that congressional consent was not required because the reciprocal state legislation scheme lacked four 'classic indicia of a compact,' which are:
>
> '(1) Creation of a joint organization or body,
> '(2) Conditioning one state's action on the actions of other states,
> '(3) Restricting states' power to modify or repeal their laws unilaterally, and
> '(4) A requirement for reciprocal constraints among all states.'"[509]

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.

Hans von Spakovsky of the Heritage Foundation 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:

> "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.'

---

[508] *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*. 472 U.S. 159. June 10, 1985. https://tile.loc.gov/storage-services/service/ll/usrep/usrep472/usrep472159/usrep472159.pdf

[509] Congressional Research Service Legal Sidebar. 2023. Interstate Compacts: An Overview, June 15, 2023. Page 6. https://crsreports.congress.gov/product/pdf/LSB/LSB10807

"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**."[510] [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 decision in *U.S. Steel Corp. v. Multistate Tax Commission* is demonstrated by *McComb v. Wambaugh* in 1991 dealing with the enforceability of the Interstate Compact for the Placement of Children, which:

- became effective without congressional consent, and
- *contained a provision that delayed a state's withdrawal for two years.*[511]

---

[510] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[511] The 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 providing: "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.

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 for the Third Circuit 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, 593–94, 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**."[512] [Emphasis added]

[512] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

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*:

> "**the test is** whether the Compact enhances state power *quaod* the National Government."[513] [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 the compact requires congressional consent in order to become effective.

9.23.7. MYTH: A constitutional crisis would be created because of the question about whether the Compact requires congressional consent.

QUICK ANSWER:

- Despite hyperbolic predictions, no constitutional crisis will be created because of the question about whether congressional consent is required before the National Popular Vote Compact can take effect. Instead, a lawsuit will (almost certainly) be filed, and the question of constitutional interpretation will be heard and settled by the courts.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[514] has written:

> "**NPV would create a Constitutional crisis**. The Constitution's Compact Clause (Article 1) requires that state compacts gain Congressional approval."[515] [Emphasis added]

Despite Maibach's hyperbole, no constitutional crisis will be created because of the question about whether congressional consent is required before the National Popular Vote Compact can take effect.

If laws approving the Compact have been enacted (and taken effect) in the requisite combination of states, and congressional consent has not been previously given, a lawsuit will (almost certainly) be filed raising the question of whether congressional consent is required before the Compact can become operative. This question of constitutional interpretation will be heard and settled in an orderly manner by the courts.

---

[513] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452 at 473. 1978.

[514] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[515] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roanoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

9.23.8. MYTH: Interstate compacts that do not receive congressional consent are unenforceable and "toothless."

QUICK ANSWER:

- Some interstate compacts require congressional consent. However, congressional consent is not required for compacts that do not challenge federal supremacy.
- Far from being "toothless," all interstate compacts are enforceable contracts once they come into effect—regardless of whether congressional consent was required for the compact to go into effect.
- 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.

MORE DETAILED ANSWER:

Professor Norman Williams of Willamette University in Salem, Oregon, raises a variation on John Samples' hypothetical withdrawal scenario (section 9.25):

> "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."[516] [Emphasis added]

Williams then presents the following legally incorrect arguments in support of his claim of toothlessness. His argument contains several astonishingly inappropriate legal citations in the footnotes, which we will discuss momentarily:

> "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 congres-

[516] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 215–216.

> sionally 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."[517] **[Williams' footnote 176 appears here]** [Emphasis added]

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' footnote fails to cite a century and a quarter of 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*[518] and the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*[519]—both of which are quoted at length in section 9.23.3.

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 explicitly 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*.[520] 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

---

[517] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[518] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[519] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. 1978.

[520] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

> occasion expressly to apply it in a holding until our recent decision in *New Hampshire v. Maine*,[521] 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**."[522] [Emphasis added]

See section 9.23.3 for additional discussion of the U.S. Supreme Court's decisions and criteria for whether a particular interstate compact requires congressional consent.

Williams' statement that a compact's "status as state law … makes it no different from any other statute enacted by the state legislature" is also 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, it 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.
- Second, if the compact does not require congressional consent, it goes into effect after being enacted by the requisite combination of states.

The legal question of whether a particular compact requires congressional consent in order to take effect is answered by whether it satisfies the criteria established by rulings of the U.S. Supreme Court.

When Congress consents to an interstate compact, the compact acquires the status of federal law, and the courts interpret it as federal law (section 5.10). Conversely, a compact that does not require congressional consent does not acquire the status of federal law, and the courts interpret it as state 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."[523]

State courts routinely enforce interstate compacts not requiring congressional consent on the basis of the Impairments Clause.

The question of whether a compact has been converted into federal law is concerned with whether the compact is interpreted as federal or state law. The fact that a compact not requiring congressional consent has not been converted into federal law is unrelated to its enforceability.

---

[521] *New Hampshire v. Maine*, 426 U.S. 363. 1976.

[522] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459–460. 1978.

[523] U.S. Constitution. Article I, section 10, clause 1.

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 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."[524]

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**."[525]
>
> "**As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not**.[526]
>
> "**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**

---

[524] *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. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[525] *Ibid*. Page 8.

[526] *Ibid*. Page 9.

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 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 ' "concurred in" ' by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, supra, 311 F.3d at pp. 276–280.)"[527] [Emphasis added]

[527] *Ibid.* Pages 9–11.

The California court thus overturned a California state law overriding the provisions of the Multistate Tax Compact.[528]

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 (and often are) litigated at the U.S. Supreme Court, as explained in *Interstate Disputes: The Supreme Court's Original Jurisdiction*.[529]

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**."[530] [Emphasis added]

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. He writes:

> "A subsequent legislature can amend or repeal the NPVC consistent with the state's own constitutionally prescribed legislative process. [Williams' footnote 175 appears here]"[531]

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*.[532] 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 a compact.

What the U.S. Supreme Court actually said was:

> "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**."[533] [Emphasis added]

---

[528] After the California court's decision in *The Gillette Company et al. v. Franchise Tax Board*, the legislature passed, and the Governor signed, a law exercising the state's right, as provided in the Multistate Tax Compact, to withdraw from the compact (Senate Bill 1015 of 2012). After the effective date of the statute withdrawing from the compact, 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.

[529] Zimmerman, Joseph F. 2006. *Interstate Disputes: The Supreme Court's Original Jurisdiction.* Albany, NY: State University of New York Press.

[530] U.S. Constitution. Article III, section 2, clause 2.

[531] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[532] *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33–34 (1951). https://supreme.justia.com/cases/federal/us/341/22/

[533] *Ibid*. Page 28.

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]**"[534]

Williams cites two authorities for this incorrect statement in his footnote 176:

- the 1996 Nebraska case of *State ex rel. Stenberg v. Moore*,[535] and
- the 1936 Pennsylvania case of *Visor v. Waters*.[536]

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 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 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 v. Moore* 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:

---

[534] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[535] *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

[536] *Visor v. Waters*, 182 A. 241, 247 (Pa. 1936).

> "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."[537] [Emphasis added]

Thus, the 1996 Nebraska case of *State ex rel. Stenberg v. Moore* cited by Williams does not support his statement, but makes it clear that Williams is just plain wrong.

Williams' citation of the 1936 Pennsylvania case of *Visor v. Waters* also fails to support his 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**."[538] [Emphasis added]

The fact is that there are *no applicable citations* in support of Williams' statements about the unenforceability of interstate compacts. The reason is that Williams is just plain wrong.

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.[539]

In *McComb v. Wambaugh* in 1991, the U.S. Court of Appeals for the 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**

---

[537] *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

[538] *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)."

[539] The 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, this compact invites the federal government of Canada and Canadian provincial governments to become members. It specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party 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.

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.').

"**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**."[540] [Emphasis added]

9.24. MYTHS ABOUT THE DISTRICT OF COLUMBIA

9.24.1. MYTH: The District of Columbia may not enter into an interstate compact, because it is not a state.

QUICK ANSWER

- The District of Columbia belongs to numerous interstate compacts, including ones adopted both before and after ratification of the 23rd Amendment in 1961 and before and after enactment of the District of Columbia Home Rule Act of 1973.
- Membership in interstate compacts is not limited to states. Some compacts include Puerto Rico, the Virgin Islands, American Samoa, and even Canadian provinces.

---

[540] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

MORE DETAILED ANSWER:

Apparently thinking that only states can belong to interstate compacts, William Josephson, a New York attorney, complained in 2022 about the District of Columbia becoming a member of the National Popular Vote Interstate Compact:

> "No exercise by Congress of its generalized power to legislate for the District could make the District a state for purposes of the Compact Clause."[541]

Josephson's only authority for this asserted limit on Congress' power is a citation to Article I, section 8, clause 17 of the Constitution, which states:

> "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." [Emphasis added]

We fail to discern any limitation on Congress' power involving interstate compacts in this provision of the Constitution.

In any case, the District of Columbia has been a member of numerous interstate compacts—both *before and after* ratification of the 23rd Amendment in 1961 and *before and after* enactment of the District of Columbia Home Rule Act of 1973.

The Council of State Governments lists 27 interstate compacts to which the District of Columbia is a party.[542] Examples include, but are not limited to, the:

- Potomac Valley Compact (1940)
- Civil Defense and Disaster Compact (1954)
- Compact for Education (1984)
- Interstate Compact on the Placement of Children (1989)
- Multi-State Lottery Agreement (1988)
- National Popular Vote Compact (2010).

Many interstate compacts include entities other than states, such as the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and various provinces of Canada.

For example, the Agreement on Detainers[543] includes 49 states, the District of Columbia, Puerto Rico, and the Virgin Islands. Several provinces of Canada are members of the Northeastern Interstate Forest Fire Compact.[544]

---

[541] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 784. https://repository.law.miami.edu/umlr/vol76/iss3/5/

[542] Council of State Governments. National Center for Interstate Compacts. *NCIC Database*. Accessed May 18, 2024. https://compacts.csg.org/database/

[543] Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[544] Northeastern Interstate Forest Fire Compact. https://compacts.csg.org/compact/northeastern-interstate-forest-fire-protection-compact/

9.24.2. MYTH: Only Congress may enter into interstate compacts on behalf of the District of Columbia.

QUICK ANSWER:

- Congress delegated authority to enter into interstate compacts to the Council of the District of Columbia in the District of Columbia Home Rule Act of 1973.
- The Council has entered into numerous interstate compacts under the authority of the 1973 Act.

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 specific areas listed in section 602(a) of the Act.[545]

The power to enter into interstate compacts was not one of the 10 specific areas listed in section 602(a).

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 Compact[546] 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.[547] In 2002, the Council entered into the Emergency Management Assistance Compact.[548]

In 2010, the District of Columbia approved the National Popular Vote Compact.[549]

9.24.3. 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 it by the District of Columbia Home Rule Act of 1973.

---

[545] D.C. Code § 1-233.

[546] D.C. Code § 24-452.

[547] Title 4, Chapter 3, D.C. St. § 4-326, June 27, 2000, D.C. Law 13-136, § 406, 47 DCR 2850.

[548] 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).

[549] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

MORE DETAILED ANSWER:

This myth apparently 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 specific areas listed in section 602(a) of the Act.[550]

---

[550] D.C. Code § 1-233.

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 Home Rule Act explicitly recognizes the authority of the District of Columbia Council concerning elections:

> "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.**"[551] [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.[552] The Council had the power to do this because Congress had specifically chosen to delegate its power over elections to the Council.

9.24.4. 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 use an interstate compact to bind itself in the same manner as a state.

MORE DETAILED ANSWER:

Because the District of Columbia is not a state, the question has been raised concerning whether it would be bound by an interstate compact in the same way that a state is.[553]

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 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 numerous restrictions on states. In particular, the Impairments Clause states:

---

[551] P.L. 93-198, 87 Stat. 774, (1973), codified at D.C. Statutes section 1-207.52.

[552] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

[553] In order to promote free-flowing debate, the rules of the *Election Law Blog* do not permit attribution. September 23, 2010.

"No State shall … pass any … Law impairing the Obligation of Contracts."

The Impairments Clause of the U.S. Constitution prevents a state from violating the terms of an interstate compact into which it has entered.

Section 302 of the Home Rule Act explicitly applies the Impairments Clause to the District of Columbia, thereby permitting the District to bind itself to a compact's terms in the same manner as a state.

The Impairments Clause is discussed in greater detail in connection with the National Popular Vote Compact in section 9.25.

9.24.5. MYTH: The enactment of the 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, in connection with the adoption of the Compact by the District.

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.[554]

Under the Home Rule Act, Congress delegated its plenary authority to pass laws concerning the District regarding a wide range of 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:

> "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."

[554] D.C. Code § 1-233.

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)(l) of the District of Columbia Home Rule Act, approved December 21 1973 (87 Stat. 813; D.C. Official Code § l-206.02(c)(l)), and **publication in the District of Columbia Register**." [Emphasis added]

On September 22, 2010, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, 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."[555] [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."[556] [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 resolution to disapprove any action of the District of Columbia Council.

If the committee to which a disapproval resolution has been referred has not reported the disapproval resolution by 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.[557]

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 one hour.

Note also that a motion by a *single* Senator to discharge a disapproval resolution from committee is *not* subject to a filibuster in the Senate.

---

[555] 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

[556] *Ibid*.

[557] Note, in contrast, that a motion to discharge a House committee ordinarily requires a discharge petition bearing the signatures of a majority of House members (218 of 435), not just the support of a single House member.

Thus, a motion to discharge the House or Senate committees of a resolution disapproving of an action of the District of Columbia Council will receive an expeditious vote on the floor of the House or Senate.

In particular, a vote on the floor is ensured, regardless of whether there is majority support for the disapproval resolution in the relevant committee or subcommittee and regardless of whether the leadership of the House or Senate wishes the question to come to a vote.

After the motion to discharge is agreed to on the floor of the House or Senate, debate on a resolution of disapproval itself is limited to 10 hours.

Thus, a 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 vote on a 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 Compact was signed by Mayor Adrian Fenty on October 12, 2010.[558]

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, it was referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. In the House

[558] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

committee, it 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*.[559]

Despite Ross' call to action to "constitutionalists in the House and Senate" to "sponsor resolutions of disapproval," not a single member of either the 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 (D–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.
>
> "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."[560]

Congress may explicitly or implicitly consent to an interstate compact (section 5.19). As the U.S. Supreme Court wrote in *Virginia v. Tennessee* in 1893:

> "Consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them."[561]

---

[559] *District of Columbia Register*. Volume 57. Page 9869.

[560] *Congressional Record*. December 15, 2010. Page E2143. https://www.congress.gov/congressional-record/volume-156/issue-166/extensions-of-remarks-section

[561] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

9.25. MYTH ABOUT WITHDRAWING FROM THE COMPACT BETWEEN ELECTION DAY AND THE ELECTORAL COLLEGE MEETING

9.25.1. MYTH: A politically motivated state legislature could throw a presidential election to its preferred candidate by withdrawing from the Compact after the people vote in November.

QUICK ANSWER:

- There are five independent reasons why a state legislature cannot repeal the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December, and thereby throw the presidency to the candidate who just lost the national popular vote.
- First, the Electoral Count Reform Act of 2022 requires that presidential electors "shall be appointed … in accordance with the laws of the State *enacted prior to election day*." Thus, a state cannot change its method of selecting presidential electors after state legislators see the election results. This federal law, of course, applies to both the National Popular Vote Compact and the current system.
- Second, federal law also requires that presidential electors "shall be appointed, in each State, on Election Day" (that is, the Tuesday after the first Monday in November). This federal law, of course, applies to both the National Popular Vote Compact and the current system.
- Third, there is more protection against politically motivated post-election mischief under the National Popular Vote Compact than under the current system. The Impairments Clause of the U.S. Constitution prohibits a state from impairing an "obligation of contract." An interstate compact is a legally binding contract. When a state enacts the National Popular Vote Compact into law, it specifically agrees that if it were to withdraw during the six-month period between July 20 of a presidential election year and the January 20 inauguration, the withdrawal would not take effect until after Inauguration Day. Thus, the Impairments Clause is an additional and independent reason why a state cannot withdraw from the National Popular Vote Compact between Election Day and the Electoral College meeting.
- Fourth, a post-election change in the rules would violate the Constitution's Due Process Clause.
- Fifth, even if there were no federal constitutional or no federal statutory obstacles, any attempt by a rogue state to repeal the Compact after the people vote in November would have to overcome daunting political and procedural obstacles at the state level.
- Because the National Popular Vote Compact is a contract that is protected by the Constitution's Impairments Clause, this myth about politically motivated post-election legislative changes is one of many examples in this book of a criticism aimed at the Compact where the Compact is superior to the current system.

MORE DETAILED ANSWER:

John Samples, a Vice President of the Cato Institute, has suggested a hypothetical scenario in which a politically motivated state legislature might try to repeal the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December, and thereby throw the presidency to the candidate who had just lost the national popular vote.

Samples suggests that a state belonging to the National Popular Vote Compact could simply:

> "withdraw from the compact when the results of an election become known."[562]

After hastily repealing (that is, withdrawing from) the Compact, the legislature and Governor would then enact some alternative method of appointing the state's presidential electors that would have the political effect of throwing the presidency to the second-place candidate.

The new method of appointing electors might be direct appointment by the legislature of the state's presidential electors, or it might involve switching to the congressional-district or whole-number proportional method of awarding electoral votes.

There are five independent reasons why a state legislature cannot throw a presidential election to the second-place candidate by repealing the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December.

Federal law requires that presidential electors be appointed in accordance with the laws "enacted prior to Election Day."

The Electoral Count Reform Act of 2022 (section 1 of title 3 of the United States Code) states:

> "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted **prior to election day**." [Emphasis added]

Thus, a state's chosen method of selecting presidential electors cannot be altered after state legislators see the election results. This law applies, of course, to both the National Popular Vote Compact and the current winner-take-all method of awarding electoral votes.

Presidential electors may only be appointed on Election Day.

No state can appoint presidential electors after the people vote, because:

- The Constitution explicitly gives Congress the power to establish the day for appointing presidential electors.
- Congress has exercised this power by passing a law requiring that every state appoint its presidential electors (whether by popular vote, legislative vote,

---

[562] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President.* Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1. https://www.cato.org/policy-analysis/critique-national-popular-vote

or any other method) on a single specific day in each four-year election cycle (namely, the Tuesday after the first Monday in November).

- The U.S. Supreme Court has explicitly stated that the power of Congress to establish the day for appointing electors is controlling over the states.

Specifically, the U.S. Constitution (Article II, section 1, clause 4) 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." [Emphasis added] [Spelling as per original]

Congress has exercised this power by enacting a federal law (quoted above in the previous subsection) that requires each state to appoint its presidential electors on a single day during each four-year election cycle. This single day (referred to as "Election Day") is defined in section 21 of the Electoral Count Reform Act of 2022 as follows:

> "'Election Day' means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, 'election day' shall include the modified period of voting."[563]

The U.S. Supreme Court has explicitly stated that Congress' power to establish the time for appointing presidential electors is controlling over the states. In *McPherson v. Blacker* in 1892, the Court ruled:

> "**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 provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."[564] [Emphasis added]

If post-election changes to the method of appointing presidential electors were legally permissible, we would already have seen this maneuver many times in the past—and, in particular, in 2000, 1960, and 2012.

In 2000, Al Gore won the national popular vote by 543,816 votes. By virtue of carrying Florida by 537 popular votes, George W. Bush had 271 electoral votes (one more than the 270 required for election).

The Democrats controlled the law-making process in four states that Bush carried—North Carolina, West Virginia, Alabama, and Arkansas. A post-election change in the

---

[563] Earlier federal laws (i.e., the Electoral Count Act of 1887 and the 1845 law) also defined "Election Day" to be the Tuesday next after the first Monday in November (section 3.13).

[564] *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

method of appointing presential electors in *any one* of these four states would have given Gore a majority of the Electoral College in 2000—even after crediting Bush with Florida's 25 electoral votes.

Various Democratic state legislators met in North Carolina (and elsewhere) to discuss various post-election maneuvers that might erase Bush's lead in the Electoral College. However, the North Carolina Legislature did not convene and appoint presidential electors who would have voted for Gore, the candidate who received the most popular votes nationwide. Moreover, the legislature did not convene after Election Day, repeal the state's pre-existing winner-take-all law, and pass a new law allocating electoral votes by, say, congressional district or proportionally. Any of these three possible actions in North Carolina alone would have (if legal) given Al Gore a comfortable majority in the Electoral College.

Similarly, the Alabama legislature did not convene after Election Day, repeal its existing winner-take-all law, and pass a new law allocating electoral votes proportionally. Moreover, it did not convene and appoint Democratic presidential electors. Either of these two actions in Alabama alone would have (if legal) given Gore a majority in the Electoral College.

The West Virginia legislature did not convene after Election Day and appoint Democratic presidential electors—an action that alone would have (if legal) given Gore a majority in the Electoral College.

Finally, in Arkansas, the Democrats controlled both houses of the legislature, but the Governor was a Republican. However, a veto in Arkansas can be overridden by a majority vote in the legislature, so the Democrats had veto-proof control of the law-making process at the time. Nonetheless, the Arkansas legislature did not convene after Election Day and appoint Democratic presidential electors—an action that alone would have (if legal) given Gore a majority in the Electoral College.

Note that, if John Samples' hypothetical scenario were legally possible, local politicians in these states could have easily fabricated political spin to justify their actions. For example, they could have conducted public opinion polls in their states about whether the winner of the nationwide popular vote should become President. Indeed, 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 (section 9.22.1).

Of course, as we all know, none of these four state legislatures took any of the above actions after the November 2000 election, because everyone recognized that post-election appointment of presidential electors would have been illegal.

If such an action had been attempted, it would have been immediately voided in either state or federal court—with no credence being given to the disingenuous political spin offered by local legislators for their post-election change in the rules.

The American people accepted the ascendancy of the second-place candidate to the White House in 2000 (and other years), because everyone understood that result was arrived at using the laws in effect at the time. The American people have accepted second-place Presidents even though a substantial majority (then and now) preferred a national popular vote for President over the state-by-state winner-take-all method of awarding electoral votes.

In 1960, John F. Kennedy won the nationwide popular vote by 118,574 votes. However, Kennedy won only 303 electoral votes—just 34 more than the 269 required for election at the time. This 34-vote margin would have been eliminated if he had not carried Illinois (27 electoral votes) by the slender margin of 8,858 popular votes and South Carolina (eight electoral votes) by 9,571 popular votes.

Some members of the South Carolina legislature suggested that the legislature meet after Election Day, repeal South Carolina's existing winner-take-all law for awarding the state's electoral votes, and then directly appoint non-Kennedy presidential electors. Nothing came of this suggestion in South Carolina in 1960, because federal law specifies that Election Day is the single day in the four-year cycle on which presidential electors may be appointed.

The U.S. Constitution does not require a state to permit its voters to vote for presidential electors. Indeed, in the nation's first presidential election in 1789, the state legislatures of three states appointed presidential electors, and the New Jersey Governor and his Council appointed the electors. The last time when the voters did not directly choose presidential electors was in 1876, when the legislature of the newly admitted state of Colorado appointed the state's presidential electors. However, these appointments of presidential electors by state legislatures were all made on the single day designated by federal law.[565]

If the South Carolina legislature had wanted to appoint presidential electors itself in 1960, it could have done so. However, it would have had to convene on Election Day for the purpose of appointing the state's eight presidential electors.

In 2012, there were Republican Governors and Republican legislatures in five states possessing 90 electoral votes—considerably more than President Obama's 62-vote margin of victory in the Electoral College. The five states were Florida (29), Pennsylvania (20), Ohio (18), Virginia (13), and Wisconsin (10).

If post-election changes in the method of appointing presidential electors had been legally permissible or politically plausible, the legislatures and Governors of these five states could have erased Obama's 62-vote margin in the Electoral College merely by convening after Election Day and switching to either direct legislative appointment of the presidential electors or perhaps the congressional-district method of allocating electoral votes (an approach that would have the patina of being based on the voters' choice). Switching to either method after Election Day would have been sufficient to give Mitt Romney a majority in the Electoral College.

---

[565] There is an additional practical political reason why no state legislature would want to appoint presidential electors today. At the time the Constitution was ratified, state legislative elections were typically held on a different day from federal elections. However, today, in all but three states, 100% of the seats in the legislature's lower house (and typically about half of state Senate seats) are up for election on the very same day that the President is being elected. In addition, about a quarter of the nation's Governors are elected on Election Day in presidential election years. Thus, if a state legislature wanted to appoint presidential electors today, it would have to do so on Election Day. That is, the very day when state legislators want to be home in their districts working to get themselves reelected. Instead, they would need to be in their state capitol appointing presidential electors.

The Impairments Clause of the U.S. Constitution prevents a state from repealing the Compact between Election Day and the Electoral College meeting.

Withdrawal from an interstate compact is accomplished by repealing the legislative act by which the state originally approved the compact.

Most interstate compacts permit member states to withdraw from the agreement subject to a specified delay in the effective date of the withdrawal (section 5.13.1).

The National Popular Vote Compact permits any member state to withdraw at any time. However, if the withdrawal occurs during the six-month period between July 20 of a presidential election year and January 20 (Inauguration Day), the effective date of the withdrawal will be delayed until after Inauguration Day.

The second clause 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."

The six-month "blackout" period in the National Popular Vote Compact includes six important events relating to presidential elections, including the:

- national nominating conventions,
- fall general-election campaign period,
- Election Day on the Tuesday after the first Monday in November,
- Electoral College meeting on the first Tuesday after the second Wednesday in December,[566]
- 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.

As the U.S. Supreme Court has repeatedly noted, interstate compacts are contracts.[567] They are construed as contracts under the principles of contract law.

Withdrawal from a compact may only be made in accordance with the terms contained in it.

The Impairments Clause (also called the "Contracts Clause") of the U.S. Constitution (Article I, section 10, clause 1) restricts states as follows:

> "No State shall … pass any … Law impairing the Obligation of Contracts."

---

[566] There are 42 days between Election Day and the meeting date of the Electoral College. Depending on the year, Election Day can be any date from November 2 to November 9. The Electoral College meeting can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8). For example, in 2024, Election Day will be Tuesday, November 5, and the meeting date for the Electoral College will be Tuesday, December 17.

[567] For example, in April 2023, the Court wrote the following in *New York v. New Jersey* (page 5 of slip opinion at https://www.supremecourt.gov/opinions/22pdf/156orig_k5fl.pdf): "This Court has said that an interstate compact 'is not just a contract,' but also … preempts contrary state law. See *Tarrant Regional Water Dist. v. Herrmann*, 569 U. S. 614, at 627, n. 8 (2013)."

Because of the Impairments Clause, the courts have never allowed *any* state to withdraw from *any* interstate compact without following the procedure for withdrawal prescribed by the compact.

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.

In 1976, the U.S. District Court for the District of Maryland stated 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 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."[568] [Emphasis added]

That is, an interstate compact is one of the rare exceptions to the general principle that one legislature may not bind a future legislature.

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:

> "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."[569]

In 1999, the Commonwealth Court of Pennsylvania ruled in *Aveline v. Pennsylvania Board of Probation and Parole*:

> "**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**."[570] [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

---

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

[569] Missouri Revised Statutes. Chapter 217. Section 217.810.

[570] *Aveline v. Pennsylvania Board of Probation and Parole* (729 A.2d. 1254 at 1257, note 10).

> this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal." [Emphasis added]

This particular compact is noteworthy because it is one of the many interstate compacts that did not require (and never received) congressional consent before taking effect (section 5.19). It illustrates that the enforceability of a compact's withdrawal clause has no connection with whether the compact required congressional consent in order to take effect (section 9.23.3).

The United States Court of Appeals for the Third Circuit ruled in *McComb v. Wambaugh* in 1991:

> "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**."[571] [Emphasis added]

The Court of Appeal of the State of California stated 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.)"[572] [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 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

---

[571] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

[572] *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. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

> terms of interstate compacts. That's why **compacts are considered the most effective means of ensuring interstate cooperation**."[573] [Emphasis added]

Both state 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 Gillette Company et al. v. Franchise Tax Board* in 2012. In that case, the California Court of Appeal voided a state law attempting to override a provision of the Multistate Tax Compact[574] (from which California had *not* withdrawn at the time of the court's decision).[575]

> "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**." [576]
>
> "As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not.[577]
>
> "**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 Com*pacts (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

---

[573] The Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

[574] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[575] After the California court's decision in *The Gillette Company et al. v. Franchise Tax Board*, the legislature passed, and the Governor signed, a law exercising the state's right, as provided in the Multistate Tax Compact, to withdraw from the compact (Senate Bill 1015 of 2012). After the effective date of the statute withdrawing from the compact, 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.

[576] *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. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[577] *Ibid*. Page 9.

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 '"concurred in"' by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, supra, 311 F.3d at pp. 276–280.)"[578] [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 Califor-**

[578] *Ibid*. Pages 9–11.

> **nia 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 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**.[579] [Emphasis added]

The courts have long held that a state that belongs 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 that 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 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

[579] *Ibid.* Pages 15–16.

> 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, he 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, he 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 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 supreme court 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**."[580] [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 agree-

[580] *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22 at 28. 1950. https://supreme.justia.com/cases/federal/us/341/22/

> ment with other States. **The Compact involves a reasonable and carefully limited delegation of power to an interstate agency**."[581] [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 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**."[582] [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 (the so-called "donor" states) 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."[583]

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."[584]

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.[585]

---

[581] *Ibid.* Pages 30–31.

[582] *Ibid.* Page 36.

[583] *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 902 F.Supp. 1046, 1049 (D.Neb. 1995).

[584] *Hess v. Port Authority Trans-Hudson Corp.* 513 U.S. 30 at 42. 1994.

[585] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*. 440 U.S. 391 at 399 and 402. 1979.

In *Kansas City Area Transportation Authority v. Missouri*, the U.S. Court of Appeals for the Eighth Circuit in 1981 held that a member state may not legislatively burden the other member states unless they concur.[586]

Moreover, the courts have prevented a compacting state from undermining the workings of that compact. In *Alcorn v. Wolfe* in 1993, 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."[587]

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.[588] 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.[589]

In short, a state is estopped from withdrawing from a compact in any manner other than that which it agreed to when it entered into the compact.

Almost every interstate compact contains obligations that a member state would never have agreed to unless it could rely on the enforceability of 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.

The six-month blackout period for withdrawing from the National Popular Vote Compact is reasonable and appropriate in order to ensure that a politically motivated member state does not renege on its obligations after the candidates, the political parties, the voters, and the other compacting states have proceeded through the presidential campaign and election cycle.

The enforceability of interstate compacts under the Impairments Clause is precisely the reason why sovereign states enter into them. If a state were willing to rely merely on the goodwill and graciousness of other states to undertake certain actions (particularly actions that the state would not undertake absent reciprocal action by other states), it could unilaterally enact its own independent law on the subject matter involved or unilaterally enact a uniform state law (and hope that other states would follow suit). However, if a state wants an agreement that is legally binding on other states, it enters into an interstate compact. Indeed, interstate compacts would be pointless if they were not legally binding on the participating states.

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

---

[586] *Kansas City Area Transportation Authority v. Missouri*. 640 F.2d 173 at 174 (8th Cir.). 1979.

[587] *Alcorn v. Wolfe*. 827 F.Supp. 47, 53 (D.D.C. 1993).

[588] *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 834 F.Supp. 1205 at 1215 (D.Neb. 1993).

[589] *New York v. United States*. 505 U.S. 144 at 183. 1992.

20 of a presidential election year and Inauguration Day (January 20), that legislation would be unconstitutional on its face because of the Impairments Clause.[590]

The Supreme Court has rejected the argument that a state's power under Article II, section 1 is not subject to any restriction found elsewhere in the U.S. Constitution. Article II, section 1 of the U.S. Constitution provides:

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."[591] [Emphasis added]

Professor Norman Williams of Willamette University in Salem, Oregon, has made the argument that this grant of power to states under Article II is not subject to any restriction found elsewhere in the U.S. Constitution:

> "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."**[592] [Emphasis added]

Williams' theory—sometimes called the "imperial legislature"[593] theory—is that Article II's grant of power is unlike any other provision in the Constitution in that it is not subject to any of the Constitution's specific restrictions on the exercise of power.

In particular, Williams' theory is that the Constitution's Impairments Clause does not apply to a state that freely enters into a contractual relationship with other states.

This theory ignores the reality that the vast majority of interstate compacts involve state plenary powers.

It also ignores the fact that the primary reason that states voluntarily enter into interstate compacts is that compacts provide a way to create legally enforceable obligations on other states. A state entering an interstate compact almost always is agreeing to do something that it would only agree to do if it were sure that its partnering states were guaranteed to fulfill their obligations.

The wording "in such manner as the state may direct" is a grant of power permitting

---

[590] The general principles of contract law (applicable to parties to *any* contract, whether the parties are state governments or not) provide 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.

[591] U.S. Constitution. Article II, section 1, clause 2.

[592] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 219.

[593] The "imperial legislature" theory should not be confused with the "independent legislature" theory. The "imperial legislature" theory contends that when a state legislature exercises its powers under Article II, section 1 of the U.S. Constitution, the legislature is not subject to any other restraint found in the U.S. Constitution. The "independent legislature" theory (which played a role in the 2020 presidential election and the events of January 6, 2021) contends that the legislature is not subject to any restraint found in its *state* Constitution.

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, Article II, section 1 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…." [Emphasis added]

Article II, section 1 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 this legislative power is subject to all of the other specific restraints in the U.S. Constitution that may apply to the exercise of legislative power.

Among the specific restrictions on the power of a state under Article II, section 1 are those contained in 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 (women's suffrage), the 24th Amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

The point can be made best by focusing on Article I, section 10, clause 1 of the U.S. Constitution, which contains the prohibition on impairing an obligation of contract and the prohibition on *ex post facto* (retroactive) laws.

> "**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]

Everyone would agree that a state legislature has the power under Article II, section 1 to 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* law making it a crime to have committed fraud in a *previous* presidential election, because the Constitution's explicit prohibition against *ex post facto* laws operates as a restraint on the grant of power contained in Article II, section 1.

Necessarily, the Constitution's explicit prohibition against a "law impairing the obligation of contract"—appearing in the same clause of the Constitution as the prohibition against *ex post facto* laws—operates as a restraint on the grant of power contained in Article II, section 1.

It is interesting to note that the wording "in such manner as the Congress may direct" also 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…." [Emphasis added]

Surely, no one would argue that "in such manner as the Congress may direct" (the

exact parallel of the wording of Article II, section 1) 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). Similarly, no one would argue that Congress could pass an *ex post facto* law making it a crime to have committed fraud in a *previous* presidential election in the District of Columbia.

The wording "as the legislature may direct" appears in another place in the Constitution, namely the 17th Amendment (ratified in 1913). The 17th Amendment allows 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 "as the legislature may direct" wording means that a state legislature is not subject to other specific provisions in the Constitution restricting the exercise of 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.

For example, Congress has plenary power over counterfeiting, federal taxation, and numerous other "enumerated" areas, but no one would argue that its 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).

Similarly, Article I, section 8, clause 17 of the Constitution gives Congress plenary power over the District of Columbia:

> "The Congress shall have Power … to exercise exclusive Legislation in all Cases whatsoever, over such District."

Yet, no one would argue that Congress may pass *ex post facto* laws applicable to the District of Columbia.

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.

Williams' "imperial legislature" interpretation of Article II, section 1 of the Constitution is not new.

In fact, the U.S. Supreme Court ruled on the "imperial legislature" argument in 1968 in interpreting Article II, section 1 in *Williams v. Rhodes* involving the state of Ohio.

> "The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article

> of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors …' to choose a President and Vice President. **There of course can be no question but that this section does grant extensive power to the States** to pass laws regulating the selection of electors. But **the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution**. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. **Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws.** Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.' Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote where such burdens are expressly prohibited in other constitutional provisions.
>
> "We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that
>
> > 'No State shall … deny to any person … the equal protection of the laws.'"[594] [Emphasis added]

Moreover, in 2020, the U.S. Supreme Court reached the same conclusion about Article II, section 1 in *Chiafalo v. Washington*:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, **absent some other constitutional constraint**." [Emphasis added]

See section 9.23.8 for a discussion of Professor Williams' claim that interstate compacts are "toothless."

A post-election change in the rules would violate the Due Process Clause of the Constitution.

In 2020, the idea was bandied about that a state legislature could meet after Election Day and sidestep the state's existing method of awarding electoral votes (that is, the winner-take-all method) and simply choose a slate of presidential electors to its liking.

---

[594] *Williams v. Rhodes*. 393 U.S. 23, 28–29. 1968.

In September 2020, the National Task Force on Election Crises concluded that:

> "A state legislature cannot appoint its preferred slate of electors to override the will of the people after the election."[595]
>
> "Although the power to choose the manner in which electors are appointed means that state legislatures theoretically could reclaim the ability to appoint electors directly *before* Election Day, they may not substitute their judgment for the will of the people by directly appointing their preferred slate of electors *after* Election Day."
>
> "A state legislature's post-Election Day substitution of its own preferences for those of voters raises constitutional concerns. The Supreme Court has explained that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental," and is subject to constitutional due process and equal protection guarantees. *Bush*, 531 U.S. at 104-05. The due process clause, in particular, protects citizens' reasonable reliance on the expectation under state law that they will be able to meaningfully exercise their fundamental right to vote."[596]

Even if there were no federal constitutional or federal statutory obstacles, a rogue state would have to overcome daunting practical political and procedural obstacles at the state level.

Executing John Samples' hypothetical post-election maneuver between Election Day and the Electoral College meeting would require several steps:

- The state legislature and Governor would have to enact a law repealing (that is, withdrawing from) the National Popular Vote Compact.
- The repeal statute would have to take effect in the state involved before the Electoral College meeting.
- The legislature and Governor would have to enact a new statute providing a different way to appoint the state's presidential electors. For example, they might enact a statute allocating the state's electoral votes by congressional district or proportionally, or they might authorize the legislature to appoint the state's presidential electors.[597]
- The statute providing the new way to appoint the state's presidential electors would have to take effect in the state involved before the Electoral College meeting.

---

[595] National Task Force on Election Crises. A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election. September 2, 2020. Page 1. https://electiontaskforce.org/a-state-legislature-cannot-appoint-its-own-preferred-slate-of-electors-to-override-the-will-of-the-people/

[596] *Ibid*. Page 3.

[597] Historical precedent, going back to the first presidential election in 1789, is that the authorization for the state legislature to directly appoint presidential electors requires a law presented to the state's Governor for approval or veto (section 7.3.5 and section 2.2).

- If the new way to appoint presidential electors were to involve direct legislative appointment, the legislature would have to appoint the presidential electors.

Seven pre-conditions would have to be satisfied simultaneously in order for the hypothetical maneuver to be executed successfully in a given state. Each of these conditions narrows the number of states where the post-election maneuver could even be contemplated.

First, the same political party would have to control both houses of the legislature and the Governor's office, or the party controlling the legislature would have to have a veto-proof majority.[598] Any attempt to change a state law after Election Day in order to throw the presidency to the second-place candidate would be a partisan maneuver of the most extreme nature. As such, it would arouse the fiercest opposition from the to-be-disadvantaged political party.

Second, the presidential nominee who lost the national popular vote would have to belong to the state's dominant political party. Otherwise, the Governor and legislature would be pleased that the Compact was about to deliver the state's electoral votes to the national popular vote winner.

Third, the state would have to be one of the states that actually belongs to the National Popular Vote Compact. Otherwise, there would be no compact to repeal.

Fourth, because very few state legislatures are in session in November and December of an election year, it would first be necessary to call the legislature into special session. Governors generally have the power to call a special session. In a few states, legislators have independent power to do so. Thus, except in the minority of states where legislative leaders have independent power to summon a special session, even a veto-proof legislative majority would not be sufficient in states where the legislature is not in session, and the Governor is unwilling to convene a special session.

The practical political difficulties of obtaining a special session of a state legislature were illustrated in 2020 when the Trump campaign attempted to recruit state legislators and Governors to change the method of awarding electoral votes after Election Day. For example, even though the Republican Party controlled both houses of the legislature *and* the Governor's office in Arizona and Georgia, Trump supporters found it impossible to convene a special session of the legislature in either state. It also proved impossible to convene the legislatures of three states where the Republicans controlled both houses of the legislatures (Michigan, Pennsylvania, and Wisconsin) but where the Governor was a Democrat.

In its unsuccessful lawsuit in 2020, the Amistad Project of the Thomas More Society complained:

> "**At present state legislatures are unable to meet.** This inability to meet has existed from election day and continues through various congressionally

[598] In most states, a two-thirds super-majority vote of the legislature is necessary to override a Governor's veto. However, a gubernatorial veto can be overridden by a three-fifths vote in seven states (Delaware, Illinois, Maryland, Nebraska, North Carolina, Ohio, and Rhode Island). A gubernatorial veto can be overridden by a majority vote in six states (Alabama, Arkansas, Indiana, Kentucky, Tennessee, and West Virginia). See *Ballotpedia*. Veto overrides in state legislatures. https://ballotpedia.org/Veto_overrides_in_state_legislatures

> set deadlines for the appointment of presidential electors and the counting of presidential elector votes. **The states legislatures of Pennsylvania, Michigan, Wisconsin, Georgia and Arizona** … are unable to review the manner in which the election was conducted, are prevented from exercising their investigative powers and are unable to vote, debate or as a body speak to the conduct of the election. **In sum, State legislatures are impotent to respond to what happened in the November 3, 2020, election.**
>
> **"This impotency is caused by** the ministerial functions of Congress and the Vice President regarding the counting of the Presidential Elector's votes and also **by state law prohibiting the legislative body from meeting without a supermajority or governor or leadership agreement** during a time they can respond to what happened in the election. Accordingly, even if the state legislatures were aware of clear fraud by the executive branch—**the state legislatures could not meet unless a supermajority, or a governor, or legislative leadership agreed they should meet**."[599] [Emphasis added]

Fifth, many state constitutions impose a substantial delay before *any* legislation passed by the legislature can take effect.

There are only 42 days between Election Day in November and the December Electoral College meeting.

It would be pointless to repeal the National Popular Vote Compact after Election Day if the repeal law could not take effect before the Electoral College meeting.

Thus, unless the law repealing the National Popular Vote Compact were to take effect immediately, the presidential electors chosen in accordance with the Compact would have cast their votes long before the repeal law takes effect. In fact, absent immediate effect, the new President would have been inaugurated before a repeal law could take effect in these states.

A newly passed law can be given "immediate effect" in 19 of these 21 states by passing it with a constitutionally specified super-majority (e.g., three-fifths, two-thirds, three-quarters, or four-fifths).

Table 9.40 shows the date when a new state law ordinarily takes effect in each state. In states where a new state law does not ordinarily take effect immediately, column 3 of the table shows the super-majority needed in each house of the legislature in order to give a new law immediate effect.

In 2024, neither political party alone had the super-majorities required to give a bill immediate effect in nine of the 19 states where a bill can be given immediate effect (Alaska, Arizona, Illinois, Maine, Michigan, Nebraska, New Mexico, Virginia, and Texas). Moreover, the required super-majority would be difficult to obtain in the remaining states (even from among members of the state's dominant party) if the purpose were to steal the presidency.

Sixth, the majority party would have to be able to overcome the numerous dilatory

---

[599] Complaint. *Wisconsin Voters Alliance v. Pence*. United States District Court for the District of Columbia. December 22, 2020. Pages 5 and 6. https://www.democracydocket.com/wp-content/uploads/sites/45/2020/12/DC-WVA-20201222-complaint.pdf

Table 9.40 Effective dates 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 1 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	

parliamentary tactics that enable the minority party to frustrate action in legislative bodies. A highly motivated minority in most state legislatures can delay the enactment of new legislation for a considerable length of time by invoking these tactics.

Although these dilatory tactics cannot delay enactment of a particular bill forever, they are more than sufficient in most states to delay a legislative bill in the brief 42-day period between Election Day and the Electoral College meeting in mid-December.

The available dilatory tactics vary by state, but include:

- quorum requirements;
- filibusters;
- lay-over requirements;
- offering a blizzard of amendments, insisting that no action occur until pending amendments are printed, and demanding a roll call on each amendment; and
- "working to rule"—that is, refusing to waive the numerous notice, scheduling, and other requirements that are routinely waived under ordinary circumstances.

Let's examine these dilatory tactics one-by-one.

The state constitutions of four states (Oregon, Indiana, Tennessee, and Texas) require a two-thirds quorum for a meeting of the legislature.

As the *Oregon Statesman Journal* observed in 2018:

> "Denying a quorum is one of several parliamentary tools the minority party has to slow down progress on legislation, often deployed when they feel ignored or cut out of the lawmaking process."[600]

Legislators opposing certain bills have absented themselves on many occasions in Oregon, notably during the 2023 session.[601]

In Texas in 2003, the Democrats pulled the quorum when the Republicans attempted to pass a politically motivated mid-decade redrawing of the state's congressional districts. In an article entitled "Texas House paralyzed by Democratic walkout," CNN reported:

> "With action in the Texas House brought to a standstill, roughly 50 state Democratic representatives said they would remain in neighboring Oklahoma 'as long as it takes' to block a Republican-drawn redistricting plan that could cost them five seats in Congress. 'There's 51 of us here today, and a quorum of the Texas House of Representatives will not meet without us,' said state Rep. Jim Dunnam, the chairman of the House Democratic Caucus. He spoke with reporters outside a hotel in Ardmore, Oklahoma, where the Democrats have holed up."

---

[600] Radnovich, Connor. 2018 *Salem Statesman Journal*. Ambitious goals, new worries come with Oregon Democratic supermajorities. November 9, 2018. https://www.statesmanjournal.com/story/news/politics/2018/11/09/oregon-democratic-supermajority-ambitious-policy-goals-worries/1920930002/ This article discussed the Democrat's *three-fifths* supermajority in 2019 (necessary in Oregon for passing bills for raising revenue) in relation to the *two-thirds* quorum.

[601] Baker, Mike. 2023. In a Year of Capitol Feuds, Oregon Has a Political Breakdown. *New York Times*. June 5, 2023. https://www.nytimes.com/2023/06/04/us/oregon-legislature-republican-walkout.html

> "The Democrats are trying to thwart a GOP redistricting plan they say is being pushed by U.S. Rep. Tom DeLay, the majority leader in the U.S. House of Representatives and a Texan. Democrats call the plan 'an outrageous partisan power grab.' They have gathered in Ardmore, just across the state line and beyond the jurisdiction of Texas state police, whom the House's Republican majority has ordered to bring them back to the state Capitol."[602]

In 2024, neither political party in Texas and Oregon has had a two-thirds super-majority in both houses of the legislature.[603] Thus, it would be futile to even contemplate executing the hypothetical post-election scenario in these two states, because the minority party would simply run out the clock by boycotting the legislative session during the brief period between Election Day in November and the Electoral College meeting in mid-December.

The filibuster (or its functional equivalent) is available to the minority in many states. For example, when the Nebraska Republican Party attempted to repeal the state's congressional-district method of awarding electoral votes and replace it with a winner-take-all law, the bill was blocked by a filibuster in several recent years, including 2024.[604,605]

Many state constitutions impose significant lay-over requirements. For example, the California state constitution imposes a 30-day delay after a bill's introduction before it can even be considered. This constitutional lay-over requirement can only be waived by a three-quarters vote. Neither political party has had a three-quarters super-majority in both houses of the California legislature at any time since World War II. Other state constitutions impose lay-overs before the second chamber of the legislature can consider a bill passed by the first chamber. When lay-over requirements are in state legislative rules (rather than the state constitution), they typically may be suspended only by a super-majority.

A further delay would occur if passage of a repeal law depended on overriding the veto of a governor from the opposing party. Such a governor would surely slow-walk the issuance of his or her veto so as to consume every last day of the available time (typically 10 days).

Seventh, the rogue state(s) would have to cumulatively possess enough electoral votes to matter. In any given election year, it would be unlikely for the states belonging to the National Popular Vote Compact to possess a bare 270 electoral votes. More importantly, the national popular vote winner is likely to have won some—and perhaps many—electoral votes from *non-compacting* states. Thus, the rogue state(s) would have to collectively possess a considerable number of electoral votes in order to throw the presidency to the candidate who lost the national popular vote.

Taken together, John Samples' hypothetical partisan and illegal maneuver of attempt-

---

[602] Texas House paralyzed by Democratic walkout. CNN. May 19, 2003. https://search.yahoo.com/search?fr=mcafee&type=D211US667G0&p=texas+quorum+redistricting

[603] In 2024, the Republican Party has a two-thirds super-majority in both houses in Tennessee and Indiana.

[604] Hughes, Paul. 2024. Dover not sure if votes are there for electoral college winner-take-all method. *WJAG Radio*. May 1, 2024. https://www.norfolkneradio.com/news/dover-not-sure-if-votes-are-there-for-electoral-college-winner-take-all-method/article_35af7872-071a-11ef-bac6-ffd922f44ab3.html

[605] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

ing to withdraw from the National Popular Vote Compact after Election Day is both illegal and impractical.

Florida in 2000

The events in the Florida legislature between Election Day and the Electoral College meeting in 2000 are instructive, even though they involved a provision of the Electoral Count Act of 1887 that is no longer in effect.

Because section 1 of the Electoral Count Act of 1887 provided that presidential electors were to be appointed on Election Day, everyone recognized that there was no possibility that the Republican-controlled Florida legislature could meet after Election Day and retroactively decide to ignore the already-cast popular vote and appoint the slate of presidential electors nominated by the Florida Republican Party.[606]

The now-repealed section 2 of the Electoral Count Act of 1887 provided:

> "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]

Republicans in the Florida legislature advanced the argument that if a court were to vacate the initial count of the popular votes cast on Election Day, and if a court-ordered recount were not completed by the federal Safe Harbor Day (i.e., six days prior to the Electoral College meeting), Florida could have been left with no presidential electors at the time of the Electoral College meeting.

This possibility aroused considerable concern, because the Constitution does not require an absolute majority of the electoral votes to become President, but merely:

> "a majority of the whole number of electors **appointed**."[607] [Emphasis added].

Thus, if Florida had failed to appoint its 25 presidential electors in 2000, Al Gore would have had a majority of the electors *appointed* and, therefore, would have been elected President by the Electoral College.

This outcome was clearly unappealing to the Republican-controlled Florida legislature and the Republican Governor, the brother of the Republican presidential nominee.

It was therefore argued at the time that the Florida legislature had the power to act under section 2, because there was a possibility of a "failure to make a choice."

On December 7, 2000, the *New York Times* reported:

> "Nervous about meeting a deadline of next Tuesday for states to pick electors, and with Vice President Al Gore having made remarks indicating that he is not ready to concede, [Senate president, John] McKay and [Speaker Tom] Feeney

---

[606] The authors appreciate their 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.

[607] The 12th Amendment (ratified in 1804) provides: "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."

> signed a proclamation today convening a special session of the Legislature beginning on Friday.
>
> "'On Dec. 12, we may find ourselves in a position that calls for our involvement **should there be no finality to the contests that are still pending**,' Mr. McKay said in a joint news conference with Mr. Feeney to announce the decision. 'And it is possible that there may be more filed before this day is out. **It would be irresponsible of us if we failed to put a safety net in place** under the current court conditions."
>
> "Mr. Feeney said he was compelled to call for the special session because we have **a duty to protect Florida's participation in the Electoral College**.'"[608] [Emphasis added]

Thus, the Republican-controlled Florida House of Representatives passed a resolution *reaffirming* the initial *already-certified* vote count favoring the Republican presidential electors supporting George W. Bush.

The Republican-controlled state Senate never took any action on the House's "reaffirming" motion, because the U.S. Supreme Court's decision in *Bush v. Gore* mooted the issue.

Thus, the "failed to make a choice" provision of the Electoral Count Act of 1887 was never invoked.

The Electoral Count Reform Act of 2022 repealed this provision.

9.26. MYTH THAT CANDIDATES WILL BE KEPT OFF THE BALLOT

9.26.1. MYTH: Candidates will be kept off the ballot in a patchwork of states because of the Compact.

QUICK ANSWER:

- The Constitution's Equal Protection Clause and First Amendment provide a strong legal basis for thwarting politically motivated attempts to keep presidential candidates off the ballot. For example, in 2019, courts found five different reasons to invalidate a California law (aimed at Donald Trump) to keep a candidate off the ballot for failure to disclose tax information. In 2024, after a Colorado state court evidentiary hearing found that Donald Trump had engaged in insurrection within the meaning of section 3 of the 14th Amendment, the U.S. Supreme Court ruled that Donald Trump could not be kept off the Colorado ballot.
- Numerous court precedents protecting ballot access indicate that a major-party presidential candidate could not be kept off the ballot.

---

[608] Canedy, Dana and Barstow, David. 2000. Florida Lawmakers to Convene Special Session Tomorrow. *New York Times*. December 7, 2000. https://www.nytimes.com/2000/12/07/us/contesting-vote-legislature-florida-lawmakers-convene-special-session-tomorrow.html

- The possibility of keeping candidates off the ballot in a patchwork of states is not a question that arises because of the National Popular Vote Compact. It exists in the current system. This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

An anonymous posting on the Volokh election blog in 2012 said:

> "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 … thus knocking the other party's votes in that state to 0."[609]

The reasons for the failure of past politically motivated attempts to keep particular candidates off the ballot under the current system apply equally to the National Popular Vote Compact.

First, the Constitution's Equal Protection Clause and First Amendment provide a strong legal basis for thwarting politically motivated attempts to keep presidential candidates off the ballot in certain states.

California's unsuccessful 2019 attempt to make ballot access dependent on a presidential candidate's disclosure of tax returns

After Donald Trump was elected President in 2016, bills were introduced in several state legislatures to deny ballot access to a presidential candidate who had not publicly disclosed his or her income tax returns.

In California, a bill (SB 149) entitled the "Presidential Tax Transparency and Accountability Act" was introduced along these lines in 2017.

Before the California legislature acted on the bill, the California Office of the Legislative Counsel concluded that the legislation:

> "would be unconstitutional if enacted."

Despite this prescient warning, the legislature passed the bill.

California Governor Jerry Brown then vetoed the bill, saying:

> "This bill is a response to President Trump's refusal to release his returns during the last election. While I recognize the political attractiveness—even the merits—of getting President Trump's tax returns, **I worry about the political perils of individual states seeking to regulate presidential elections in this manner**. First, it may not be constitutional. Second, it sets a 'slippery slope' precedent. Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards?

---

[609] Posting by Valarauko on The Volokh Conspiracy blog on October 30, 2012. http://www.volokh.com/2012/10/30/the-popular-vote-and-presidential-legitimacy/

> And **will these requirements vary depending on which political party is in power?"**[610] [Emphasis added]

Despite Governor Brown's veto in 2017, the California legislature passed a similar bill (SB 27) in 2019. Governor Gavin Newsom signed the bill in 2019.[611]

The courts found five different reasons to invalidate California's 2019 law, including:

- three federal constitutional reasons
- one state constitutional reason
- one reason based on the fact that an existing federal statute pre-empted state laws on the topic.

Federal District Judge Morrison C. England wrote in *Griffin v. Padilla* in 2019:

> "The Court appreciates the State's desire for transparency in the political process. Requiring candidates to disclose tax returns could shed light on sources of income, potential conflicts of interest, and charitable tendencies. This information is important to a voter's ability to evaluate how a candidate's financial interests might affect future decision making."
>
> "It is not the job of the courts, however, to decide whether a tax return disclosure requirement is good policy or makes political sense. Those are questions delegated to the political branches of the federal government, that is Congress and the President, under Articles I and II of the United States Constitution. Those are the branches that make the law. Article III Courts such as this one, on the other hand, are tasked with interpreting the law and evaluating whether laws passed by the other two branches of federal government or by the states are constitutional in the first place. The job of the federal courts is therefore to follow the law and to decide questions based on the United States Constitution, which is the only thing the Court is being asked to do in these cases. Courts created under Article III of the United States Constitution are not concerned with political victories or who may or may not 'win.' Instead, it is the Court's job to make sure the Constitution wins."[612]

Judge England then issued a preliminary injunction barring the enforcement of California's 2019 law as applied to presidential candidates for the following four reasons:

> "The Court finds that Plaintiffs are likely to prevail on the merits of their arguments that the Act
>
> (1) violates the Presidential Qualifications Clause contained in Article II of the United States Constitution;

---

[610] Veto message of California Governor Jerry Brown on SB 149. October 15, 2017. https://www.gov.ca.gov/wp-content/uploads/2017/11/SB_149_Veto_Message_2017.pdf

[611] Nick Cahill, 2019. Trump Tax Returns Required by New California Law. *Courthouse News Service*. July 30, 2019. https://www.courthousenews.com/trump-tax-returns-required-by-new-california-law

[612] *Griffin v. Padilla*. 417 F. Supp. 3d 1291 at 1297. (E.D. Cal. 2019). https://scholar.google.com/scholar_case?case=14784440801933178029&q=Griffin+v.+Padilla,&hl=en&as_sdt=2006&as_vis=1

> (2) deprives Plaintiffs of their rights to associate and/or to access the ballot, as guaranteed by the First Amendment of the Constitution;
>
> (3) further violates the Constitution's Equal Protection Clause as set forth in the Fourteenth Amendment; and
>
> (4) is preempted by the provisions of [Ethics in Government Act] in any event."[613]

The federal district court's decision in *Griffin v. Padilla* said:

> "The Presidential Qualifications Clause of the United States Constitution sets forth the eligibility requirements for the Office of President:
>
> > 'No person except a natural born Citizen … shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. U.S. Const., art. II, § 1, cl. 5.'
>
> "The United States Supreme Court analyzed the Constitution's Qualifications Clauses in the seminal case, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). There the Court held that the Framers intended the foregoing language to 'fix as exclusive the qualifications in the Constitution,' 'thereby divest[ing] States of any power to add qualifications.' *Id.* at 801, 806, 115 S.Ct. 1842. The Court reasoned that 'the text and structure of the Constitution, the relevant historical materials, and, most importantly, the basic principles of our democratic system all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power' … *Id.* at 806, 115 S.Ct. 1842. Significantly, the Court rejected any notion that a state can cloak an otherwise impermissible qualification as a ballot access issue subject to regulation by the states under the Elections Clause, stating that states cannot indirectly create new eligibility requirements by 'dressing eligibility to stand for [public office] in ballot access clothing. *Id.* at 831, 115 S.Ct. 1842."[614]

California's 2019 law was also found to be unconstitutional based on First Amendment rights of association and ballot access. The federal district court's decision in *Griffin v. Padilla* said:

> "The Constitution guarantees, among other things, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' *Illinois State Bd. of Elections v. Social Workers Party*, 440 U.S. at 184, 99

[613] *Ibid.* at 1308.

[614] *Ibid.* Page 1298.

> S.Ct. 983 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)). Ballot access restrictions 'implicate the right to vote' because 'limiting the choices available to voters … impairs the voter's ability to express their political preferences.' *Id*. The rights of individual voters to associate with, and vote for, the candidate of their choice 'rank among our most precious freedoms.' *Williams*, 393 U.S. at 30-31, 89 S.Ct. 5 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)). Moreover, as the Supreme Court also noted, the 'freedom to associate as a political party' also 'has diminished practical value if the party can be kept off the ballot.' *Illinois State Bd. of Elections v. Social Workers Party*, 440 U.S. at 184, 99 S.Ct. 983.
>
> "According to Plaintiffs, by barring partisan presidential candidates who decline to release their tax returns from appearing on the California primary ballot, the Act imposes a severe burden on voters' ability to access the ballot and vote for the candidate of their choice. Additionally, President Trump further claims that the Act similarly burdens his ability to appear on the Republican primary ballot and to associate with Republican voters in California. The Trump Campaign as well as the Republican National Committee and the California Republican Party make similar arguments."[615]

In addition, California's 2019 law was found unconstitutional based on the Equal Protection Clause of the 14th Amendment. The federal district court's decision in *Griffin v. Padilla* said:

> "The Fourteenth Amendment's Equal Protection Clause guarantees that 'no state shall … deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const., amend. XIV, § 1. Two of the related cases … argue that the Act is unconstitutional to the extent it requires a political party's candidates for President to disclose his or her tax returns in the primary election but exempts independent candidates from doing so. By distinguishing among constitutionally eligible candidates for President in that manner, Plaintiffs argue that the Act imposes greater burdens on the voting and associational rights of California voters who support major party candidates than those who support independents. According to Plaintiffs, this triggers equal protection concerns. See *Lubin v. Panish*, 415 U.S. at 716, 94 S.Ct. 1315 ('The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters'); see also *Matsumoto v. Pua*, 775 F.2d 1393, 1396 (9th Cir. 1985).[616]

Moreover, the court found that California's 2019 law was pre-empted by the federal Ethics in Government Act.

---

[615] *Ibid.* at 1302.

[616] *Ibid.* at 1305.

As the ads on late-night TV say, "But wait, there's more."

Before the U.S. Court of Appeals for the Ninth Circuit could consider an appeal of Judge England's decision, the California State Supreme Court delivered the *coup de grâce* to California's 2019 law by ruling that it violated the state Constitution.[617,618]

Unsuccessful attempt to keep Donald Trump off the ballot in 2024 based on the Insurrection Clause of the 14th Amendment

Section 3 of the 14th Amendment provides:

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

After a five-day evidentiary hearing, a Colorado state court found that former President Donald Trump had engaged in insurrection within the meaning of Section 3. That lower court provided no relief to the plaintiffs, because it found that the word "office" in the 14th Amendment did not apply to the presidency.

The Colorado Supreme Court reached the opposite conclusion on the meaning of the word "office" and, after ruling on various other issues, ordered that Trump could not be listed on Colorado's ballot in 2024.

Similar litigation was proceeding in several other states at about the time of the Colorado decision.

In *Trump v. Anderson*, the U.S. Supreme Court reversed the Colorado Supreme Court citing the "patchwork" that would result if single states could keep presidential candidates from the ballot. The Court wrote:

> "The result could well be that **a single candidate would be declared ineligible in some States, but not others**, based on the same conduct (and perhaps even the same factual record).
>
> "**The 'patchwork' that would likely result** from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U. S., at 822. But **in a Presidential election 'the impact of the votes cast in each State is affected by the votes cast'—or, in this case,**

---

[617] *Patterson v. Padilla*. 451 P.3d 1171 (Cal. 2019). https://scholar.google.com/scholar_case?case=5187408300869215161&q=Patterson+v.+Padilla.+451+P.3d+1171&hl=en&as_sdt=2006&as_vis=1

[618] *Harvard Law Review*. As the Legislature Has Prescribed: Removing Presidential Elections from the Anderson-Burdick Framework. Volume 135. Issue 4. Page 1082. February 10, 2022. https://harvardlawreview.org/2022/02/as-the-legislature-has-prescribed/

> **the votes not allowed to be cast—'for the various candidates in other States**.' *Anderson*, 460 U. S., at 795. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times."[619] [Emphasis added]

Numerous court precedents protecting ballot access for minor-party or independent presidential candidates suggest that a major-party candidate would not be kept off the ballot.

The question of ballot access did not, of course, arise until the 1890s, when government-printed ballots were first used in the United States (section 3.11).

Over the years, the *major* political parties have often used numerous sharp-elbowed tactics to try to keep *minor* parties off the ballot. These tactics have included state laws requiring that minor parties submit petitions signed by an unreasonably large number of voters in order to appear on the ballot, that minor parties submit the required petitions by unreasonably early deadlines not applicable to major parties, that minor parties receive an unreasonably large number of votes in order to stay on the ballot, and that an unreasonably large number of voters remain registered with a party for it to stay on the ballot.

In addition, major parties often oppose ballot access for specific minor-party and independent candidates because of a concern (often well placed) that they will become spoilers in a specific upcoming race.

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."[620]

Despite Pennsylvania Republican Party efforts, courts ordered that Johnson appear on the 2012 ballot in Pennsylvania. Johnson ultimately received only 0.99% of the national popular vote in 2012.

Ballot Access News has listed 40 lawsuits where the courts have invalidated a variety of efforts to keep candidates off the ballot for reasons that go beyond the specific qualifications stated in the state or federal constitutions. The only cases where such laws have been upheld (and only in some states) have involved laws requiring candidates to resign their current office in order to run for another one.

As Richard Winger reported in 2019:

> "Ever since the start of government-printed ballots in 1890, courts have been striking down state election laws (aside from petitions and fees) that prevent

---

[619] *Trump v. Anderson*. May 4, 2024. Slip opinion. https://www.supremecourt.gov/opinions/23pdf/23-719_19m2.pdf

[620] Rutenberg, Jim. Spoiler alert! G.O.P. fighting Libertarian's spot on the ballot. *New York Times*. October 15, 2012.

> candidates from getting on the ballot for federal office. [There have been] 40 lawsuits in the last 100 years that have struck down barriers to the ballot. These barriers included loyalty oaths; bans on felons; bans on candidates who were holding a state elective office and hadn't resigned the state job; laws requiring candidates to be registered voters; and laws requiring residency in a particular district or state."[621]

Despite the obstacles, presidential candidates who have significant national support can generally qualify for the ballot in most or all states.

For example, the Libertarian Party received the most votes nationwide of any minor-party in 2020, 2016, and 2012. In 2020, that party was on the ballot for President in all 50 states (when Jo Jorgensen received 1% of the national popular vote). In 2016, it was on the ballot for President in all 50 states (when Gary Johnson received 3% of the national popular vote). In 2012, the Libertarian Party was on the ballot in every state except Oklahoma (when Gary Johnson received 1% of the national popular vote).

See section 9.30.16 for a list of other minor parties that have been on the ballot in all 50 states.

Overall, 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 presidential candidate could be kept off the ballot in any state.

There is no history of major-party presidential candidates being denied ballot access because of the date of their nominating convention.

After each political party nominates its presidential-vice-presidential slate at its national convention, it must officially notify each state's election officials of its choice so that the state can include the names of the nominees on their ballots (section 3.2.2).

The various state deadlines start in early August.[622]

In 2004, the Republican National Committee scheduled the party's National Convention to start on August 30—considerably later than usual. The convention's late date created the possibility that there would be no Republican presidential candidate on the Alabama ballot in 2004, because the convention was scheduled to be held after Alabama's pre-existing statutory deadline for each political party to provide the name of its national nominees to state officials. The problem was satisfactorily resolved when the Alabama legislature agreed to pass special legislation temporarily changing the state's deadline to accommodate the Republicans.

In 2012, special legislation was required in several states, because the Republican National Convention was held in late August, and the Democratic Convention was held in early September.

In 2024, the Alabama legislature similarly passed special temporary legislation to accommodate the relatively late date (August 19) of the Democratic National Convention.

---

[621] Winger, Richard. 2019. Bills to require presidential candidates to show tax returns. *Ballot Access News*. April 1, 2019. https://ballot-access.org/2019/04/28/april-2019-ballot-access-news-print-edition/

[622] For a map showing the various state deadlines, see Vakil, Caroline and Roy, Yash. 2024. Here's how the process to replace Biden would work if he withdraws. *The Hill*. July 6, 2024. https://thehill.com/homenews/campaign/4757220-joe-biden-kamala-harris-donald-trump-withdraw/

In 2024, Ohio Republican legislative leaders initially resisted passing legislation to accommodate the Democratic National Convention (which was scheduled to start 12 days after Ohio's pre-existing statutory deadline). The legislature then adjourned without accommodating the Democrat's schedule. Republican Governor Mike DeWine broke the impasse by calling the legislature into a special session, which then promptly passed the required temporary change in Ohio's deadline to accommodate the Democrats.[623]

The failed attempt to keep Obama off the Kansas ballot is a further reminder that the public does not support attempts to keep candidates off the ballot.

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."[624,625]

The public's reaction to the Republican challenge to Obama's access to the ballot in Kansas in 2012 is a further reminder of the fact that the public (even in a state that voted heavily against Obama) would not tolerate an attempt by partisan officials to create a one-party election.

9.27. MYTHS ABOUT RANKED CHOICE VOTING

9.27.1. MYTH: Ranked Choice Voting is incompatible with National Popular Vote.

QUICK ANSWER:

- Groups that oppose both ranked choice voting (RCV) and the National Popular Vote Compact have incorrectly claimed that there is uncertainty as to whether the first-round count or the final-round count produced by RCV should be used in computing the national popular vote. They claim that the uncertainty will create a "constitutional crisis … throwing the nation into turmoil."
- In fact, there is no legitimate uncertainty as to how to interpret state RCV-for-President laws for the purpose of computing the national popular vote total. The statutory interpretation of the RCV-for-President laws is settled law in the only two states currently using RCV (Maine and Alaska). Maine settled any possible question in 2021 before it approved the National Popular Vote Compact, and confirmed its policy decision in 2024 when it enacted the Compact. The Alaska State Supreme Court has ruled: "With ranked-choice voting, the vote count is not final after the first round of tabulation. … According to both

---

[623] Svitek, Patrick. 2024. Ohio governor calls special session to ensure Biden gets on ballot. *Washington Post*. May 23, 2024. https://www.washingtonpost.com/politics/2024/05/23/ohio-biden-ballot/

[624] Eligon, John. Kansas ballot challenge over Obama's birth is ended. *New York Times*. September 15, 2012. https://www.nytimes.com/2012/09/15/us/politics/kansas-election-officials-seek-copy-of-obamas-birth-certificate.html

[625] Official Challenge by Joe Montgomery and Obama Response. *New York Times*. September 14, 2012. https://archive.nytimes.com/www.nytimes.com/interactive/2012/09/14/us/politics/20120914-kansas-obama.html?action=click&contentCollection=Politics&module=RelatedCoverage&pgtype=article&region=EndOfArticle

[Alaska's and Maine's] ranked choice voting laws, the vote count is not complete until the final round of tabulation."

- In Oregon and the District of Columbia (where an RCV-for-President law is on the ballot in November 2024) this issue is moot, because both proposed laws explicitly designate the final-round count.

MORE DETAILED ANSWER:

Description of Ranked Choice Voting

Ranked choice voting (RCV) allows the voter to numerically rank candidates on their ballot in order of preference—first choice, second choice, and so forth.

Figure 9.15 shows a sample ballot for the 2020 presidential election in Maine.

Instructions to Voters

To vote, fill in the oval like this ●

To rank your candidate choices, fill in the oval:

- **In the 1st column for your 1st choice candidate.**
- **In the 2nd column for your 2nd choice candidate, and so on.**

Continue until you have ranked as many or as few candidates as you like.

Fill in no more than one oval for each candidate or column.

To rank a Write-in candidate, write the person's name in the write-in space and fill in the oval for the ranking of your choice.

President Vice President	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice	6th Choice
Biden, Joseph R. Harris, Kamala D. Democratic	○	○	○	○	○	○
De La Fuente, Roque "Rocky" Richardson, Darcy G. Alliance Party	○	○	○	○	○	○
Hawkins, Howard Walker, Angela Nicole Green Independent	○	○	○	○	○	○
Jorgensen, Jo Cohen, Jeremy Libertarian	○	○	○	○	○	○
Trump, Donald J. Pence, Michael R. Republican	○	○	○	○	○	○
Write-in	○	○	○	○	○	○

Figure 9.15 Maine 2020 RCV ballot for President

RCV is sometimes called "instant runoff voting," because the ballot-counting process resembles a series of runoff elections.[626]

In the first round of counting in RCV elections, each ballot counts as one vote for the candidate whom the voter ranked as their first choice. If any candidate receives an absolute majority of the votes, the counting process stops. If not, the candidate with the fewest votes is eliminated, and each ballot for the just-eliminated candidate is counted as one vote for that voter's next choice. This process of counting and eliminating the weak-

[626] RCV is also known as the "single transferable vote" or "Hare system," after its inventor, Thomas Hare.

est candidate is repeated until one candidate has the support of a majority of the ballots expressing a choice.[627]

Supporters of RCV argue that it is preferable to the conventional plurality-voting system used in almost all elections in the United States,[628] because the winner has the support of a majority of voters expressing a choice.

RCV supporters argue that it gives candidates a strong reason not to run harshly negative campaigns, because winning often requires earning the support of some voters whose first choice was eliminated.

Moreover, RCV eliminates the dilemma of voting for the lesser of two evils—instead of the candidate who most closely matches the voter's views.

For example, RCV enables Libertarian voters to give their first-choice ranking to the Libertarian Party candidate, but to also give their second-choice ranking to the Republican candidate. Some Green voters might give their first-choice ranking to the Green Party candidate, but then give their second-choice ranking to the Democratic candidate.

In the traditional plurality-voting system, a voter who supports a minor-party or independent candidate often aids the major-party candidate whose views are farthest from the voter's.

For example, 97,488 Floridians voted for Ralph Nader for President in 2000. If those voters had been able to express their second-choice on their ballots, George W. Bush almost certainly would not have carried Florida by 537 votes—and therefore would not have become President.

Similarly, in 2020, Libertarian presidential candidate Jo Jorgensen received more than three times as many popular votes in Arizona, Georgia, and Wisconsin (152,185) as Biden's margin over Trump in those states, as shown in table 9.30. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[629]

History and constitutionality of ranked choice voting

RCV has been used for decades in numerous municipal elections in the United States.

As of 2024, RCV is used on a statewide basis in Maine and Alaska and by over 50 cities and counties in various states.[630]

Maine was the first state to adopt RCV on a statewide basis. In November 2016, its voters approved an initiative petition that adopted RCV for use in elections for Congress and state offices—but not President.[631]

---

[627] In some jurisdictions, the RCV law specifies that the rounds of counting and redistribution continue until two candidates remain (even if a candidate secured an absolute majority in an earlier round).

[628] Georgia, for example, uses the conventional plurality-voting system for President. For all other offices, if a candidate does not receive an absolute majority of the votes, a run-off election is held.

[629] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

[630] FairVote. 2023. Where Is Ranked Choice Voting Used? https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used

[631] *Ballotpedia*. https://ballotpedia.org/Maine_Question_5,_Ranked-Choice_Voting_Initiative_(2016)

In 2017, the Maine Supreme Judicial Court issued an advisory opinion saying that, based on its interpretation of the Maine Constitution, RCV could not be used in *general* elections for *state* offices. The court noted that RCV could be used in *primary* elections for *state* offices and in both primary and general elections for federal offices.[632,633]

As a result, RCV was used in Maine in 2018 for both the primary and general elections for U.S. Senator and U.S. Representative—but only in the June primary election for state offices.[634]

The constitutionality of Maine's RCV law was contested in federal court after RCV played a decisive role in Maine's 2nd congressional district election in 2018.

Both a federal district court and a federal appeals court upheld the constitutionality of Maine's RCV law. Both found RCV to be a "one-person, one-vote" system.[635] These federal-court rulings characterized the objections raised against RCV as primarily differences of opinion as to what constitutes a desirable voting system—rather than valid legal arguments as to what is, or is not, constitutional.[636]

In his 2018 opinion Federal District Judge Walker wrote:

> "Whether RCV is a better method for holding elections is not a question for which the Constitution holds the answer. … **To the extent that the Plaintiffs call into question the wisdom of using RCV, they are free to do so, but … such criticism falls short of constitutional impropriety.** A majority of Maine voters have rejected that criticism and **Article I does not empower this Court to second guess the considered judgment of the polity on the basis of the tautological observation that RCV may suffer from problems, as all voting systems do**. The proper question for the Court is whether RCV voting is incompatible with the text of Article I by giving the language its plain and ordinary meaning."[637] [Emphasis added]

---

[632] *Ballotpedia*. https://ballotpedia.org/Maine_Supreme_Judicial_Court_advisory_opinion_on_ranked-choice_voting

[633] In 2017, the Maine legislature passed a law delaying implementation of RCV. However, a protest-referendum petition suspended the legislature's action. The voters rejected the delaying legislation in June 2018.

[634] In June 2018, Maine voters reaffirmed their support for the 2016 RCV law in a referendum on a law passed by the legislature aimed at delaying the implementation of RCV in the state. https://ballotpedia.org/Maine_Question_1,_Ranked-Choice_Voting_Delayed_Enactment_and_Automatic_Repeal_Referendum_(June_2018)

[635] *Baber v. Dunlap*. 376 F. Supp. 3d 125 (D. Maine 2018), appeal dismissed, 2018 WL 8583796 (1st Cir. 2018). The opinion of Judge Walker on December 13, 2018 denying a preliminary injunction is at https://scholar.google.com/scholar_case?case=18197201880727345565&hl=en&as_sdt=6&as_vis=1&oi=scholarr The opinion of United States District Judge Lance Walker on November 15, 2018 denying a temporary restraining order is at https://scholar.google.com/scholar_case?case=9635396658969862750&hl=en&as_sdt=6&as_vis=1&oi=scholarr

[636] Pildes, Richard H. and Parsons, G. Michael. 2021. The Legality of Ranked-Choice Voting. 109 *California Law Review*. Volume 109. Number 5. October 2021. https://www.californialawreview.org/print/the-legality-of-ranked-choice-voting/

[637] *Baber v. Dunlap*. 376 F. Supp. 3d 125 at 135 (D. Maine 2018) https://scholar.google.com/scholar_case?case=18197201880727345565&hl=en&as_sdt=6&as_vis=1&oi=scholarr

In 2019, the Maine legislature passed a law extending RCV to presidential elections.[638]

In 2020, the constitutionality of Maine's law was again challenged in federal court. Federal District Judge Walker upheld Maine's RCV law against the claim that voters were forced to vote for candidates they did not favor.[639]

RCV has also been upheld by the highest courts of Massachusetts and Minnesota in cases involving local elections.[640]

RCV was used for the first time in a presidential election in Maine in 2020 (as shown by the sample ballot in figure 9.15).

In November 2020, an absolute majority of Maine's voters gave Biden their first-choice ranking on a statewide basis. Thus, the statewide RCV counting process ended in the first round. That is, the first-round count was equivalent to the final-round count.

Under Maine law, RCV is separately applied at the statewide level (for two electoral votes) and at the congressional-district level. An absolute majority of voters in the 1st district (the southern part of the state) gave Biden their first-choice ranking. An absolute majority of voters in the 2nd district (the northern part of the state) similarly gave Trump their first-choice ranking. Thus, the first-round count was equivalent to the final-round count in both districts.

Maine is not the only state that will use RCV in the 2024 presidential election.

In November 2020, Alaska voters approved an initiative petition that established a top-four multi-party primary for offices other than President and the use of RCV in general elections for all offices—including President.[641]

In 2021, the Alaska Supreme Court unanimously upheld the constitutionality of RCV.[642,643,644]

In 2022, RCV was used in Alaska in the general election for U.S. Senator and U.S. Representative as well as state offices, including Governor.[645]

In 2023, RCV opponents in Alaska launched an initiative petition to repeal RCV. The

---

[638] Rosin, Michael L. 2023. Ranked Choice Voting in Presidential Elections in Maine—A State That Appoints Electors Statewide and By District. *Elections Law Journal: Rules, Politics, and Policy*. October 4, 2023. https://doi.org/10.1089/elj.2022.0035

[639] *Hagopian v. Dunlap*. 2020. 480 F. Supp. 3d 288. https://www.govinfo.gov/content/pkg/USCOURTS-med-1_20-cv-00257/pdf/USCOURTS-med-1_20-cv-00257-0.pdf

[640] Balser, Jimmy. 2022. *Ranked-Choice Voting: Legal Challenges and Considerations for Congress*. Congressional Research Service. October 12, 2022. Page 3. https://crsreports.congress.gov/product/pdf/LSB/LSB10837

[641] The initiative petition also contained various campaign financing provisions as well. *Ballotpedia*. https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020)

[642] Bohrer, Becky. 2021. Judge to hear case challenging ranked-choice election initiative approved by Alaska voters. *Associated Press*. July 9, 2021. https://www.adn.com/politics/2021/07/09/judge-to-hear-case-challenging-ranked-choice-election-initiative-approved-by-alaska-voters/

[643] *Kohlhaas v. State of Alaska*. Alaska Supreme Court opinion. October 21, 2022. https://electionlawblog.org/wp-content/uploads/AK-Supreme-Court-Decision.pdf

[644] Lee, Jeanette. 2022. Alaska Supreme Court Upholds State's New Election System. *Sightline*. January 24, 2022. https://www.sightline.org/2022/01/24/alaska-supreme-court-upholds-states-new-election-system/

[645] Reilly, Benjamin; Lublin, David; and Wright, Glenn, 2023. Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"? *California Journal of Politics and Policy*. Volume 15. Number 1. https://escholarship.org/uc/item/5k75w7xw

opponents included former Governor Sarah Palin, who attributed her loss in her 2022 congressional race to Alaska's use of RCV. Voters are expected to vote on the question of repealing RCV in Alaska in November 2024.

Political context

A substantial percentage of supporters of RCV are supporters of the National Popular Vote Compact (NPV), and vice versa.

Moreover, opponents of RCV are very often opponents of NPV.

Trent England, Executive Director of Save Our States (the leading lobbying organization opposing NPV), also serves as a leading spokesman for Stop RCV (a lobbying organization opposing RCV).

The supporters of these anti-RCV and anti-NPV groups include the Honest Election Project, Heritage Action, and the Oklahoma Council on Public Affairs (OCPA), a think tank that employs Trent England as its Vice President.

Because of the overlap of support for RCV and NPV and the overlap of opposition to RCV and NPV, the opponents of RCV and NPV have attempted to divide the electoral reform community by claiming that RCV and NPV are incompatible.[646] Their aim is to get supporters of NPV to oppose RCV, and to get supporters of RCV to oppose NPV.

Save Our States incorrectly claims that RCV is incompatible with the National Popular Vote Compact.

In 2023, Sean Parnell, Senior Legislative Director of Save Our States, submitted written testimony to the Minnesota Senate Elections Committee claiming:

> "There is a fundamental incompatibility between the National Popular Vote interstate compact (NPV) and an election process used by some states called Ranked Choice Voting (RCV)."[647,648,649]

Jeanne Massey, Executive Director of FairVote Minnesota (the leading advocate for RCV in Minnesota),[650] submitted written testimony to a Minnesota House committee the day after Parnell's testimony:

---

[646] Save Our States also incorrectly claims that the National Popular Vote Compact is incompatible with STAR voting (section 9.28.1), range voting (section 9.28.2), approval voting (section 9.28.3), and top-two approval voting (section 9.28.3).

[647] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[648] England, Trent. 2022. *Save Our States video: 6 Questions for Sean Parnell*. https://www.youtube.com/watch?v=TNk3VIoP8dU

[649] Parnell, Sean. 2021. Ranked choice voting makes a National Popular Vote impossible. *Go Erie*. January 24, 2021. https://www.goerie.com/story/opinion/columns/2021/01/24/ranked-choice-voting-makes-national-popular-vote-impossible/4210235001/

[650] Traub, James. 2023. The Hottest Political Reform of the Moment Gains Ground: Inside Jeanne Massey's relentless campaign to fix democracy, starting in Minnesota. *Politico*. April 16, 2023. https://www.politico.com/news/magazine/2023/04/16/ranked-choice-voting-minnesota-00089505

> "I have read the opposing testimony related to RCV and National Popular Vote compatibility, and it is misleading and incorrect. **The testimony comes from an organization opposed to both RCV and NPV and has a clear motive—to hurt both reforms**. … I urge you to disregard the unproven, misleading argument that RCV and NPV are incompatible and support the NPV legislation before you."[651] [Emphasis added]

A policy memorandum from Save Our States says:

> "The National Popular Vote interstate compact (NPV) and an election method known as Ranked Choice Voting (RCV) are … **fundamentally incompatible.**"
>
> "The incompatibility of RCV and NPV could prevent a conclusive determination of which candidate has won the presidency, causing a political, legal, and **constitutional crisis and throwing the nation into turmoil**."[652]

The problem that allegedly will provoke a constitutional crisis was described in written testimony to the Minnesota Senate Elections Committee on January 31, 2023, by Parnell:

> "NPV anticipates that every state will produce a single vote total for each candidate, but **RCV produces at least two: an initial vote count, before the RCV process of transferring votes, and the final vote count** at the conclusion of the RCV process. **This would produce uncertainty**, litigation, and opportunities for manipulation if NPV took effect."[653,654,655] [Emphasis added]

In fact, there is no legitimate uncertainty as to whether to use the first-round count or the final-round count in computing the national popular vote.

Indeed, it would be preposterous to interpret an RCV-for-President law to mean that a state would hand voters a ballot enabling them to rank candidates according to their first, second, and other preferences—but then would ignore everything on the ballot except the voter's first choice.

---

[651] Massey, Jeanne. 2023. Testimony before Minnesota House Elections Finance and Policy Committee. February 1, 2023. https://www.house.mn.gov/comm/docs/TYRWZhxR-kCyJCxmXC5Z1Q.pdf

[652] Save Our States. 2021. Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist. April 26, 2021. Page 1.

[653] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[654] According to Save Our States, "The problem is that … the RCV process can yield two different vote counts—an initial total of all voters' first choice votes, and a final number that has eliminated votes for some candidates and added votes to others." See Save Our States Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote Cannot Coexist. April 26, 2021. Page 2.

[655] Save Our States has also stated, "If NPV is in effect, does [an RCV state] report on its Certificate of Ascertainment the initial numbers, or the final numbers after the RCV process has been used? There is no obviously correct answer." See Save Our States Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist. April 26, 2021. Page 4.

Using only the first-round count would negate *the* purpose of having an RCV-for-President law in the first place—namely to give voters the opportunity to rank candidates and have those rankings matter.

Moreover, the outcome of every election in every jurisdiction (state or local) that uses RCV in the United States is based on the final-round count—not just the first-round count or any other intermediate count. Nothing in Alaska's or Maine's RCV laws even hints that the state's final result for President should be arrived at differently than for U.S. Senator, U.S. Representative, or the other offices covered by the state's RCV law.

Finally, voters need to know how their vote for President will be counted before they decide how to vote.

- If only the first-round count is going to matter, many supporters of the Libertarian, Green, and other minor-party nominees for President might well choose to pragmatically give their first-choice ranking to one of the major-party candidates.
- If the final-round count is going to matter, such voters would vote their conscience and give their first-choice ranking to their genuine first choice.

Voters would be misled if the state were to provide them with a ballot allowing them to rank candidates, but then ignore all but their first-choice ranking.

In short, there is no good-faith legal argument in favor of using anything other than the final-round count produced by RCV.

There is no uncertainty about the statutory interpretation in the only two states that currently use RCV in presidential elections.

The interpretation of the RCV-for-President laws is a settled legal question in both of the states that currently use it (Maine and Alaska).

Maine passed its RCV-for-President law in 2019.

In November 2020, Maine used RCV in a presidential election for the first time.

In a *Harvard Law & Policy Review* article[656] written in 2019 and published in 2020, Rob Richie, FairVote's founding Chief Executive Officer, and his co-authors discussed RCV in relation to the National Popular Vote Compact.[657]

At the time of the article, RCV had not yet been used in a presidential election. The article raised the rhetorical question of how the national popular vote total would be computed if the National Popular Vote Compact were in effect, but no presidential candidate were to win an absolute majority of the votes in the first round of RCV counting.

The rhetorical question raised by the *Harvard Law & Policy Review* article did not come up in Maine in the 2020 election, because Biden won an absolute majority of the votes in the first round (both statewide and in each congressional district). Thus, the first-round count was the final-round count.

---

[656] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review*. Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[657] Note that Rob Richie is a co-author of this book and of the National Popular Vote Compact.

In 2021, Secretary of State Shenna Bellows proposed an amendment to the state's RCV-for-President law to eliminate any possible ambiguity in the state's RCV-for-President law. Bellow's 2021 proposal designated the final-round RCV tally as Maine's final determination of its presidential vote count. The Maine Governor signed the Secretary of State's recommended bill into law on June 17, 2021. That law provided:

> "§803. Duties of Governor: The Governor shall send a **certificate of the determination** of the electors to the Archivist of the United States under the state seal. The certificate **must state** … **the number of votes each candidate for President received … in the final round of tabulation** under section 723A [Maine's RCV law]."[658] [Emphasis added]

Maine had not enacted the National Popular Vote Compact into law at the time that it clarified its RCV-for-President law in 2021.

When Maine enacted the Compact in 2024, it retained the wording of the 2021 law quoted above and added the following new section specifically referring to Article III of the Compact (which is section 1304 of Maine law):

> "**When the National Popular Vote for President Act governs the appointment of presidential electors**, the Governor has the following duties.
>
> "As soon as possible after the canvass of the presidential count under section 723-A, subsection 7 is determined, the Governor shall send a certificate of determination containing the names of the electors and **the statewide number of votes for each presidential slate that received votes in the final round** to the Archivist of the United States under state seal. **This final round vote is deemed to be the determination of the vote in the State for the purposes of section 1304**.
>
> "As used in this paragraph, 'final round' means the round that ends with the result described in section 723-A, subsection 7, paragraph C, subparagraph (1)."[659] [Emphasis added]

Alaska is the only other state that is poised to use RCV in the 2024 presidential election.

In 2022, the Alaska Supreme Court eliminated any uncertainty about the issue in its unanimous opinion upholding RCV ("Initiative 2") in *Kohlhaas v. State*.

> "**With ranked-choice voting, the vote count is not final after the first round of tabulation**. Maine's law provided that if there were more than two candidates left 'the last-place candidate [was] defeated and a new round [of tabulation began],' repeating until two candidates remained and the candidate with the most votes was declared the winner. Similarly, Initiative 2 specifies that the tabulation 'continues' until two or fewer candidates remain and 'the candidate with the greatest number of votes is elected and the tabulation is complete.' **According to both states' ranked choice voting laws, the vote**

---

[658] Maine Rev. Stat. tit. 21-A, § 803. https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html

[659] Chapter 628 Public Law. https://legislature.maine.gov/bills/getPDF.asp?paper=HP1023&item=4&snum=131

> **count is not complete until the final round of tabulation**."[660] [Emphasis added]

In summary, the issue is settled in both Maine and Alaska.

There is no uncertainty about the statutory interpretation of RCV-for-President ballot propositions that voters may enact in November 2024.

In November 2024, Oregon voters will decide whether to use RCV in federal and statewide elections, including the general election for President.[661] Oregon's proposed RCV law explicitly states that the final-round RCV count will be the state's final determination of its presidential vote count. The proposed Oregon RCV law reads:

> "(B) If the National Popular Vote interstate compact set forth in section 1, chapter 356, Oregon Laws 2019, governs the appointment of presidential electors and the election of presidential electors in this state is determined by ranked choice voting:
>
> (i) The determination of which candidates for presidential elector shall be declared elected in this state shall be made in accordance with the provisions of the National Popular Vote interstate compact; and
>
> (ii) **The "final determination" of the presidential vote count reported and certified to the member states of the compact and to the federal government shall be the votes received in the final round of statewide tabulation** by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of statewide tabulation."[662] [Emphasis added]

As of July 2024, it appears that an initiative petition to adopt RCV may be on the ballot in November 2024 in the District of Columbia.[663]

The proposed RCV law in the District of Columbia, like Oregon's, explicitly states that the final-round RCV count will be the final determination of its presidential vote count:

> "If the appointment of presidential electors following any general election for President of the United States is governed by the National Popular Vote Interstate Agreement Act of 2010, effective December 7, 2010 (D.C. Law 18-274; D.C. Official Code §1-1051.01), then, in any general election for President and Vice-President of the United States using ranked choice voting:

---

[660] *Kohlhaas v. State*. 518 P.3d 1095 at 1121. (2022). https://casetext.com/case/kohlhaas-v-state-2

[661] *Ballotpedia*. 2024. Oregon Ranked-Choice Voting for Federal and State Elections Measure (2024). https://ballotpedia.org/Oregon_Ranked-Choice_Voting_for_Federal_and_State_Elections_Measure_(2024)

[662] Oregon Enrolled Bill HB2004 of 2023 is at https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2004/Enrolled

[663] The Democratic Party of the District of Columbia has filed a lawsuit challenging the use of the initiative process to adopt RCV in the District. See *District of Columbia Democratic Party v. Muriel E. Bowser*. August 1, 2023. https://www.scribd.com/document/663510619/2023-CAB-004732

"(1) The certification of the appointment of electors shall be made in accordance with the provisions of such Act;

"(2) **The final determination of the presidential vote count reported and certified to the States that have enacted such Act**, for purposes of that Act, shall be:

"(A) In an election using ranked choice voting pursuant to subsection (d) of this section, **the votes received in the final round of tabulation** by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of tabulation."[664] [Emphasis added]

Other RCV proposals that may be on the ballot in November 2024 do not apply to presidential elections.

In November 2024, Nevada voters will be voting on an initiative petition to adopt the "final 5" system for nominating candidates in the primary and RCV for the general election. However, this proposed legislation does not include President.[665]

As of July 2024, it appears that RCV legislation will also be on the ballot in Arizona and Colorado in November 2024; however, neither of these proposals covers presidential elections.[666]

Similarly, the proposal that may be on the ballot in Idaho in November 2024 does not apply to presidential elections.[667]

9.27.2. MYTH: The Compact does not enable RCV states to control how their votes for President are counted by NPV states.

QUICK ANSWER:

- The National Popular Compact explicitly requires officials in states belonging to the Compact to treat a state's final determination of its presidential vote count as "conclusive."

---

[664] The District of Columbia initiative petition may be found at https://makeallvotescountdc.org/ballot-initiative/ Accessed July 29, 2023.

[665] The proposed RCV legislation in Nevada was approved by voters in November 2022. If approved by the voters for a second time in November 2024, it would take effect in 2026. *Ballotpedia*. 2024 https://ballotpedia.org/Nevada_Question_3,_Top-Five_Ranked_Choice_Voting_Initiative_(2022)

[666] A pending initiative proposal in Montana would require candidates for office to win by a majority vote—a requirement that could be achieved by either RCV or a run-off election. If this proposal passes, the legislature would have to decide how to implement the majority-vote requirement. Leifer, Nancy; Haugen, Sharon; and Piske, Becky. 2024. Constitutional Initiative CI-126 and CI-127 would change Montana elections. *Helena Independent Record*. March 26, 2024. https://helenair.com/opinion/column/guest-view-constitutional-initiative-ci-126-and-ci-127-would-change-montana-elections/article_005ba6c8-e79e-11ee-8354-5308ef5cb4d2.html

[667] Ballotpedia. 2024. Idaho Top-Four Ranked-Choice Voting Initiative (2024). https://ballotpedia.org/Idaho_Top-Four_Ranked-Choice_Voting_Initiative_(2024)

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, has written:

> "**Maine has no power to tell California (for example) which set of numbers to use."**
>
> "Officials in various states [belonging to the NPV Compact] would **just decide, on their own and with no legal guidance,** which numbers to use from Maine or any other states using RCV or similar election systems.
>
> "The changes suggested by Secretary Bellows seek to solve this problem by reporting only the final RCV-adjusted numbers to other states on Maine's Certificate of Ascertainment. … **Officials in other NPV states could still decide to ignore Maine's preference** and use the raw numbers from the statewide canvas."[668] [Emphasis added]

Contrary to what England says, every state—whether it is a member of the Compact or not—*does* have the power to tell states belonging to the National Popular Vote Compact how to treat its presidential vote count.

Every state has that power, because the Compact *explicitly* requires officials in states belonging to the Compact to treat every state's final determination of its presidential vote count as "conclusive." Specifically, the fifth clause of Article III of the NPV Compact states:

> "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." [Emphasis added]

Maine's law specifically designates the final-round RCV tally as the state's final determination of its presidential vote count.

Maine's law is not a suggestion, hint, nudge, or plea to the election officials of states belonging to the National Popular Vote Compact. Those officials are legally required by the Compact to treat Maine's final determination of its presidential vote count as "conclusive."

Any ambiguity about how to interpret future RCV-for-President laws will be decided before any election based on the national popular vote.

Although the RCV-for-President laws that voters will consider in the November 2024 election explicitly address the issue of statutory interpretation raised by Save Our States, no "constitutional crisis … throwing the nation into turmoil" would arise if some future RCV-for-President law ever happened to be silent about this issue.

In the unlikely event that some future RCV-for-President law were to fail to address the issue, voters in the state involved would seek a declaratory judgment prior to Election Day so that they would know how their votes would be counted.

---

[668] England, Trent. 2021. Failed Attempt to Reconcile NPV, RCV in Maine. *Save Our States Blog*. May 14, 2021. Accessed June 21, 2021. https://saveourstates.com/blog/a-failed-attempt-to-reconcile-npv-rcv-in-maine

This question of statutory interpretation would arise and be resolved *before Election Day* for two reasons.

First, voters need to know how their vote for President will be counted before they decide how to cast it. If only the first-round count is going to matter for President, Libertarian and Green Party voters might pragmatically choose to give their first-choice ranking to one of the major-party candidates. If the final-round count is going to matter, such voters would give their first-choice ranking to their genuine first choice.

Second, courts generally apply the doctrine of *laches* to reject post-election challenges in cases in which the plaintiff was aware of an issue before the election but failed to initiate litigation until seeing the election results.

Thus, it would be virtually mandatory to raise this issue in court before the election and for the courts to settle the question before the election.

As explained in *Dobbs and Robert's Law of Remedies, Damages, Equity, Restitution:*

> "*Laches* is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant."[669]

As the U.S. Court of Appeals for the Fourth Circuit wrote in *Hendon v. North Carolina State Board of Elections*:

> "Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim "to lay by and gamble upon receiving a favorable decision of the electorate" and then, upon losing, seek to undo the ballot results in a court action.'"[670,671,672]

Professor Richard L. Hasen—a leading expert on both election law and the law of remedies—explains that:

> "laches … prevent[s] litigants from securing options over election administration problems."[673]

In short, the question of interpreting a state's RCV-for-President law would be litigated in the state involved, and such litigation would occur prior to the time when voters start to cast their ballots.

Whatever the outcome of litigation of this question of statutory interpretation, that

---

[669] Dobbs, Dan B. and Roberts, Captice L. 1993. *Law of Remedies, Damages, Equity, Restitution*. St. Paul, MN: West Academic Publishing.

[670] *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983).

[671] *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988).

[672] Manheim, Lisa Marshall. 2023. Electoral Sandbagging. *UC Irvine Law Review*. Volume 13. Issue 4. November 2023. Pages 1187–1238. Page 1196. https://scholarship.law.uci.edu/ucilr/vol13/iss4/7/

[673] Hasen, Richard L. 2005. Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown. *Washington and Lee Law Review*. Volume 62, Issue 3. Summer 2005. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1284&context=wlulr

state's final determination of its presidential vote count would be made in accordance with the final judicial interpretation of its RCV-for-President law.

While FairVote and virtually all other supporters of RCV believe that the only reasonable interpretation of an RCV-for-President law that is consistent with RCV's essential purpose is that the final-round count should be used to compute the national popular vote total, the alternative interpretation would present no operational difficulty for the National Popular Vote Compact. The Compact simply requires that its member states treat the state-of-origin's "final determination" as "conclusive."

Save Our States continues to complain even after Maine eliminated the alleged ambiguity.

In 2021, Sean Parnell, Senior Legislative Director of Save Our States, testified against the Maine Secretary of State's recommended amendment that eliminates the arguable ambiguity.

In testifying before the Maine Committee on Veterans and Legal Affairs on May 11, 2021, Parnell mentioned the historical fact that in the 1992 race involving incumbent President George H.W. Bush, Bill Clinton, and Ross Perot, one of the major-party candidates came in third in Maine:

- Clinton finished first with 38.8%
- Perot finished second with 30.44%
- Bush finished third with 30.39%.[674]

One of the major-party candidates also came in third in Utah in 1992:

- Bush finished first with 43.3%;
- Perot finished second with 27.3%
- Clinton finished third with 24.7%.[675]

The major-party nominees have come in first or second in 610 of the 612 state-level counts in the 12 presidential elections between 1972 and 2020.

These two cases in 1992 have been the only times since George Wallace's 1968 run for President that a third-party nominee has come in second in any state.[676]

Parnell testified:

> "Under Ranked Choice Voting, if a third party or an independent candidate were to finish ahead of either the Democratic or Republican candidate, … **the votes for that Democratic or Republican candidate get completely erased** and will not be reported.
>
> "In 1992, for example, Ross Perot finished ahead of George Bush in Maine. George Bush would have had subtracted, or never appeared in the national

[674] In Maine in 1992, Bill Clinton received 263,420 votes; Ross Perot received 206,820 votes; and incumbent President George H.W. Bush received 206,504 votes.

[675] In Utah in 1992, incumbent President George H.W. Bush received 322,682 votes and came in first; Ross Perot received 203,400 votes and came in second; and Bill Clinton received 183,429 votes and came in third.

[676] Segregationist Governor George Wallace of Alabama carried five states in 1968.

> vote totals about 207,000 votes. The amendment that your Secretary of State has offered does not address this problem."[677] [Emphasis added]

At a debate conducted by the Broad and Liberty group in Philadelphia in 2021, Sean Parnell said:

> "If you're just using the final votes, then if a candidate—a Democrat or Republican—ever finishes in third place in a state with ranked choice voting, … then **what you wind up doing is literally zeroing out votes**. If you ever have a Republican candidate or Democratic candidate finishing third place in a state with ranked choice voting, then you are literally going to watch **hundreds of thousands, maybe even millions of votes, be completely erased**."[678] [Emphasis added]

Of course, Parnell is a vigorous defender of the current winner-take-all method of awarding electoral votes—a system that actually "erases" the popular votes cast for *every* second-place and *every* third-place candidate in *every* state in *every* election—that is, in *all* 612 state-level vote counts in the 12 presidential elections between 1972 and 2020.[679]

There is another important difference in the transferring that might have occurred under RCV in these two cases out of 612. If RCV and National Popular Vote had been in effect in 1992 when Bush came in third in Maine, and Clinton came in third in Utah, every voter in Maine and Utah would have had their vote counted for a candidate *for whom they had actually voted.* In contrast, the current winner-take-all system routinely transfers the voter's vote to a candidate *for whom the voter did not vote.*

Moreover, Parnell's objection also fails to acknowledge the important fact that every voter makes their choice and casts their vote with an awareness of the existing voting system. The people who voted for Ross Perot in 1992 in Maine and Utah were aware that doing so could either:

(1) switch the state's popular-lead from one major-party candidate to the other, or

(2) result in their state's electoral votes going to Perot—thereby potentially depriving one of the major-party candidates of Maine's four or Utah's six electoral votes.

Aware of the existing rules of the game, these voters cast their ballots for Perot in

---

[677] Testimony of Sean Parnell. Maine Committee on Veterans and Legal Affairs. May 11, 2021

[678] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

[679] Of course, if Perot had carried Maine in 1992, neither George H.W. Bush nor Bill Clinton would have received any votes in the Electoral College from Maine under the current winner-take-all method of awarding electoral votes. Similarly, if Perot had carried Utah in 1992, neither Bush nor Clinton would have received any electoral votes from Utah under the winner-take-all method. A Perot first-place showing in Maine or Utah in 1992 would have, under the current system, made it slightly harder for a major-party candidate to accumulate the 270 electoral votes required to be elected President. That is, a Perot victory in Maine or Utah in 1992 would have made it slightly more likely that the presidential election would have been thrown into the U.S. House of Representatives. That is, of course, what third-party candidates often hope to do.

1992. It is condescending to suggest that these voters were ignorant or confused about the implications of their votes. Lawmakers, voters, and the RCV voting system are not obligated to protect the two major-party candidates from the consequences of their own failure to earn enough support to come in first or second place.

Indeed, the precise purpose of RCV is to honor the voter's second choice in case the voter's first-choice candidate cannot win. This is not a bug of RCV, but a feature.

Given that Parnell vigorously defends the current system, which erases the popular votes cast for *every* second-place and third-place candidate in *every* state in *every* election, the concern about what might happen in two elections out of 612 elections is little more than crocodile tears.

9.27.3. MYTH: Slow counting is inherent in Ranked Choice Voting and other alternative voting systems, thus creating problems for the Compact.

QUICK ANSWER:

- Slowness in releasing *unofficial* vote counts from an RCV state will have no effect on the operation of the National Popular Vote Compact, because the Compact uses only the *official* certified counts. Official results for President must be certified by the same federal deadline—whether RCV is used or not.
- The delays in releasing *unofficial* counts on Election Night in some recent RCV elections are attributable to the understandable caution of election administrators in conducting their first RCV elections. There is no technological or other reason why the *unofficial* counts from RCV elections cannot come out as promptly as the unofficial results of non-RCV elections. In fact, in most RCV jurisdictions, unofficial counts are already released on Election Night and updated on the same schedule as unofficial counts from non-RCV races. Any slowness in announcing *unofficial* results is a transitory issue—not an inherent characteristic of RCV.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "Final RCV results typically take much longer to be determined than plurality voting. In 2022, the winner of Maine's 2nd congressional district wasn't known until November 16, more than a week after the November 8 election, and Alaska's results weren't announced until November 23 for the state's U.S. House race. In both races, however, most of the first-round vote totals were public on election night or shortly after.
>
> "Assuming this timeline is repeated for presidential election results, the initial votes will be publicly available on or shortly after election night and will be incorporated into media and other counts of the national popular vote. These early tabulations will include hundreds of thousands and perhaps millions of votes that, within the next few weeks, will be removed from the national tally

> for at least one of the two major party candidates, which could easily change the outcome in a close national election. It is not difficult to predict the chaos, confusion, and crisis that would ensue if a candidate initially thought to have won under NPV is suddenly determined to have lost weeks later after having hundreds of thousands of votes erased from their national totals."[680]

This testimony is mistaken in several ways.

First, there was nothing noteworthy—much less scandalous—about Maine taking eight days in 2022 to finish its RCV count in the competitive 2nd congressional district. For example, in 2020, Pennsylvania took until the Saturday after Election Day to finalize its non-RCV count for President in 2020.[681]

Moreover, Alaska's official count is not slow because of RCV. It has always been slow—in part because ballots must be physically transported from remote areas. For example, it took until November 17, 2008, to ascertain that Mark Begich won Alaska's U.S. Senate race in a *non-RCV* election.[682]

Second, any slowness in releasing *unofficial* vote counts from an RCV state will have no effect on the operation of the National Popular Vote Compact, because the Compact uses only the *official* certified counts. Official results for President must be certified by the same federal deadline whether RCV is used or not.

Third, there is no technological or other reason why the unofficial counts from RCV elections cannot come out as promptly as the unofficial results of non-RCV elections. In many RCV jurisdictions, unofficial counts are already released on Election Night and updated on the same schedule as unofficial counts from non-RCV races.

RCV has only been used at the state level in Maine since 2018, and in Alaska since 2022. Election administrators established understandably cautious schedules in conducting their first few statewide elections under RCV. Any slowness in producing unofficial preliminary or official certified vote counts is a transitory issue—not an inherent characteristic of RCV.

Fourth, no vote count is official until all ballots are received, validated, and counted. The delays in releasing *unofficial* counts of some recent elections on Election Night or shortly thereafter are not attributable to RCV, but instead to the understandable caution of election administrators in conducting their first few statewide elections under RCV. These delays in releasing unofficial counts stem from administrative decisions to withhold all unofficial counts until all absentee ballots arrive and get counted, and until all provisional ballots are validated and counted. In any event, official certified results for RCV and non-RCV races take the same amount of time.

---

[680] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 3. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[681] Bauder, David. 2020. After waiting game, media moves swiftly to call Biden winner. *Associated Press*. November 7, 2020. https://apnews.com/article/media-calls-joe-biden-winner-bee69f9d1d32e84d68e6164ea956e67a

[682] Blood, Michael R. 2008. Begich wins Alaska senate race. *The Spokesman-Review*. November 17, 2008. https://www.spokesman.com/stories/2008/nov/19/begich-wins-alaska-senate-race/

9.27.4. MYTH: Huge numbers of votes are in jeopardy because of RCV-for-President laws.

QUICK ANSWER:

- Even if there were any legitimate ambiguity in RCV-for-President laws (and there is not), large numbers of votes were never in jeopardy.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has repeatedly tried to get attention for his incorrect arguments about the ambiguity of RCV-for-President laws (section 9.27.1) by making hyperbolic claims about "hundreds of thousands" or "millions" of votes being in jeopardy.[683]

First, it is important to recognize that the pool of votes being discussed by Parnell is not:

- the total number of voters in the state;
- the total number of votes received by the major-party candidates; or
- the total number of votes received by the minor-party candidates.

Instead, it is the *considerably smaller* number of minor-party ballots that would get redistributed when a minor-party candidate is eliminated in early rounds of RCV counting.

To get a picture about how few votes are involved in this discussion, note that only four minor-party presidential candidates received more than 1% of the national popular vote during the six presidential elections between 2000 and 2020:

- 1% for Jo Jorgensen in 2020,
- 1% for Jill Stein in 2016,
- 3% for Gary Johnson in 2016, and
- 3% for Ralph Nader in 2000.[684]

Recently, opponents of RCV and National Popular Vote (NPV) have frequently cited Alaska as a place where a question of statutory interpretation of RCV counting procedures might conceivably matter (even though the Alaska Supreme Court has already settled the issue).

We can get a rough idea of the magnitude of the difference between the first-round RCV tally and the final-round RCV tally by examining Alaska's vote count in 2016—a year when minor-party candidates received unusually large numbers of votes.

Of the 318,608 votes cast in Alaska in 2016, Libertarian Party nominee Gary Johnson received 18,725, and Green Party nominee Jill Stein received 5,735.

For the sake of argument, let's assume that *all* minor-party voters gave *all* of their second-choice rankings to a major-party candidate.

In particular, let's assume that Hillary Clinton would have received 100% of the second

---

[683] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

[684] In 2012, Libertarian nominee Gary Johnson came close to receiving 1% of the national popular vote.

choices of Green Party voters, and that Trump would have received 100% of the second choices of Libertarian Party voters.

The net difference between 18,725 and 5,735 is 12,990. That is, Trump's 46,033-vote margin over Hillary Clinton in Alaska would have increased by 12,990 votes under these assumptions.[685]

These 12,990 votes represent 0.00008 of the total of 158,224,999 votes cast in the 2020 presidential election.

Using standard statistical methods,[686] the probability that 12,990 votes would change the outcome of a nationwide election is 1-in-605. Since presidential elections are conducted every four years, this would mean that 12,990 votes might matter once in 2,420 years.

Second, keep in mind that when one candidate wins an absolute majority of first choices (as happened in Maine in 2020), the RCV counting process generally stops immediately.[687] That is, the first-round count is equivalent to the final-round count, and therefore there is no possible claim of uncertainty about what count to use.

In fact, this outcome is what is most likely to occur in practice.

One presidential candidate won an absolute majority of the state's popular vote in an average of 45 states in the six presidential elections between 2000 and 2020—that is, in 90% of the cases.

In particular, one candidate won an absolute majority:

- in all but five states in 2020[688]
- in all but 12 states in 2016[689]
- in 100% of the states in 2012
- in all but four states in 2008[690]
- in all but three states in 2004[691]
- in all but nine states in 2000.[692]

That is, even if all 50 states were to enact an RCV-for-President law, the first-round count of RCV votes would, based on history, likely be equivalent to the final-round count in an average of 90% of the states.

---

[685] There were other minor-party candidates in the race. We assume Castle's 3,866 voters, Fuente's 1,240 voters, and the 9,201 write-in voters divide equally in their preference for the two major-party nominees—that is, these 14,307 votes do not affect the spread between the two major-party nominees.

[686] The statistical calculation used here is the same as that shown in table 9.50 and figure 9.26. Based on historical data of recent presidential elections, the probability that the national popular vote difference between the two major-party candidates lies between 12,990 votes in favor of the Democratic nominee and 12,990 votes in favor of the Republican nominee is the difference between 0.73313 and 0.73148. This difference represents a probability of 0.00165—that is one chance in 605.

[687] In some jurisdictions, the RCV law specifies that the rounds of counting and redistribution continue until two candidates remain (even if a candidate secured an absolute majority on an earlier round).

[688] Arizona, Georgia, North Carolina, Pennsylvania, and Wisconsin.

[689] Arizona, Colorado, Florida, Maine, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Virginia, and Wisconsin.

[690] Indiana, Missouri, Montana, and North Carolina.

[691] Iowa, New Mexico, and Wisconsin.

[692] Florida, Iowa, Maine, Nevada, New Hampshire, New Mexico, Ohio, Oregon, and Wisconsin.

In short, even if there were any legitimate ambiguity in RCV-for-President laws (and there is not), this issue is unlikely to be outcome-determinative in any presidential election.

9.27.5. MYTH: The Compact was not drafted to accommodate RCV.

QUICK ANSWER:

- Leading supporters of RCV worked closely with the National Popular Vote organization in writing the Compact to ensure that the Compact would be compatible with RCV.

MORE DETAILED ANSWER:

A group called "Keep Our 50 States" wrote to the Minnesota Senate Committee hearing the National Popular Vote Compact (SF538) on January 31, 2023, saying:

> "From a process standpoint, NPVIC is the legislative equivalent of inserting first-generation hybrid technology into your brand new Tesla and expecting it to transition seamlessly to the flying cars of the future. The first state Compact legislation passed over 15 years ago and there's been no effort to bring those bills into compliance with other changes in state election standards. Compact states that enact Ranked Choice Voting, for example, face a legal hornet's nest if the Compact ever takes effect."

Although RCV was not used at the state level by any state at the time when the National Popular Vote Compact was written in 2004 and 2005, it is not true that the Compact does not accommodate RCV.

In fact, leading supporters of RCV worked closely with the National Popular Vote organization in writing the Compact to ensure that the Compact would be compatible with RCV.

FairVote was the first organization to endorse the National Popular Vote Compact and is widely recognized as the nation's leading advocacy group for RCV dating back to its inception in 1992. Its founding Chief Executive Officer, Rob Richie, was a co-author of the Compact and was a co-author of this book, starting with its first edition in 2006. Richie spoke at NPV's first press conference announcing the launch of the book and the Compact in 2006.

The Compact anticipated the possibility that states would adopt innovative voting systems, such as RCV, in the future. Accordingly, the Compact was silent as to how a future RCV state's presidential vote count would be tabulated and, more importantly, it explicitly made each state's determination of its presidential vote count "conclusive" on the states belonging to the Compact.[693]

---

[693] If, at some future time, a substantial number of states have enacted RCV-for-President laws, those states could choose to form an interstate compact that would pool all their RCV ballots and apply the RCV counting process to the combined pool of ballots. See Richie, Rob; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy. 2020. Toward a More Perfect Union: Integrating, Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

9.27.6. MYTH: The President of FairVote says that RCV and NPV conflict even after passage of Maine's 2021 law.

QUICK ANSWER:

- This inaccurate statement depends on deceptively quoting the Founding Chief Executive of FairVote.

MORE DETAILED ANSWER:

Sean Parnell is the Senior Legislative Director of Save Our States—an organization that lobbies against both the National Popular Vote Compact (NPV) and ranked choice voting (RCV).

Rob Richie is the founding Chief Executive Officer of FairVote, the leading advocate for RCV since the 1990s. Richie was lead author of an article discussing RCV and NPV in the *Harvard Law & Policy Review* that was written in 2019 and published in 2020.[694]

In his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023, Parnell quoted from page 159 of Richie's law review article, saying:

> "I will note that lobbyists for NPV claim that it's not possible for there to be any **conflict between the compact and RCV** because the nation's leading proponent of RCV (Rob Richie, president of FairVote) helped write the compact. **This ignores a 2021 paper on this issue that Richie** served as the lead author of, which noted:
>
> > 'As currently drafted, the [NPV compact] seems to assume a plurality system…. [U]sing RCV for Presidential elections in states might seem incompatible with [NPV]. Most fundamentally, which votes should be reported out for the purpose of [NPV]? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If that latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state?'"
>
> "**That paper came out in August 2021, months after Maine changed its law**."[695] [Emphasis added]

The deceptive nature of Parnell's written testimony to the Maine committee becomes apparent when one realizes that Richie's law review article was written in 2019 and completed in 2020—not August 2021.

---

[694] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review.* Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[695] *Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine's Electoral Votes by Prohibiting Enactment of the National Popular Vote Interstate Compact), May 17, 2023.* Page 3. https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf

That is, Richie's article was written and completed long before the law that the Maine Legislature debated and passed in spring 2021 and that the Governor signed in June 2021.

By inaccurately attributing an August 2021 date to Richie's 2019–2020 article, Parnell gave the impression that Richie was saying that there was a conflict between RCV and the National Popular Vote Compact *after passage of Maine's law in June 2021.*

Richie raised the above rhetorical questions in his 2020 article, and he then answered his own rhetorical questions in the remainder of the article. Richie never stated that the National Popular Vote Compact should not be implemented.

The spring 2021 hearing of the Maine Veterans and Legal Affairs Committee considered the issues raised in Richie's 2020 article.

These rhetorical questions were then answered when the Maine Legislature passed, and the Governor signed, a law on June 17, 2021, specifying that the state's Certificate of Ascertainment would contain the result of the RCV tabulation from the final round.[696]

2020] Toward a More Perfect Union 159

Both the NPVIC and RCV also improve political equality. When the NPVIC takes effect, voters in "safe states" will finally be treated equally to voters in "swing states." Presidential candidates will have incentives to campaign all across the country, not just in the usual five to ten swing states we see today. Similarly, RCV ensures political equality by giving voters across the political spectrum an equal opportunity to express themselves. With RCV, voters can vote with both their "heart" and their "head" by indicating their sincere first-choice candidate—even if that candidate is not perceived as a frontrunner—while having the option to indicate backup choices.

Nevertheless, as currently drafted, the NPVIC seems to assume a plurality system—that is, the candidate with the most popular votes is to be elected President, regardless of how low their percentage of the vote. While this potential of non-majority winners is not worse with NPVIC than in the status quo, it allows a candidate to win despite the opposition of most voters due to vote-splitting between two or more candidates. On the other hand, using RCV for Presidential elections in states might seem incompatible with NPVIC. Most fundamentally, which votes should be reported out for the purpose of NPVIC? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If the latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state? While not an NPVIC deal breaker, it is an ambiguity worth seeking to resolve.

Figure 9.16 Picture showing that the date "2020" appears right at the top of page 159 of Richie's article.

Note that Parnell's deceptive forward-dating of Richie's 2020 article was not accidental or inadvertent.

- Parnell's own footnote to Richie's article in his 2023 written testimony to the Maine Legislature conspicuously omits any date for Richie's published 2020 article.

[696] Maine Rev. Stat. tit. 21-A, § 803. https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html

- The date could not possibly have been inadvertently overlooked. It appears right at the top of page 159 of the 2020 article that Parnell quotes.[697] Figure 9.16 shows the "2020" date at the top of page 159 of Richie's 2020 article. Parnell's quotation comes from paragraph 2 on page 159.

9.28. MYTHS ABOUT STAR, RANGE, AND APPROVAL VOTING

9.28.1. MYTH: STAR voting is incompatible with National Popular Vote.

QUICK ANSWER:

- It is a straightforward matter to draft state legislation for enacting STAR voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- STAR voting is currently not in use today in the United States for any public elections. In May 2024, voters in the city of Eugene, Oregon, rejected an initiative petition to adopt STAR voting for local elections by a 65%–35% margin.

MORE DETAILED ANSWER:

STAR is an acronym for "Score, Then Automatic Runoff."

Figure 9.17 shows a sample STAR ballot.[698]

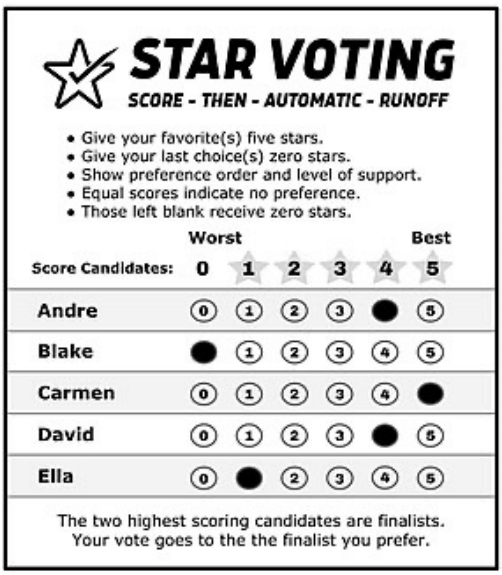


Figure 9.17 Sample STAR ballot

---

[697] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review.* Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[698] Figure courtesy of Wikipedia. https://en.wikipedia.org/wiki/STAR_voting

In STAR voting, the voter gives each candidate a score from "no stars" (the worst) to "five stars" (the best). Voters can assign scores to candidates without restriction. That is, a voter need not assign a particular score (e.g., five stars) to any candidate and can give the same score to more than one candidate.

There are two rounds of counting in STAR voting.

In the first round (called the "scoring" round), each candidate's total score is computed by adding up all of that candidate's scores from all the ballots. The two candidates with the highest total scores then proceed to an automatic runoff.[699]

In the second round of counting (the "runoff"), every voter's ballot counts as one vote. One vote goes to whichever finalist an individual voter scored higher. If a voter scored the two finalists equally, that voter is considered to have abstained in the runoff. The candidate receiving the most total votes in the runoff wins.

Ties in the first round are broken in favor of the candidate who was preferred by more voters. Ties in the second round are broken in favor of the candidate who scored higher in the first round.[700]

STAR voting is currently not in use today in the United States for any public elections.

In 2018, voters in Lane County, Oregon (which contains the city of Eugene) rejected an initiative petition to adopt STAR voting for local elections.

In May 2024, voters in the city of Eugene, Oregon, rejected an initiative petition to adopt STAR voting for local elections by a 65%–35% margin.[701]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[702]

That statement is false.

If legislation is being drafted to enact STAR voting at the state level, and STAR voting is to be used in the presidential election, it is a straightforward matter to draft such legislation so that STAR voting would operate harmoniously with the National Popular Vote Compact.

We present the following as the most obvious approach.

Because each voter in STAR voting has one vote in the final round of tabulation involving two candidates, the wording in the RCV legislation that the Oregon legislature put on

---

[699] In "score" voting (also called "range" voting), the counting process ends with the first round. STAR voting is a two-step process—hence its name "Score, Then Automatic Runoff."

[700] Information about STAR voting is available at www.StarVoting.org, https://www.equal.vote, and https://en.wikipedia.org/wiki/STAR_voting

[701] The 2024 proposed amendments to the Eugene, Oregon, City Charter to implement STAR voting may be found at https://www.eugene-or.gov/DocumentCenter/View/69921/Proposed-Charter-Amendments---STAR-Voting?bidId=

[702] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

the November 2024 ballot[703] would be the obvious way to implement STAR voting if it were being used in presidential elections.

That is, the total number of votes earned by the two finalists in the runoff round of STAR voting would be reported in the state's Certificate of Ascertainment.

Thus, a state legislative bill for adopting STAR voting would say:

> "If the Agreement Among the States to Elect the President by National Popular Vote[704] governs the appointment of presidential electors, and the election of presidential electors in this state is determined by STAR voting, the final determination of the presidential vote count reported and certified to the member states of the Agreement and to the federal government shall be the votes received in the final round of statewide tabulation by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of statewide tabulation."

A legislative bill for adopting STAR voting will necessarily contain a provision specifying the conditions under which a candidate will be declared elected.

If the state adopting STAR voting has also adopted the National Popular Vote Compact, the condition under which presidential electors will be declared elected is based on the nationwide popular vote—not the statewide count. Therefore, it is important that the following "saving" provision also be part of a state legislative bill for adopting STAR voting:

> "The determination of which candidates for presidential elector shall be declared elected in this state shall be made in accordance with the provisions of the Agreement Among the States to Elect the President by National Popular Vote."

9.28.2. MYTH: Range voting is incompatible with National Popular Vote.

QUICK ANSWER:

- State legislation can be drafted for enacting range voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- Range voting is not used today in any jurisdiction in the United States for public elections.

MORE DETAILED ANSWER:

Range voting (sometimes called "score voting") is essentially the first round of STAR voting.

A range voting ballot could allow for any number of stars (e.g., zero to five, one to 10).

---

[703] Oregon Enrolled Bill HB2004 of 2023 is at https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2004/Enrolled

[704] The official name of the National Popular Vote Interstate Compact is the "Agreement Among the States to Elect the President by National Popular Vote."

A ballot for range voting looks substantially the same as a ballot for STAR voting (except, of course, for the description of how the winner is determined). Thus, figure 9.17 also serves to illustrate a range voting ballot.

As in STAR voting, range voting involves assigning scores to candidates without restriction. That is, a voter need not assign a particular score (e.g., five stars) to any candidate and can give the same score to more than one candidate.

In range voting, each candidate's total score is computed by adding up all of that candidate's scores from all of the ballots. The candidate with the highest total score wins.

Range voting is not used today in any jurisdiction in the United States for public elections.

Additional information about range voting is available at https://www.RangeVoting.org and Wikipedia.[705]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[706]

That statement is incorrect.

If legislation is being drafted to enact range voting at the state level, and range voting is to be used in the presidential election, such legislation can be written so that it would operate harmoniously with the National Popular Vote Compact.

Note that in range voting, the sum of the scores assigned by one voter might not equal the total score assigned by another voter. This fact does not matter in STAR voting, because STAR voting has two rounds, and every voter has exactly one vote in the final runoff round.

However, range voting does not have a runoff. Supporters of range voting have suggested, on their web site, a formula that might be considered as a possible solution in case range voting is ever adopted by a state and in case it is ever used in presidential elections.[707]

Then, the two additional provisions presented in connection with STAR voting (section 9.28.1) should also be included in the implementing legislation for range voting.

9.28.3. MYTH: Approval voting is incompatible with National Popular Vote.

QUICK ANSWER:

- It is a straightforward matter to draft state legislation for enacting approval voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- Approval voting is used in municipal elections in Fargo, North Dakota.

---

[705] *Wikipedia*. 2023. Accessed July 31, 2023. https://en.wikipedia.org/wiki/Score_voting

[706] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[707] See https://www.RangeVoting.org Accessed July 31, 2023.

MORE DETAILED ANSWER:

In approval voting, each voter may cast a vote for as many or as few candidates as they like. The candidate receiving the most votes wins.

Figure 9.18 shows a sample ballot for approval voting.[708]

FIGURE 9.18 Sample ballot for approval voting

Additional information about approval voting is available at www.ElectionScience.org and Wikipedia.[709]

In 2018, Fargo, North Dakota, passed a local ballot initiative adopting approval voting for the city's local elections. Approval voting has been used there starting in 2020.[710]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[711]

---

[708] Figure courtesy of *Wikipedia*. https://en.wikipedia.org/wiki/Approval_voting#Description

[709] *Wikipedia*. 2023. https://en.wikipedia.org/wiki/Approval_voting

[710] *Ballotpedia*. 2023 Fargo, North Dakota, Measure 1, Approval Voting Initiative (November 2018) Accessed June 29, 2023. https://ballotpedia.org/Fargo,_North_Dakota,_Measure_1,_Approval_Voting_Initiative_(November_2018)

[711] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

If legislation is being drafted to enact approval voting at the state level, and approval voting is to be used in the presidential election, it is a straightforward matter to draft such legislation so that it would operate harmoniously with the National Popular Vote Compact.

We present the following as the most obvious approach.

Note that in approval voting as used in Fargo, the number of approvals issued by one voter might not equal the number issued by other voters.

Therefore, if approval voting as used in Fargo were being considered for use in presidential elections, a voter issuing *N* approvals could be deemed to have cast a fractional vote of 1/*N* for each of that voter's approved candidates.

Then, the two additional provisions presented in connection with STAR voting should also be included in the implementing legislation for approval voting (section 9.28.1).

Top-two approval voting

In 2020, voters in St. Louis, Missouri, adopted a variation of approval voting for the city's local elections.[712,713]

Top-two approval voting is identical to STAR voting (and ranked choice voting) in that each voter has one vote in the decisive final round of tabulation.

Thus, the two provisions presented in connection with STAR voting (section 9.28.1) would allow top-two approval voting to operate harmoniously with the National Popular Vote Compact.

Note, however, that there is a runoff for the two candidates receiving the highest number of approvals in top-two approval voting. That is, two election days are required. Thus, harmonizing top-two approval voting with *federal* requirements would presumably require holding the first round of voting prior to Election Day in November.

9.29. MYTHS ABOUT ELECTION ADMINISTRATION

9.29.1. MYTH: A federal election bureaucracy appointed by the sitting President would be created by the Compact.

QUICK ANSWER:

- The National Popular Vote Compact does not create any bureaucracy whatsoever—much less a federal election bureaucracy appointed by the sitting President.
- The National Popular Vote Compact does not change Article II, section 1 of the U.S. Constitution, which gives the states exclusive control over the manner of selecting presidential electors.

---

[712] *Ballotpedia*. https://ballotpedia.org/St._Louis,_Missouri,_Proposition_D,_Approval_Voting_Initiative_(November_2020)

[713] The full text of the St. Louis law is at https://drive.google.com/file/d/1CKwHpwBffcT239d57oZep14tt7tj_iIZ/view

- The Compact's operation requires one task to be performed by *existing* state officials of states belonging to the Compact, namely adding up the official popular-vote totals already certified by all the other states. These state-level vote totals would be generated by each state in exactly the same manner as they are today.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[714] wrote in 2020:

> "The NPV scheme would have other dangerous consequences … [and] would put a President in charge of his own reelection."[715]

Professor Robert Hardaway of the University of Denver Sturm College of Law repeated this incorrect claim 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 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***,[716] decides that it's something else?" [Emphasis added]

Gary Gregg II, a defender of the current system of electing the President, says:

> "Will we have to create and pay for **a new federal agency** to verify the accuracy of popular vote totals? Probably."[717] [Emphasis added]

A brochure published by the Freedom Foundation of Olympia, Washington, during the time when Trent England was there, suggests that the National Popular Vote Compact would result in:

> "**nationalizing election administration**, potentially putting presidential appointees in charge of presidential elections."[718] [Emphasis added]

---

[714] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[715] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roanoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

[716] Note that the Congressional Budget Office has nothing to do with elections, and that the Congressional Quarterly is a private publishing corporation.

[717] Gregg, Gary. Keep Electoral College for fair presidential votes. *Politic*o. December 5, 2012.

[718] Freedom Foundation. Olympia, Washington.

Trent England, Executive Director of Save Our States and Vice-President of the Oklahoma Council on Public Affairs, wrote in an op-ed:

> "Because of the Electoral College, **the United States has no national election bureaucracy**—no presidential appointee in charge of presidential elections."[719] [Emphasis added]

The U.S. Constitution creates a system based on state control—not federal—of presidential elections in Article II, section 1, clause 2:

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

The National Popular Vote Compact does not change Article II or any other part of the U.S. Constitution.

The states would continue to control elections, as provided by the U.S. Constitution—just as they do today.

There would be no need for any state to change its procedures for compiling and certifying its popular-vote counts because of the Compact.

As to member states, the Compact merely requires that *existing* state officials add up the officially certified popular vote totals from all 50 states and the District of Columbia. This task would take place once every four years.

The Compact does not create any new federal or state governmental positions or bureaucracy—much less presidentially appointed federal officials.

The Founders had good reason to write Article II of the Constitution so as 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 the President's own re-election. This dispersal of power over presidential elections to the states was intended to guard against the establishment of a self-perpetuating President. In particular, this dispersal of power to the states addressed the Founders' concern about the possible establishment of a monarchy in the United States.

9.29.2. MYTH: The Compact would create a slippery slope leading to federal control of presidential elections.

QUICK ANSWER:

- Establishing federal control over presidential elections would require a federal constitutional amendment that would take control of presidential elections away from the states.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, warned the Missouri Senate Judiciary committee in 2016 that the National Popular Vote Compact would create a slippery slope leading to federal control of elections.

---

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

> "If you have National Popular Vote … you would ultimately have disputes that would cause Americans to demand federal power over elections."

Establishing federal control over presidential elections would require a federal constitutional amendment that would take control of presidential elections away from the states.

At the minimum, this change would require amending the current wording of Article II, section 1, clause 2 of the U.S. Constitution, which reads:

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

A federal constitutional amendment must first be initiated by either Congress (by a two-thirds vote of both houses) or a federal constitutional convention. A proposed amendment must then be ratified by three-quarters of the states—either by the state legislatures or by special state ratifying conventions.

Given that amending the federal Constitution is a time-consuming multi-step process, the slope is steeply upward—and distinctly not downward or slippery.

9.29.3. MYTH: Local election officials would be burdened by the Compact.

QUICK ANSWER:

- Local officials would conduct elections in exactly the same way that they do now.

MORE DETAILED ANSWER:

The National Popular Vote Compact makes no changes in any state's laws or procedures concerning the preparation of ballots, conducting early voting, operating polling places, handling absentee ballots, processing provisional ballots, counting votes, or transmitting local vote counts to state officials.

County, parish, city, town, district, and precinct election officials would administer a presidential election in exactly the same way that they do now.

9.29.4. MYTH: State election officials would be burdened by the Compact.

QUICK ANSWER:

- State election officials in every state would tally and certify the total number of popular votes cast for each presidential slate in their state in the same way that they do now.
- The only change involves the chief election official of states belonging to the Compact, and that change occurs *after* the state's count is certified. At that point, the chief election official of each state belonging to the Compact would add up the popular vote totals for each presidential slate in all 50 states and the District of Columbia in order to determine the national popular vote winner. In adding up the votes from other states, the chief election official of each of the states belonging to the Compact would treat a state's certified vote count as conclusive.

MORE DETAILED ANSWER:

The only change introduced by the National Popular Vote Compact would occur *after* a member state has finished tallying the statewide total number of popular votes cast for each presidential slate.

At that point, the chief election official of each state belonging to the Compact would add up the votes cast for each presidential slate in all 50 states and the District of Columbia to produce the national popular vote total for each presidential slate.

In adding up the votes from other states, the chief election official of each of the states belonging to the Compact would treat every other state's final determination of its vote for President as conclusive.

This "final determination" is typically made by a certain designated body or official (e.g., state board of canvassers, state board of elections, the Secretary of State) in compliance with the state's statutory deadline shortly after Election Day. Any disputes would be resolved—as they are now—by state or federal courts in the state-of-origin (section 6.2.3). That is, the role of the chief election official of each of the states belonging to the Compact is entirely ministerial.

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 member state would then certify the election of the entire slate of presidential electors that was nominated in association with the national popular vote winner.

As a matter of efficiency, the chief election officials of the states belonging to the Compact *might* decide to designate (by means of an executive agreement) one of their members to gather up the documentation of each state's final determination and immediately pass that information along to each other compacting state.

The presidential electors would then meet in their states, as they do now, in mid-December and cast their electoral votes.

9.29.5. MYTH: The Compact would be costly to operate.

QUICK ANSWER:

- Fiscal officials who have analyzed the National Popular Vote bill have uniformly concluded that it would impose no significant costs on their states.

MORE DETAILED ANSWER:

When a bill is first introduced in a state legislature, fiscal officials designated by the legislature typically analyze it for its impact on state finances. These fiscal officials then report their findings to the legislature in the form of what is typically called a "fiscal note." Fiscal officials have uniformly concluded that the National Popular Vote Compact would impose no significant costs on their states.

9.30. MYTHS ABOUT VOTE COUNTING

9.30.1. MYTH: There is no such thing as an official national popular vote count.

QUICK ANSWER:

- The legal definition of the "national popular vote total" is contained in the National Popular Vote Interstate Compact. It is defined as the result of adding together the officially certified popular-vote count that existing federal law requires every state to provide and that every state already routinely produces.
- Every state has a law requiring a designated board or official to certify the number of popular votes cast for each presidential candidate shortly after Election Day.
- Long-standing federal law requires that each state issue a certificate containing the official count of the votes cast in the state for President. Current federal law requires issuance of the required Certificate of Ascertainment no later than six days before the Electoral College meeting.
- The Electoral Count Reform Act of 2022 created a special three-judge court for the sole purpose of ensuring the timely issuance and transmission of each state's officially certified vote count to the federal government.

MORE DETAILED ANSWER:

In written testimony to the Michigan House Elections Committee on March 7, 2023, Sean Parnell, Senior Legislative Director of Save Our States (the leading group employing lobbyists to oppose the adoption of the National Popular Vote Compact) said:

> "The core defect of the compact … is that **there is no official national vote count**."[720] [Emphasis added]

Parnell has also written:

> "The NPV compact also **risks causing an electoral crisis** due to its poor design. **There is no official national popular vote count**."[721] [Emphasis added]

Despite Parnell's denials, there *is* an official national popular vote count.

---

[720] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact)*. March 7, 2023. Page 2. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[721] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

Long-standing federal law requires that each state issue a certificate containing its vote count.

Since 1792, federal law has required each state to issue a certificate reporting the official results of the presidential election.[722]

Vote counts commonly appeared in pre-1887 certificates.

The Electoral Count Act of 1887[723] included a specific requirement that each state's Certificate of Ascertainment contain the number of popular votes (the "canvass") received by each candidate.[724]

Current federal law (the Electoral Count Reform Act of 2022) provides (in section 5):

> "Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of **each State shall issue a certificate of ascertainment. … Each certificate of ascertainment of appointment of electors shall set forth** the names of the electors appointed and **the canvass** or other determination 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."[725] [Emphasis added]

Because every state today uses the so-called "short presidential ballot," each state's officially certified vote count consists of the number of popular votes received by each presidential-vice-presidential slate (section 2.14).

Congress passed the Electoral Count Reform Act of 2022 after reviewing the tumultuous events of January 6, 2021.

The 2022 Act contains numerous specific provisions to prevent:

- a recurrence of various maneuvers that occurred after the 2020 presidential election;
- the occurrence of various hypothetical scenarios that were bandied about—but never executed—by those challenging the 2020 election; and
- the occurrence of specific hypothetical scenarios that had been raised in recent years by opponents of the National Popular Vote Compact.

For example, several provisions of the 2022 Act were aimed at countering various hypothetical scenarios involving the issuance of each state's Certificate of Ascertainment and the prompt transmission of the Certificate to the federal government.

---

[722] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

[723] The Electoral Count Act of 1887 may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[724] As an example of a Certificate of Ascertainment, see figure 3.4 showing Vermont's 2008 Certificate. The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

[725] The Electoral Count Reform Act of 2022 may be found in appendix B of this book and is also at https://uscode.house.gov/view.xhtml?path=/prelim@title3/chapter1&edition=prelim.

Section 5(b)(1) of The Electoral Count Reform Act of 2022 provides:

> "It shall be the duty of the executive of each State (1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors." [Emphasis added]

Federal law also requires that the Certificates at the National Archives be "public" and "open to public inspection."

The legal definition of the "national popular vote total" is in the National Popular Vote Compact.

When it takes effect, the National Popular Vote Compact becomes the state law governing the appointment of presidential electors for states belonging to the Compact.

The Compact specifies that the national total be obtained by adding up the officially certified number of popular votes received by each presidential candidate in each state. 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 … and **shall add such votes together to produce a 'national popular vote total'** for each presidential slate."[726] [Emphasis added]

The Compact further requires the chief election official of each member state to treat as "conclusive" the officially certified "final determination" of each state's presidential vote counts (discussed in detail in section 9.30.3 and section 9.30.4).

Because of the requirement to treat the officially certified vote counts from each state as "conclusive," the chief election official of each state belonging to the Compact will be adding up the *same* vote counts.

Parnell tries to characterize the process of adding up the 51 numbers for each presidential candidate as some kind of unsolvable puzzle. He told the Minnesota House Elections Finance and Policy Committee on February 1, 2023:

> "There is no official national popular vote count. There are 51 official state vote counts that **national popular vote attempts to cobble together**."[727] [Emphasis added]

However, there is no puzzle, cobbling, or ambiguity when it comes to performing ordinary arithmetic to add up the officially certified vote count that existing federal law requires every state to provide and that every state already routinely produces.

In fact, the National Popular Vote Compact arrives at the "national popular vote total" in the same way as the proposed constitutional amendment that the U.S. House of

---

[726] The full text of the Compact is in section 6.1.

[727] Parnell, Sean. 2023. *Testimony at Minnesota House Elections Finance and Policy Committee on HB642*. February 1, 2023. Timestamp 1:11:14. https://www.house.leg.state.mn.us/hjvid/93/896232

Representatives passed by a bipartisan 338–70 vote in 1969. Both are based on ordinary arithmetic applied to the officially certified vote counts that existing federal law requires every state to provide and that every state already routinely produces.

The proposed amendment passed by the House in 1969 simply said:

> "The pair of persons having **the greatest number of votes** for President and Vice President shall be elected…"[728] [Emphasis added]

An examination of the other proposed constitutional amendments that have been introduced in Congress since 1969 contain similar common-sense wording based on applying simple arithmetic to the officially certified vote counts produced by the states (chapter 4).

In short, the various constitutional amendments that have been considered over the years and the National Popular Vote Compact would use the same long-standing laws and procedures as the current system.

A new three-judge federal court has been created to ensure the timely issuance and transmission of each state's presidential vote.

To ensure the timely issuance and transmission of each state's Certificate of Ascertainment, the Electoral Count Reform Act of 2022 created a special three-judge federal court whose sole function is to enforce the federal requirement for the timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment.

This new court is open *only* to presidential candidates.

Given that the Constitution provides that the Electoral College meet on the same day in every state, this court operates on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[729] do not apply. There is expedited appeal to the U.S. Supreme Court. All of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion is reached prior to the Electoral College meeting.

Thus, this special court enables presidential candidates to obtain timely relief from, for example, a rogue Governor who failed or refused to issue the state's Certificate of Ascertainment, issued an incorrect Certificate, or attempted to slow-walk the transmission of the Certificate to federal authorities.

Specifically, the 2022 Act provides:

> "(1) In general.—**Any action brought by an aggrieved candidate for President** or Vice President that arises under the Constitution or laws of the United States **with respect to the issuance of the certification** required under section (a)(1), **or the transmission of such certification** as required under subsection (b), shall be subject to the following rules:

---

[728] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

[729] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

"(A) Venue.—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

"(B) 3-judge panel.—**Such action shall be heard by a district court of three judges**, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the Circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

"(C) Expedited procedure.—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, **consistent with all other relevant deadlines established by this chapter** and the laws of the United States.

"(D) Appeals.—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, **so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors**.

"(2) Rule of construction.—This subsection—

"(A) shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States; and

"(B) shall not be construed to preempt or displace any existing State or Federal cause of action." [Emphasis added]

In short, federal law guarantees the timely availability of the official count of the certified number of popular votes for each presidential-vice-presidential slate in each state and the District of Columbia before the Electoral College meets.

Other provisions of the Electoral Count Reform Act of 2022

The 2022 Act eliminated several avenues for mischief that existed under earlier federal law.

For example, the 1887 Act contained vague language referring to a Certificate of Ascertainment coming "from a state." After the 2020 presidential election, this vague wording was used to open the door to fraudulent Certificates originating from *non-governmental* sources such as losing candidates for the position of presidential elector (so-called "fake electors").

To foreclose the possibility of a Certificate coming from a non-governmental source in

the future, the 2022 Act specifies that only one state official (by default, the Governor) has the power to issue the Certificate. Moreover, this single Certificate may be subsequently revised only by court action.

The 1887 Act contained another procedure that was open to potential abuse. In the contested 1876 Tilden-Hayes election, there were competing Certificates from several states—typically one from the Governor and another *governmental* source such as the Secretary of State or the Board of Canvassers. The 1887 Act addressed the possibility of Certificates coming from more than one source by providing a tie-breaking procedure. Specifically, if the U.S. House and U.S. Senate were to disagree on which competing Certificate to accept, the impasse would be resolved by the state's Governor. One of the hypothetical scenarios that was bandied about—but never executed—by those challenging the 2020 election was based on certain state Governors overriding the voters of their own state. The 2022 Act eliminated this potential avenue for abuse.

The new three-judge court does not replace any existing avenues for administrative challenges to presidential elections (e.g., recounts) or judicial challenges in state or federal courts prior to the federal Safe Harbor deadline.

9.30.2. MYTH: The Compact is flawed, because it provides no way to resolve disputes.

QUICK ANSWER:

- The reason why the National Popular Vote Compact is silent as to how to adjudicate disputes is that the United States already has a fully operational judicial system throughout the country.
- There is no need for each new federal or state law (including each new interstate compact) to repeat the existing *book-length* state and federal judicial codes that already provide detailed procedures for adjudicating disputes.
- For example, although there was no explicit procedure in Florida's winner-take-all law for adjudicating disputes about the awarding of electoral votes, existing *general* state and federal laws and procedures enabled the 2000 election dispute to be adjudicated on a timely basis. The dispute moved rapidly through state administrative proceedings, state lower-court proceedings, state supreme court proceedings, federal lower-court proceedings, and U.S. Supreme Court proceedings. These same five ways to adjudicate disputes about the awarding of electoral votes were available—and used—during the challenges to the 2020 presidential election. They are available under *both* the National Popular Vote Compact and the current system.
- Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms. For example, while falsely claiming that there is no way to adjudicate disputes under the Compact, they simultaneously claim that litigation under the Compact will overwhelm the courts (see section 9.32.4).

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, wrote in 2021:

> "What if there was a problem with the election or vote counting in another state? **The National Popular Vote has no way to resolve disputes** or deal with even common challenges. … Under the National Popular Vote, controversies in one or more states **could make it impossible to determine a winner**."[730] [Emphasis added]

Parnell's written testimony to the Minnesota Senate Elections Committee on January 31, 2023, said:

> **"NPV provides no mechanism for resolving** differences or **disputes**. … NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and similar issues, makes it **fatally flawed and dangerous to democracy**."[731] [Emphasis added]

Trent England, Executive Director of Save Our States, joined Parnell by saying:

> "Even if state officials knew or suspected that a state's reported vote total was incorrect, **the compact offers no recourse**." [732] [Emphasis added]

The reason why the National Popular Vote Compact is silent as to how to adjudicate disputes is the same reason why almost all new federal or state laws (including virtually all other interstate compacts) are silent about adjudication—namely that the United States already has a fully operational judicial system throughout the country.

There is no need for each new federal or state law (including each new interstate compact) to repeat the existing *book-length* state and federal judicial codes that already provide detailed procedures for adjudicating disputes.[733]

These existing state and federal laws provide five ways to adjudicate election disputes.

---

[730] Parnell, Sean. 2021. Protect Florida's Electoral College power. *Herald Tribune*. May 17, 2021. https://www.heraldtribune.com/story/opinion/columns/guest/2021/05/17/opinion-protect-floridas-power-electoral-college/5109604001/

[731] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[732] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

[733] On rare occasions, Congress or state legislatures have provided that a particular new law be adjudicated in some special way. For example, in 1971, Congress provided a special accelerated procedure (now repealed) for hearing constitutional challenges to the Federal Election Campaign Act. Section 437h specified that constitutional challenges to that act (after being certified as being substantial by a federal district court) would be heard *en banc* by the U.S. Court of Appeals for the District of Columbia Circuit, and, if appealed, proceed to mandatory review by the U.S. Supreme Court. This special accelerated procedure led to the 1976 U.S. Supreme Court decision in *Buckley v. Valeo* (424 U.S. 1). The only other case to reach the U.S. Supreme court under this (now repealed) procedure was the 1981 case of *California Medical Association v. Federal Election Commission* (453 U.S. 182). See pages 467–474 of Douglas, Joshua. 2011.

Specifically, a state's determination of its popular-vote count may be challenged under the National Popular Vote Compact in the same five ways that it can be challenged under the current system, namely:

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings, and
- federal proceedings at the U.S. Supreme Court.

Indeed, aggrieved presidential candidates used all five ways in both 2000 and 2020.

For example, Florida's winner-take-all law for awarding the state's electoral votes contained no specific mechanism for resolving disputes.

Nonetheless, when a dispute arose in November 2000 involving Florida's popular-vote count, it was adjudicated on a timely basis using pre-existing *general* procedures.

In fact, administrative and judicial proceedings in all five forums occurred during the brief period between Election Day (November 7, 2000) and the Safe Harbor Day (December 12).

The dispute was settled on December 11 by the U.S. Supreme Court—a week before the Electoral College met on December 18, 2000.[734]

In 2020, there were 64 lawsuits and numerous administrative proceedings involving the presidential election in eight states—Arizona, Georgia, Michigan, Minnesota, Nevada, New Mexico, Pennsylvania, and Wisconsin.[735,736]

All of these administrative and judicial proceedings were conducted in accordance with the pre-existing *general* procedures that enable state and federal courts to adjudicate disputes.

All of the proceedings proceeded simultaneously and in parallel in each separate state between Election Day (November 3, 2020) and the Safe Harbor Day (December 8). The Electoral College then met on December 14.

Similarly, in 2016, lawsuits requesting recounts in three closely divided battleground states (Pennsylvania, Michigan, and Wisconsin) were similarly considered and decided in accordance with the pre-existing *general* procedures. As a result of these proceedings, a recount was conducted in Wisconsin. All of the proceedings occurred inside the period between Election Day (November 8, 2016) and the Safe Harbor Day (December 13). The Electoral College then met on December 19.

Today, disputes about popular-vote counts are litigated in the 36-day period between Election Day and the federally established date (six days before the Electoral College meet-

---

The Procedure of Election Law in Federal Courts. *Utah Law Review*. Volume 2. Pages 433–488. Available at https://ssrn.com/abstract=1679518

[734] *Bush v. Gore*. 531 U.S. 98. 2000.

[735] See The Ohio State University's Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

[736] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

ing) for a state arriving at its "final determination" of its popular-vote count and issuing its Certificate of Ascertainment (discussed in section 9.30.1).

Rapid resolution of disputes and finality is required from all states before the Electoral College meets, because the U.S. Constitution requires that all states cast their electoral votes on the same day. The 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**."[737] [Emphasis added] [Spelling as per original]

To guarantee the timely issuance and prompt transmission of each state's Certificate of Ascertainment to the National Archives, the Electoral Count Reform Act of 2022 created a special three-judge federal court. This new court is open only to presidential candidates. It operates on a highly expedited basis, with expedited appeals. All issues must be resolved by the new court and the U.S. Supreme Court before the Electoral College meeting. Additional details about this new court are found in section 9.30.1.

Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms. For example, while falsely claiming that there is no way to adjudicate disputes under the Compact, Save Our States simultaneously asserts that litigation under it will overwhelm the courts (section 9.32.4). Which is it?

While falsely claiming that the Compact allows a state belonging to the Compact to judge and manipulate the election returns from other states (section 9.30.3), Save Our States simultaneously complains that member states are forced to accept the election returns from other states (section 9.30.4). Which is it?

The fact that opponents of the National Popular Vote Compact simultaneously raise contradictory criticisms suggests how much credence should be given to their criticisms.

9.30.3. MYTH: The Compact allows its member states to judge the election returns from other states.

QUICK ANSWER:

- The National Popular Vote Compact does not give officials in the states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate the election returns of other states. Instead, the Compact requires the chief election official of each member state to treat the final determination of the popular-vote count from each state as "conclusive."
- Under the federal system in existence in the United States, once a matter is litigated and decided in a state, the Full Faith and Credit Clause of the U.S. Constitution prevents another state's officials (administrative or judicial) from second-guessing that decision. Thus, questionable popular-vote counts are litigated and decided in judicial and/or administrative proceedings in the state or federal courts in the *state-of-origin*. After each state's final determination of its presidential vote count, the chief election official in the states belonging

[737] U.S. Constitution. Article II, section 1, clause 4.

to the Compact will perform the purely ministerial task of adding up those vote counts.

- Opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms of it. For example, while falsely claiming that the Compact allows its member states to judge, modify, reject, estimate, and manipulate the election returns of other states, they simultaneously claim that the Compact forces member states to accept election returns from other states (see section 9.30.4).

MORE DETAILED ANSWER:

In written testimony submitted to the Minnesota Senate Elections Committee on January 31, 2023, Sean Parnell, Senior Legislative Director of Save Our States, said:

> **"NPV provides no guidance on which vote totals to use in calculating the national vote total**. The choice is left to the chief election official within each compact state. … In a close election, this could **give a group of often obscure state officials the power to manipulate the national vote count based on which vote totals they use from other states**. … This is too much power to vest in any official, and will lead to confusion, controversy, and chaos."[738] [Emphasis added]

In a video produced by Save Our States, Parnell said:

> "The chief election official in an NPV state [has] a pretty broad degree of latitude to, you know, essentially decide the election the way they want to, … **deciding which votes to count, … and which they might reject, and which they might have to estimate**. … And that's a pretty scary scenario."[739] [Emphasis added]

Trent England, the Executive Director of Save Our States, wrote the following in 2021:

> "The NPV compact simply grants power to the top election official in each state to determine the national popular vote winner for that state. In other words, **officials in various states would just decide, on their own and with no legal guidance, which numbers to use** from Maine."[740] [Emphasis added]

England told a meeting at the Heritage Foundation in 2021:

> "You have independent individual elected officials within each of those states, who's actually determining what the national popular vote result is. … **Every**

---

[738] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[739] Save Our States. 2022. Six Questions. Video with Trent England and Sean Parnell. May 13, 2022. Timestamp 19:30. https://www.youtube.com/watch?v=TNk3VIoP8dU

[740] England, Trent, 2021. Failed Attempt to Reconcile NPV, RCV in Maine. Save Our States Blog. May 14, 2021. https://saveourstates.com/blog/a-failed-attempt-to-reconcile-npv-rcv-in-maine

> **state in the compact would** have to collect all the vote totals from every other state to **come up with its own total**."[741] [Emphasis added]

Contrary to what Save Our States says, the National Popular Vote Compact does *not* give administrative officials in the states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate the election returns of other states.

Instead, the Compact explicitly states the opposite:

> "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 [i.e., the Safe Harbor Day]."[742] [Emphasis added]

In short, the chief election officials of the states belonging to the National Popular Vote Compact perform the purely ministerial function of using simple arithmetic to add up the official presidential-vote counts that have been finalized and certified by the state-of-origin.

The National Popular Vote Compact does not give administrative officials of states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate any other state's final determination of its vote count.

In this respect, the Compact parallels the Full Faith and Credit Clause of the U.S. Constitution.

Under our federal system, once *any* matter is litigated in the state-of-origin, the Full Faith and Credit Clause prevents another state's officials (administrative or judicial) from second-guessing that decision. The Constitution states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[743]

As previously discussed in section 9.30.2, there are five ways to litigate a state's popular-vote counts at the administrative and judicial levels starting in the state-of-origin. All five ways are equally available under both the current system and the National Popular Vote Compact.

After this litigation, federal law requires that the state certify its final determination of its popular vote counts no later than six days before the Electoral College meeting (the Safe Harbor Day).

Thus, a questionable popular-vote count from a state will necessarily have been litigated in judicial and/or administrative proceedings in the state-of-origin *before* the officials of the states belonging to the National Popular Vote add up the vote counts from the states.

---

[741] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 50:00. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

[742] Clause 5 of Article III of the Agreement Among the States to Elect the President by National Popular Vote (the National Popular Vote Interstate Compact).

[743] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4/

This principle of federalism was illustrated in 2020 when Texas Attorney General Ken Paxton requested that the U.S. Supreme Court allow the state of Texas to file a complaint against the state of Pennsylvania challenging Pennsylvania's popular-vote count.[744]

The U.S. Constitution gives the Supreme Court exclusive jurisdiction over cases between states, and the Court usually hears such cases.

Nonetheless, on December 11, 2020, the U.S. Supreme Court refused Texas' request to even present its bill of complaint, saying:

> "The State of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. **Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections**."[745,746] [Emphasis added]

As will be seen in the next section (section 9.30.4), Save Our States repeatedly contradicts itself in criticizing the Compact. While falsely claiming that the Compact allows its member states to judge, modify, reject, estimate, and manipulate the election returns of other states, Save Our States simultaneously complains that the Compact forces member states to accept the election returns of other states.

The fact that opponents of the National Popular Vote Compact simultaneously raise contradictory criticisms suggests how much credence should be given to them.

9.30.4. MYTH: The Compact forces member states to accept other states' election returns—the exact opposite of the previous myth.

QUICK ANSWER:

- The National Popular Vote Compact does not exempt a questionable state vote count from challenge, oversight, and review. A state's final determination of its popular-vote count may be challenged under the National Popular Vote Compact in the same five ways that it can be under the current system. These five ways include administrative proceedings in the state involved (e.g., recounts, audits) and judicial proceedings in lower state courts, state supreme courts, lower federal courts, and the U.S. Supreme Court. All five ways were used in both 2000 and 2020. All five ways are available under both the Compact and the current system.

---

[744] *Texas v. Pennsylvania*. Motion for Leave to File Bill of Complaint. https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf

[745] *Texas v. Pennsylvania*. U.S. Supreme Court Order List. December 11, 2020. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

[746] Given that the U.S. Constitution gives the Supreme Court original jurisdiction over disputes between states, two justices raised the issue of whether Texas should have been allowed to file a bill of complaint in *Texas v. Pennsylvania*. Justice Alito issued a statement (joined by Justice Thomas) saying, "In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. … I would therefore grant the motion to file the bill of complaint but would not grant other relief." https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o155.html

- Once a state's questionable popular-vote count has been litigated and decided in judicial and/or administrative proceedings inside the state-of-origin, the National Popular Vote Compact requires officials of the states belonging to the Compact to treat those vote counts as "conclusive."
- Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms of the Compact. For example, while complaining that states belonging to the Compact are forced to accept other state's election returns, Save Our States simultaneously complains that the Compact allows member states to judge the election returns of other states.

MORE DETAILED ANSWER:

Recall that in the previous section (section 9.30.3), Sean Parnell and Trent England of Save Our States claimed that the National Popular Vote Compact is flawed, because it allows a state to judge, modify, reject, estimate, and manipulate another state's election returns.

Nonetheless, Parnell and England simultaneously complain that the Compact is flawed, because it does not allow a state to judge the election returns of other states.

Parnell wrote in 2020:

> "The NPV compact also risks causing an electoral crisis due to its poor design. … **States that join the compact are supposed to accept vote totals from every other state even if they are disputed, inaccurate, incomplete, or the result of fraud or vote suppression**."[747] [Emphasis added]

Trent England, Executive Director of Save Our States, testified before a Missouri Senate committee in 2016 saying:

> "In a National Popular Vote world, the state of **Missouri would, essentially, have to accept—without the ability to investigate or verify**—the results of … the 49 [other] states and the District of Columbia."[748] [Emphasis added]

Trent England and Sean Parnell wrote in 2021:

> "The compact simply says that member states 'shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate….' In other words, **even if state officials knew or suspected that a state's reported vote total was incorrect, the compact offers no recourse**."[749] [Emphasis added]

---

[747] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[748] Watson, Bob. 2016. Missouri Senate panel weighs popular vote for president. *Fulton Sun*. March 31, 2016. https://www.fultonsun.com/news/2016/mar/31/senate-panel-weighs-popular-vote-president/

[749] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

Parnell and England are correct in saying that the National Popular Vote Compact requires its member states "to accept vote totals from every other state."

However, they are wrong in suggesting that the National Popular Vote Compact somehow exempts questionable state vote counts from challenge, oversight, and review.

Election returns that are "inaccurate, incomplete, or the result of fraud or vote suppression" may be challenged under the National Popular Vote Compact in the same five ways that they can be under the current system, including:

- administrative proceedings (e.g., recounts, audits)
- lower state court proceedings,
- state supreme court proceedings,
- lower federal court proceedings, and
- U.S. Supreme Court proceedings.

The Compact and the current system are identical in that challenges must be conducted through the administrative and judicial system of the state-of-origin and/or in the federal court system starting in the state-of-origin.

Indeed, the state-of-origin is the appropriate place for such challenges (under both the Compact and the current system) because it is:

- where the questionable events occurred,
- where the records exist,
- where the witnesses (if any) are located, and
- where the administrative officials and judges are most knowledgeable about the applicable local laws and procedures.

Once a dispute has been litigated and decided in the state-of-origin, the National Popular Vote Compact treats the result as "conclusive."

At that point, the administrative officials of the states belonging to the Compact perform the purely ministerial function of using ordinary arithmetic to add up the vote counts for each presidential candidate from each state.

Note that the National Popular Vote Compact parallels the treatment of disputes under the current system. Given that a state's questionable popular-vote count will necessarily have been litigated in judicial and/or administrative proceedings inside the state-of-origin before it finalizes its vote count, the Full Faith and Credit Clause of the U.S. Constitution requires:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[750]

[750] U.S. Constitution. Article IV. Section 1.

9.30.5. MYTH: California accidentally gave Trump an extra 4.5 million votes in 2016—thus demonstrating that states cannot be relied upon to produce accurate vote counts.

QUICK ANSWER:

- Despite claims by lobbyists opposed to a nationwide vote for President, California did not give Trump an extra 4,483,810 votes in 2016—accidentally or otherwise.
- If the National Popular Vote Compact had been in effect in 2016, the states belonging to the Compact would have uneventfully credited the Trump-Pence ticket with the correct total number of votes from California—4,483,810.
- Defenders of the current state-by-state winner-take-all system of awarding electoral votes repeatedly cast doubt on the accuracy, and even the existence of, the official state-certified popular-vote counts that the National Popular Vote Compact would use. Meanwhile, they simultaneously extol the solidity of the very same state-certified vote counts when those vote counts are used to decide the presidency under the current system—such as the 537-vote margin in Florida that made George W. Bush President in 2000, or the small margins in Michigan, Wisconsin, or Pennsylvania that made Donald Trump President in 2016.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, testified before the Minnesota Senate Elections Committee on January 31, 2023, saying:

> "States … are **not necessarily going to produce an accurate vote total**."[751]
>
> "**California accidentally gave every Trump voter 2 votes in 2016 through a bad ballot design**. Donald Trump under the counting mechanism of the compact would have won, because they **gave him an extra 4.5 million votes**. That seems kind of outrageous to me."[752] [Emphasis added]

In his written testimony to the Michigan House Elections Committee on March 7, 2023, Parnell added:

> "States can sometimes just do strange things that would pose a serious problem for the compact. Because of an odd ballot design in 2016, **California wound up doubling the vote total for Donald Trump on its Certificate**

[751] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[752] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:33. https://www.youtube.com/watch?v=ZioPI__L-BM

> **of Ascertainment, crediting him with an extra 4,483,810 votes**."[753] [Emphasis added]

Parnell made similar incorrect statements about California giving Trump an extra 4.5 million votes to the Alaska Senate State Affairs Committee on April 25, 2023,[754] and the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[755]

Despite what Parnell says, California's 2016 Certificate of Ascertainment did not give Trump an extra 4,483,810 votes—accidentally or otherwise.

If the National Popular Vote Compact had been in effect in 2016, the states belonging to the Compact would have uneventfully credited the Trump-Pence ticket with the correct total number of votes from California—4,483,810.

Here are the facts.

California's 2016 Certificate of Ascertainment unambiguously states that the Clinton-Kaine ticket's 8,753,788 vote total was "higher" than the vote total of any other ticket listed on the Certificate—including the 4,483,810 votes cast for the Trump-Pence ticket. The Certificate reads:

> "I, Edmond G. Brown, Governor of the State of California, herby certify … the following persons **received the highest number of votes** for Electors of the President and Vice President of the United States for the State of California … **California Democratic Party Electors Pledged to Hillary Clinton for President** of the United States and Tim Kaine for Vice President of the United States … **Number of Votes—8,753,788**."[756] [Emphasis added]

The *only* number appearing anywhere on California's 2016 Certificate of Ascertainment in connection with the Trump-Pence ticket is 4,483,810.

If there were any truth to Parnell's claim that California accidentally gave Trump an extra 4,483,810 votes, then Trump would have received more votes than Clinton's 8,753,788. Therefore, California's Certificate of Ascertainment would necessarily have:

(1) identified the Trump-Pence ticket as having "received the highest number of votes" and

(2) certified the appointment of 55 Trump-Pence presidential electors, instead of the 55 Democratic electors.

---

[753] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact), March 7, 2023*. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[754] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote Interstate Compact), April 25, 2023*. Page 3. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238

[755] Parnell, Sean. 2023. *Testimony of Sean Parnell Senior Director, Save Our States Action to the Legislative Operations and Elections Committee, Nevada Senate, Re: AJR6 (The National Popular Vote Interstate Compact), May 2, 2023*. Page 3. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=68316&fileDownloadName=SenLOE_AJR6Testimony_SeanParnell_SeniorDirector_SaveOurStatesAction.pdf

[756] California's 2016 Certificate of Ascertainment is at https://www.archives.gov/files/electoral-college/2016/ascertainment-california.pdf

California's Certificate of Ascertainment did not do either of these things, for the obvious reason that the state did not give Trump the undeserved 4,483,810 votes that Parnell says it did.

In making the false claim that California "accidentally" gave Trump an extra 4,483,810 votes, Parnell neglected to mention that a presidential-vice-presidential ticket can be nominated by more than one political party under California's rarely used "fusion" procedure. In 2016, both the Republican Party and American Independent Party nominated the Trump-Pence ticket. The *combined* support for the Trump-Pence ticket from Republican and American Independent voters was 4,483,810 voters.

After the National Popular Vote organization pointed out the egregious inaccuracy of Parnell's testimony to Michigan and Minnesota state legislators, Parnell doubled down on his false claim. In his written testimony to the Alaska Senate State Affairs Committee on April 25, 2023, Parnell accused National Popular Vote of "errors" and "deception."

> "Lobbyists for National Popular Vote have attempted to dismiss as 'myths' these and other problems when they have been raised in other hearings, but their responses are riddled with errors, false statements, and outright deception. They have claimed, for example, that California's 2016 Certificate of Ascertainment does not include an extra 4,483,810 votes for Trump, and the whole issue is a misunderstanding related to California's use of fusion voting. **But California does not have fusion voting**."[757] [Emphasis added]

However, despite Parnell's assertion to the Alaska Committee on April 25, the fact is that California *does* have fusion voting (and, of course, California did not give Trump an undeserved extra 4,483,810 votes).

As *Ballot Access News* reported the facts of the situation in 2016:

> "On August 13, the American Independent Party held its state convention in Sacramento, and nominated Donald Trump for President and Michael Pence for Vice-President. **The California election code, section 13105(c),**[758] **permits two qualified parties to jointly nominate the same presidential and vice-presidential candidates**. The November ballot will list Trump and Pence, followed by 'Republican, American Independent.' … **This will be the first time since 1940 that two parties in California jointly nominated the same presidential candidate.**"[759,760] [Emphasis added]

---

[757] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact) April 25, 2023*. Page 4. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238 . Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[758] Section 13105(c) of the California Election Code is at https://codes.findlaw.com/ca/elections-code/elec-sect-13105/

[759] Winger, Richard. 2016. American Independent Party Formally Nominates Donald Trump and Michael Pence. *Ballot Access News*. August 13, 2016. https://ballot-access.org/2016/08/13/american-independent-party-formally-nominates-donald-trump-and-michael-pence/

[760] A listing of all the states currently using fusion voting can be found in Loepp, Eric and Melusky, Benjamin. 2022. Why Is This Candidate Listed Twice? The Behavioral and Electoral Consequences of Fusion Voting. *Election Law Journal*. June 6, 2022. https://www.liebertpub.com/doi/10.1089/elj.2021.0037

In short, California does have fusion voting for President and used it in 1940 and 2016.

As a thought experiment, consider what would happen if a Certificate of Ascertainment erroneously credited a presidential slate with 4,483,810 votes that it never received. If this issue were to arise today, the aggrieved candidate would likely seek correction from the special three-judge federal court created by the Electoral Count Reform Act of 2022, because that court has the specific power to revise a Certificate under its section 5(C)(1)(B).

Note that opponents of the National Popular Vote Compact repeatedly cast doubt on the accuracy, and even the existence, of official state-certified popular-vote counts.[761]

Meanwhile, they simultaneously extol the solidity of the very same official state-certified vote counts when they are used to decide the presidency under the current system—such as the 537-vote difference in Florida that made George W. Bush President in 2000, or the margins in 2016 of 10,704 in Michigan, 22,748 in Wisconsin, or 44,292 in Pennsylvania that made Donald Trump President.[762]

If there were any truth to Parnell's claim that "States … are not necessarily going to produce an accurate vote total,"[763] then the question would arise as to why anyone should accept the state-produced vote counts that are used today to award electoral votes under the *current* state-by-state winner-take-all method of awarding electoral votes.

9.30.6. MYTH: New York cannot accurately count its votes to save its life.

QUICK ANSWER:

- Despite the claim by lobbyists opposed to a nationwide vote for President that "New York cannot accurately count its votes to save its life," the cited incidents involved harmless minor delays in finalizing vote counts (notably after Hurricane Sandy in 2012) that were unanimously authorized by the bipartisan New York State Board of Elections. In each case, every voter ultimately had his or her vote accurately counted by New York. No candidate complained or was adversely affected. No election outcome was changed.
- The Electoral Count Reform Act of 2022 created clear and firm federal deadlines for states to finalize their vote counts.
- Defenders of the current state-by-state winner-take-all system of awarding electoral votes repeatedly cast doubt on the accuracy, and even the existence,

[761] In an article entitled "Lawmakers Seek to Change Presidential Elections to Make Them More Risky, Reduce Confidence," Luther Weeks wrote, "There is no official national popular vote number complied and certified nationally that can be used to officially and accurately determine the winner in any reasonably close election." February 3, 2011. http://ctvoterscount.org/lawmakers-seek-to-change-presidential-elections-to-make-them-more-risky-reduce-confidence/

[762] The national popular vote total occasionally appears in existing law for purposes unrelated to the National Popular Vote Compact. For example, an organization can acquire the status of an official political party in Georgia—and hence future ballot access—if the organization "at the preceding … presidential election nominated a candidate for President of the United States and whose candidates for presidential electors at such election polled at least 20 percent of the total vote cast in the nation for that office." [Emphasis added]

[763] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

of the official state-certified popular-vote counts that the National Popular Vote Compact would use. Meanwhile, they simultaneously extol the solidity of the very same state-certified vote counts when those vote counts are used to decide the presidency under the current system—such as the 537-vote margin in Florida that made George W. Bush President in 2000, or the small margins in Michigan, Wisconsin, or Pennsylvania that made Donald Trump President in 2016.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "New York cannot accurately count its votes to save its life."[764]

Parnell told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are **not necessarily going to produce an accurate vote total**. … There are about 425,000 votes that New York was missing off of its 2012 Certificate of Ascertainment."[765] [Emphasis added]

He repeated this claim in testimony to the Alaska Senate State Affairs Committee on April 25, 2023[766] and the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[767]

Despite the claims that New York regularly produces inaccurate vote counts, the actual incidents cited by Parnell involved harmless slight delays in finalizing vote counts (notably after Hurricane Sandy in 2012) that were unanimously authorized by the bipartisan New York State Board of Elections.

In 2012, Hurricane Sandy resulted in the temporary relocation of hundreds of thousands of New Yorkers just before Election Day in 2012.

Governor Andrew Cuomo issued Executive Order No. 62, allowing any registered New York 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 four suburban counties of Nassau, Rockland, Suffolk, and Westchester.

---

[764] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:02:20. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[765] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[766] Parnell, Sean. 2023. *Testimony of Sean Parnell, Senior Director, Save Our States Action to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact)*. April 25, 2023. Page 2. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238 Also see https://www.akleg.gov/basis/Bill/Detail/33?Root=SB%2061

[767] Parnell, Sean. 2023. Testimony before Nevada Senate Legislative Operations and Elections Committee. May 2, 2023. Timestamp 4:33:14. https://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/?fk=12298&viewmode=1&autoPlay=false

The result was 400,629 provisional ballots in New York's 2012 election—about four times the number handled in 2008.

Counting provisional ballots is a time-consuming and labor-intensive task under normal circumstances (section 9.30.15). Counting the provisional ballots resulting from Hurricane Sandy was unusually time-consuming, because a provisional ballot given to a voter *outside* his or her normal precinct would almost inevitably contain some local 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."

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.

When the provisional ballots arrived at each voter's home county, the Board there had to determine, on a laborious case-by-case basis, whether that particular voter was entitled to vote for *each separate contest* that appeared on the sending precinct'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, but not his own state senate district. Thus, the voter's vote for Congress would be counted, but their vote for State Senator would not.

Thus, each vote cast on each provisional ballot had to be laboriously analyzed to determine whether that particular out-of-precinct voter was entitled to vote for each office.

After Election Day, it was apparent to everyone that the result of processing the 400,629 provisional ballots could not possibly reverse Obama's statewide win of almost two million votes.

Under the state's existing winner-take-all law, Obama would have been entitled to all of New York's electoral votes—even if he had received *none* of the 400,629 provisional votes.

In this "no harm, no foul" situation, the bipartisan New York State Board of Elections unanimously decided against diverting personnel from hurricane relief to the task of finishing the count of these provisional ballots prior to the Electoral College meeting.

Specifically, the Board unanimously certified a statewide count for President before the Safe Harbor Day without including the provisional ballots. The state's first certified count on December 10, 2012, reported that Obama had received 4,159,441 votes and that Romney had received 2,401,799 votes—a statewide margin of 1,757,642 votes in favor of Obama.

Then, on December 31, 2012, the Board of Elections certified an amended statewide count showing that Obama had received 4,471,871 votes and that Romney had received 2,485,432 votes—a margin of 1,986,439 votes in favor of Obama. In the final count, Obama won 57% of the 400,629 provisional ballots—that is, an additional 228,797 votes.

Manifestly, New York was not a closely divided battleground state in 2012. However, 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 or inconvenience.

Because every voter in New York was entitled to vote for President, the obvious course of action would have been to count just each provisional voter's choice for President (and later go back to analyze the eligibility of each vote for lower offices). Thus, if it had been necessary, the presidential count could have been done quickly if New York had been in the position of determining the national outcome of the presidential election.

Douglas Kellner, Co-Chair of the New York State Board of Elections, has stated that if these provisional ballots had had any chance of affecting the presidential election, the Board would have deployed whatever personnel would have been needed to process all of the provisional ballots for President prior to the Electoral College meeting.

If any presidential candidate had felt that New York's delay in counting provisional ballots adversely affected his interests, he could have sought (and undoubtedly would immediately have received) a court order compelling completion of the counting prior to the Electoral College meeting. Of course, if either Romney or Obama had felt that this delay adversely affected their interests, the bipartisan Board would never have voted unanimously to authorize the delay in the first place.

In short, the Board's "no harm, no foul" decision in 2012 was based on common sense.

- No presidential candidate or political party was adversely affected.
- The allocation of electoral votes was not affected.
- The outcome of the election was not affected.
- Every voter ultimately had his or her vote accurately counted and included in the final total.

In 2016 and 2020, New York again did not complete its final count of some provisional ballots until after the Electoral College met (albeit a much smaller number than resulted from Hurricane Sandy). In each of these cases, the bipartisan New York State Board of Elections acted with unanimous consent.

Parnell falsely asserted that previous "no harm, no foul" counting delays under the current system "would be used" in a future election in which a timely and complete popular-vote count would actually matter. Specifically, he told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are not necessarily going to produce an accurate vote total. In the last four presidential elections, New York has provided vote totals, **that would be used under the compact**, that have been missing tens or even hundreds of thousands of votes."[768] [Emphasis added]

[768] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

If anyone is concerned that popular-vote counts might be unavailable because of hurricanes, this problem is infinitely more pressing under the current state-by-state winner-take-all method of awarding electoral votes than it would ever be in an election with a single national pool of 158,224,999 votes.

Hurricanes are not frequent in New York (which has not been a closely divided battleground state for decades).

Hurricanes are far more frequent in Florida (which Bush carried by 537 votes in 2000), Georgia (which Biden carried by 11,779 votes in 2000), and North Carolina (which Obama carried by 14,177 votes in 2008).

In any case, New York's previous history is academic. The Electoral Count Reform Act of 2022 tightened the deadline for states to complete their vote-counting and created a special three-judge federal court to guarantee rapid enforcement of both the requirement for timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment (section 9.30.1).

New York's previous delays in counting provisional ballots should serve as a reminder as to why a national popular vote for President is needed. Under the state-by-state winner-take-all system, the votes cast by the 400,629 provisional voters in New York were politically irrelevant, because they could not possibly have affected the awarding of New York's electoral votes—with or without a hurricane. In contrast, under a national popular vote, every voter in every state would be politically relevant in every presidential election.

9.30.7. MYTH: The Compact allows vote totals to be estimated.

QUICK ANSWER:

- Nothing in the National Popular Vote Compact allows officials in states belonging to the Compact to estimate the vote counts of other states. Instead, the Compact requires the chief election official of each state belonging to the Compact to treat the final determination of the popular-vote count from each state as "conclusive."

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, said the following in written testimony to the North Dakota Government and Veterans Affairs Committee on March 18, 2021:

> "The language of the compact requires member states to 'determine the number of votes' in each state, which may leave the door open for them to **concoct estimated vote totals** to use. … This means that some compact member states **might use estimated vote totals** for North Dakota."[769] [Emphasis added]

[769] Parnell, Sean. 2021. *Testimony of Sean Parnell, Senior Legislative Director, Save Our States to the Government and Veterans Affairs Committee of the North Dakota House of Representatives. March 18, 2021. Committee Testimony for SB 2271.* Document 9573. All written testimony can be found at https://www.ndlegis.gov/assembly/67-2021/bill-testimony/bt2271.html

Parnell similarly claimed, in written testimony to the Michigan House Elections Committee on March 7, 2023:

> "If for some reason there is not an 'official statement' available to obtain vote totals by the time the compact needs them—for example, if there is a recount still underway or court challenges to results, or if a state is simply refusing to cooperate with the compact, then **the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate**."[770] [Emphasis added]

There is nothing in the National Popular Vote Compact that gives officials in states belonging to the Compact (or anyone else) the authority to estimate vote counts.

Instead, the Compact explicitly requires precisely the opposite:

> "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…."[771] [Emphasis added]

9.30.8. MYTH: Differences in state election procedures prevent determination of the national popular vote winner.

QUICK ANSWER:

- Although there are differences in election procedures among the states, the end result of each state's vote-counting process is an officially certified number of the popular votes for each presidential-vice-presidential slate.
- The only thing that the National Popular Vote Compact needs in order to operate is the officially certified vote count that existing federal law requires every state to provide and that every state already routinely produces.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "**It simply will not be possible to conclusively determine which candidate has received the most votes because every state runs its own election** and will continue to do so under the Compact. They run their own election according to their own codes, standards, policies, practices, and procedures.

---

[770] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[771] National Popular Vote Compact. Article III, clause 5. The full text of the Compact is at https://www.nationalpopularvote.com/bill-text The Compact may also be found starting on page 4 of Alaska Senate Bill 61 at https://www.akleg.gov/PDF/33/Bills/SB0061A.PDF

> And **those don't always line up well with what the Compact requires**."[772] [Emphasis added]

In written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024, Parnell said:

> "The fact that votes in every state are cast, counted, recounted, and reported **in different ways**, some of which cause serious problems for National Popular Vote."[773] [Emphasis added]

Although there are differences in election procedures among the states, the end result of each state's vote-counting process is the same—that is, the number of popular votes cast for each presidential-vice-presidential slate.

The Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 both require that each state include those numbers (the "canvass") in its Certificate of Ascertainment.

The only thing that the National Popular Vote Compact requires in order to operate are the popular-vote counts that every state already routinely produces.

Moreover, contrary to what Parnell says, the Compact imposes no procedural requirements on the "codes, standards, policies, practices, and procedures" of non-member states. Therefore, there is nothing any state needs to do in order to "line up well with what the Compact requires."

Finally, there is nothing novel about the way the National Popular Vote Compact arrives at the national popular vote total.

The Compact would operate in the same way as the proposed constitutional amendment that the U.S. House of Representatives passed by a bipartisan 338–70 vote in 1969.[774] Both the Compact and the amendment are based on ordinary arithmetic applied to the officially certified vote counts that existing federal law requires every state to provide and that every state already routinely produces.

Since 1969, there have been dozens of other proposed constitutional amendments introduced in Congress for a national popular vote for President (section 4.7). An examination of these proposals shows that they, too, operate in the same way as the National Popular Vote Compact, namely that they simply call for adding up the officially certified popular-vote counts that every state already produces.[775]

---

[772] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:01:52. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[773] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote Interstate Compact)*. January 8, 2024. Page 2. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[774] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

[775] Similarly, the Compact's reliance on ordinary arithmetic to ascertain the national popular vote is identical to the procedure used in the proposed Lodge-Gossett constitutional amendment that passed the U.S. Senate by a 64–27 vote in 1950 (section 4.1).

9.30.9. MYTH: A presidential candidate running with multiple vice-presidential running mates would create a problem for the Compact.

QUICK ANSWER:

- The self-destructive tactic of a presidential candidate running simultaneously with different vice-presidential running mates would not affect the operation of the National Popular Vote Compact. This rare occurrence would be uneventfully handled by the Compact in the same way that it is uneventfully handled by the current system.
- No presidential candidate who is seriously seeking the presidency would run simultaneously with different running mates in different states—thereby dividing his or her support across two different presidential-vice-presidential slates and effectively eliminating any chance of victory.
- The myth about a hypothetical presidential candidate running simultaneously with different vice-presidential running mates is one of many examples in this book of a criticism aimed at the Compact that would be handled by the Compact in the same way that it is handled by the current system.

MORE DETAILED ANSWER:

A long-time opponent of the National Popular Vote Compact claimed on the *Election Law Blog* in 2023 that a presidential candidate simultaneously running with different running mates would create problems for the Compact.

> "If disputes arise over … which slates qualify (e.g., **whether the "Stein-Hawkins" ticket in Minnesota in 2016 should be tabulated with "Stein-Baraka" tickets in the rest of the United States**), … the Supreme Court would step in to resolve disputes. … Maybe that's what we want in exchange for a national popular vote."[776] [Emphasis added]

There have been occasional cases when minor-party presidential candidates have engaged in the self-destructive tactic of simultaneously running with different vice-presidential running mates—sometimes even in the same state.

For example, Green Party presidential candidate Jill Stein ran with Howie Hawkins as her vice-presidential running mate in Minnesota in 2016, while simultaneously running with Ajamu Baraka as her running mate in other states.

Both the Compact and the current system operate in the same way in dealing with this rare and self-destructive tactic. Specifically, votes are cast and counted for presidential-vice-presidential slates—not individual candidates for President and individual candidates for Vice President—under both the Compact and the current system.

If Stein had carried Minnesota, her 10 presidential electors would have cast 10 electoral votes for her for President and 10 electoral votes for Howie Hawkins for Vice President.

---

[776] In order to promote free-flowing debate, the rules of the *Election Law Blog* do not permit attribution. April 18, 2023.

If Stein had carried any other state(s), the Stein presidential electors would have cast their electoral votes for Ajamu Baraka for Vice President.

In the unlikely event that Stein had received between 270 and 279 electoral votes for President in the Electoral College, she would have been elected President. However, Ajamu Baraka would have received 10 fewer electoral votes for Vice President—not enough to be elected.

Ralph Nader's 2004 presidential campaign in New York was even more bizarre and self-destructive.

New York allows "fusion voting" that permits a candidate to appear on the ballot as the nominee of more than one political party (section 3.12).

For example, in 2004 the Bush-Cheney slate appeared on the ballot in New York as nominees of both the Republican Party and the Conservative Party. Similarly, the Kerry-Edwards slate appeared on the ballot as nominees of both the Democratic Party and the Working Families Party.

In 2004, Nader was on the ballot simultaneously in New York with two *different* vice-presidential running mates. Specifically, Nader ran with Jan Pierce as his vice-presidential running mate on the Independence Party line, and he simultaneously ran with Peter Miguel Camejo on the Peace and Justice Party line.

Article V of the Compact defines the term "presidential slate" as follows:

> "'**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 …" [Emphasis added]

Clauses 1 and 2 of Article III of the Compact provide:

> "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**.
>
> "The chief election official of each member state shall designate the **presidential slate** with the largest national popular vote total as the 'national popular vote winner.'" [Emphasis added]

The current system operates in the same way as the Compact in that votes are cast and counted for presidential-vice-presidential slates.

The result was that when Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of two different political parties—with two different vice-presidential running mates—New York's Certificate of Ascertainment (figure 3.8) separately recorded the vote counts for the two distinct presidential-vice-presidential slates.

In the unlikely event that the combined vote for the two presidential slates headed by Nader had received more popular votes in New York than any other slate in 2004, Nader would almost certainly not have won New York's electoral votes. Nader would only have

won the state's electoral votes if one of the two dueling Nader slates had received more popular votes in New York than the other Nader slate.

Of course, no presidential candidate who is seriously seeking the presidency would run simultaneously with different running mates in the same state or in different states—thereby dividing his or her support across two different slates and effectively eliminating any chance of victory.

Finally, note that the blogger is incorrect in claiming that direct involvement of the U.S. Supreme Court in presidential elections is the price to pay "in exchange for a national popular vote."

There would have been no need for any court—much less the U.S. Supreme Court—to "step in" to deal with the question of how to handle the votes cast for Stein in Minnesota in 2016 or Nader in New York in 2004. There is simply no ambiguity as to how these votes would be handled under either the Compact or the current system.

In any case, the Supreme Court inserted itself directly into the process of deciding presidential elections in 2000—long before the National Popular Vote Compact came onto the scene. Court involvement is not a price to be paid "in exchange for a national popular vote."

9.30.10. MYTH: Administrative officials in the Compact's member states may refuse to count votes from other states that have policies that they dislike.

QUICK ANSWER:

- No administrative official in any state belonging to the National Popular Vote Compact has the power to refuse to count votes from other states for any reason—much less that some other state has some policy that the official personally dislikes.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a meeting at the Heritage Foundation on May 19, 2021, that under the National Popular Vote Compact:

> "You have independent individual elected officials within each of those states, who's actually determining what the national popular vote result is. … Every state in the compact would have to collect all the vote totals from every other state to come up with its own total. … You might have a **Secretary of State of California say, well, we think that states that are requiring voter ID are engaged in vote suppression**. So, you know what? **We're not going to consider the votes from Texas part of the national popular vote**. … Or states using a certain kind of voting machine, or whatever they could come up with."[777] [Emphasis added]

[777] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 50:00. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

The method of calculating the "national popular vote total" under the National Popular Vote Compact is a matter of law—not by the personal preferences of the election administrators of the Compact's member states.

Article III, clause 1 of the Compact states:

> "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]

Despite what England says, there is nothing in the Compact that authorizes any administrative official of any state belonging to the Compact to refuse to count votes from some other state that has some policy that the official personally dislikes.

In fact, as previously discussed in section 9.30.3, the administrative officials of states belonging to the Compact are required to treat the certified vote counts from other states as "conclusive."

9.30.11. MYTH: The Compact is flawed, because it does not accommodate a state legislature that authorizes itself to appoint the state's presidential electors.

QUICK ANSWER:

- Every state today has a law providing that all of a state's presidential electors will be chosen by the voters—not the state legislature. This has been the case in every state since the 1880 presidential election.
- It is unequivocally true that the Compact would not accommodate a state legislature if it were to decide, at some future time, to designate itself as the authority to choose some or all of the state's presidential electors.
- We regard the enshrinement in the National Popular Vote Compact of the principle that the people should choose as a feature—not a bug.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "A couple of years ago **there was a bill in Arizona proposing that … [some of Arizona's] electoral votes would be chosen by the legislature**. I don't really have an opinion one way or the other on whether this is a good idea or not. But **it's an interesting idea** that's out there. If Arizona were to do that, National Popular Vote would look at that and say, 'there is no statewide popular election for electors.' … That **seems like it's going to be a problem**."[778] [Emphasis added]

---

[778] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:08:28. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

The 2021 Arizona state legislative bill to which Parnell is referring (HB2426) was one of many bizarre proposals that were introduced in the Arizona legislature after outgoing President Donald Trump failed to overturn the results of the 2020 presidential election in Arizona.

This bill specified that two of the state's electoral votes were to be cast for the presidential-vice-presidential ticket that:

> "Received the highest number of votes from the aggregate vote of all the members of the legislature voting as a single body."[779]

The state's remaining electoral votes would be allocated according to the popular vote in each congressional district. This bill died in committee and has not been re-introduced since.

In addition, in 2024 Arizona Senator Anthony Kern proposed that the Arizona legislature appoint all of the state's presidential electors:

> "A GOP state lawmaker who participated in the 2020 alternate elector strategy has introduced bill that aims to **give state legislature sole authority to appoint presidential electors**."[780] [Emphasis added]

Senator Kern's Senate Concurrent Resolution 1014 (SCR 1014) provided:

> "The Legislature, and no other official, shall appoint presidential electors in accordance with the United States Constitution."[781,782]

It is unequivocally true that the Compact would not accommodate the Arizona legislature if it were to decide, at some future time, to designate itself as the authority to choose some or all of the state's presidential electors.

While Parnell says he does not have "an opinion one way or the other on whether this is a good idea," we do.

The National Popular Vote Compact is squarely based on the principle that the voters—not state legislatures—should choose the President.

Every state today has a law providing that all of a state's presidential electors will be chosen by the voters—not the state legislature. This has been the case in every state starting with the 1880 presidential election.

We regard the enshrinement in the National Popular Vote Compact of the principle that the people should choose as a feature—not a bug.

---

[779] Arizona House Bill HB2426 of 2021 may be found at https://apps.azleg.gov/BillStatus/BillOverview/74978

[780] *Election Law Blog.* January 22, 2024. https://electionlawblog.org/?p=140874

[781] Senate Concurrent Resolution SCR 1014. 2024. A concurrent resolution supporting the constitutional appointment of presidential electors by the legislature. https://www.azleg.gov/legtext/56leg/2R/bills/SCR1014P.htm

[782] Note that Senator Kern introduced his 2024 proposal as a concurrent resolution of the legislature (which would not be presented to the Governor for approval or veto) rather than as an ordinary statutory bill (which would be presented to the Governor). His approach was consistent with the so-called "independent state legislature" theory, but inconsistent with the U.S. Supreme Court's decision in 2023 in *Moore v. Harper* (600 U.S. 1).

When a state adopts the National Popular Vote Compact, it obligates itself to continue to conduct a "statewide popular election" for President. Article II of the Compact states:

> "Each member state shall conduct a statewide popular election for President and Vice President of the United States."

Moreover, clause 8 of Article V of the Compact defines a "statewide popular election" as follows:

> "'Statewide popular election' shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis."

If either HB2426 or SCR 1014 were to go into effect in Arizona, that state would no longer be conducting a "statewide popular election" for President and would, therefore, be voluntarily opting out of the Compact's national popular vote count.

As discussed in detail in section 9.31.6, if a state legislature were to choose to opt-out of the national popular vote count, that state's departure would present no operational difficulty in terms of the Compact's ability to compute the national popular vote total from the states that did conduct a "statewide popular election."

Opting out of the national popular vote count would be a very poor policy decision for a state and its voters.

Such legislation would, of course, be vigorously opposed by the political party that normally wins the state involved.

Moreover, a lot of voters would be angry with a state legislature that had disenfranchised them.

9.30.12. MYTH: The 1960 Alabama election reveals a flaw in the Compact.

QUICK ANSWER:

- Neither Kennedy's nor Nixon's name appeared on the ballot in Alabama in 1960, and hence there were no popular votes to count from Alabama for Kennedy or Nixon. No state has used a voting system of this kind for decades.
- In the unlikely event that a state were to adopt Alabama's long-abandoned method of voting, the National Popular Vote Compact would encounter no operational difficulty.
- In the absence of any actual popular-vote count for Kennedy or Nixon in Alabama in 1960, various almanac editors and political writers have bandied about various unofficial (and not very plausible) estimates of how Alabama voters might have voted if they had been allowed to vote directly for Kennedy and Nixon.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "Historians still argue whether Richard Nixon or John Kennedy won the popular vote in 1960, owing largely to uncertainty over how to count votes from Alabama that year. It's an interesting bit of historical trivia because of course Kennedy won the Electoral College regardless of the Alabama issues, but **under National Popular Vote, not being able to conclusively determine a winner would be a national crisis**."[783] [Emphasis added]

The reason it is arguable whether Kennedy or Nixon would have won the national popular vote in 1960 is that neither Kennedy's nor Nixon's name appeared on the ballot in Alabama in 1960. Figure 3.10a and figure 3.10b in section 3.13 show Alabama's 1960 ballot for President.

Hence there were no popular votes to count from Alabama for Kennedy or Nixon.

The cumbersome voting system that Alabama used in 1960 has not been used by Alabama or any other state for decades.

In the unlikely event that a state were to adopt Alabama's long-abandoned method of voting today, the National Popular Vote Compact would encounter no operational difficulties.

In the early days of the Republic, voters were required to vote for individual candidates for presidential elector rather than the actual candidates for President and Vice President. Thus, a voter in a state with, say, 11 electoral votes (the number that Alabama had in 1960) would have to vote for 11 separate candidates for presidential elector.

By 1960, three-quarters of the states had abandoned this cumbersome and inconvenient way of voting and adopted the so-called "short presidential ballot" (section 2.14). Since 1980, every state has used it.

The short presidential ballot lists the names of the actual candidates for President and Vice President and enables voters to cast a single vote for their chosen presidential-vice-presidential ticket. A vote for a presidential-vice-presidential ticket is then "deemed" to be a vote for all of the individual candidates for presidential electors nominated in association with that ticket in the voter's state.

Back in 1960 in Alabama, each of the Democratic Party's 11 candidates for presidential elector was nominated separately at the time of the primary election.

Segregationists saw Alabama's method of voting as a way to nominate and elect Democratic presidential electors who would not support the Democratic Party's national nominee (that is, John F. Kennedy) in the Electoral College.

The segregationists were partially successful in Alabama's 1960 Democratic primary. They nominated six of Alabama's 11 Democratic candidates for the position of presidential elector.

A majority of Alabama's voters were in the habit of supporting the state's dominant political party (that is, the Democratic Party) in November general elections at the time.

Thus, the voters elected all 11 Democratic presidential electors in the November gen-

---

[783] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 4. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

eral election. Each of the 11 winning elector candidates received a slightly different number of popular votes (with each of them receiving about 58% of the statewide vote).

Meanwhile, no Republican presidential electors were chosen in November (with each of them receiving about 42% of the statewide vote).

When the Electoral College met in mid-December, the six segregationist Democratic presidential electors voted for Senator Harry Byrd of Virginia, and the five "loyalist" Democratic electors voted for the person nominated by the Democratic National Convention (that is, Senator John F. Kennedy of Massachusetts).

Today, no state uses the method of voting used in Alabama in 1960. All states use the short presidential ballot. All states today conduct a "statewide popular vote" for President, as that term is defined in the National Popular Vote Compact.

If, after the National Popular Vote Compact comes into effect, any state were to decide to revert to Alabama's abandoned method of voting, that state would no longer be conducting a "statewide popular vote" for President (section 9.31.6). That state would, therefore, be voluntarily opting out of the Compact's national popular vote count (because there obviously would be no vote count for any presidential and vice-presidential candidate from that state).

Reverting to Alabama's 1960 method of voting would be a very poor policy decision for a state and its voters. However, it would present no operational difficulty in terms of the Compact's ability to compute the national popular vote total from the states that did conduct a "statewide popular election."

There would be no "national crisis"—simply a lot of voters angry with a state legislature that disenfranchised them.

There is a continuing academic argument about whether the 1960 election was a wrong-winner election.

The 1960 presidential election in Alabama has fueled an academic discussion about whether that election was an instance of a President (Kennedy, in this case) winning a majority of the Electoral College without having received the most popular votes nationwide.[784]

In the absence of any actual popular vote count for Kennedy or Nixon from Alabama in 1960, the answer is unknowable.

Nonetheless, various political writers have bandied about various ways of estimating how many popular votes Kennedy and Nixon might have received if Alabama voters had been allowed to vote directly for Kennedy or Nixon on a head-to-head basis.

Some have suggested, for example, that Republican Richard Nixon should be credited with six-elevenths of the state's popular vote, because segregationist Democratic Senator Byrd of Viginia received six of Alabama's 11 presidential votes in the Electoral College. That is, these writers advocate equating statewide voter sentiment in the November *general election* to the ratio of segregationists to loyalists who won the *Democratic primary* held earlier in the year.

This method of accounting would credit Nixon with the support of six-elevenths of

---

[784] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America.* New Haven, CT: Yale University Press. Second edition. Pages 67–69.

Alabama voters (that is, 55%) in the November general election—even though the Republican candidates for presidential elector received only about 42% of the state's popular vote in November.

This method of accounting of Alabama's popular vote gives Nixon enough additional popular votes nationally to erase Kennedy's modest national-popular-vote margin.

There are obvious problems with this method of accounting. At the time of the November general election, public awareness of the radically different intentions of the 11 Democratic nominees for presidential elector was low, as evidenced by the fact that all 11 received almost the same percentage of the statewide vote (58%). That is, the voters showed no particular preference for the six segregationist Democrats, compared to five loyalist Democrats. They simply voted Democratic. The statewide Democratic popular-vote margin of 58% would have been more or less the same if, say, six, seven, or eight of the 11 Democratic nominees for presidential elector had intended to support Kennedy in the Electoral College or, conversely, if only four, three, or two of them had intended to support him.

Moreover, neither Kennedy nor Nixon were segregationists. In fact, both ran on a pro-civil-rights platform in 1960.

Finally, it is noteworthy that Nixon never publicly supported this method of post-election accounting or claimed to have won the national popular vote in 1960.[785]

See the discussion about the short presidential ballot in section 9.31.6.

9.30.13. MYTH: States will be forced to change their election laws in order to have their votes included in the national popular vote count.

QUICK ANSWER:

- No state would have to make any change in its existing laws or take any action it would not otherwise take, in order to have its votes automatically included in the national popular vote count compiled under the Compact.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated at a debate conducted by the Broad and Liberty group in Philadelphia:

> "A state that doesn't conform their election process to the way National Popular Vote requires, they're effectively locked out."[786]

No state would have to make any change in its existing laws or take any action it would not otherwise take, in order to have its voters automatically included in the national popular vote count compiled under the Compact.

---

[785] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 67–69.

[786] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 4:31. https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

9.30.14. MYTH: Absentee and/or provisional ballots are not counted in California when they do not affect the presidential race.

QUICK ANSWER:

- It is simply an urban legend that absentee and provisional ballots are not counted in California (or any other state) when their number is significantly less than the margin in the presidential race in that state.
- A typical general-election ballot contains votes for numerous offices and ballot propositions. Regardless of whether there is any doubt as to which presidential candidate received the most popular votes in a state, all valid ballots (including all valid provisional ballots) must be counted in order to determine the outcome of the numerous other contested races and ballot propositions and because it is the law.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a debate audience at American University in 2015:

> "I do know that in some states, if the number of provisionals outstanding is less than the margin, when they finish counting the regular votes, they will not count the provisionals if they can't be decisive."[787]

A blog posting on *Real Clear Politics* by "Southerner01" in 2012 stated:

> "**One thing worth noting is that the true [national] 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 [national] popular vote. **I believe there were roughly million absentee ballots not counted in California**, and Gore was leading by about 500,000 votes [nationally]. While that was nowhere near enough to flip the state, it might have changed the [national] popular vote total."[788] [Emphasis added]

Regardless of what Trent England "knows" or what the blogger "remembers hearing," all valid ballots are counted in every state regardless of whether there is any suspense about which presidential candidate is destined to win the state's electoral votes.

---

[787] Debate at Washington College of Law, American University on April 22, 2015, with Jamie Raskin, John Koza, Sean Parnell, and Trent England. Timestamp 2:32:00. https://media.wcl.american.edu/Mediasite/Play/18d99c80bb904c998374375d8fc23f4d1d?useHTML5=true

[788] Blog posting by Southerner01. *Real Clear Politics*. October 12, 2012.

Indeed, there has been no suspense about which presidential candidate would win the most popular votes in about three-quarters or more of the states in recent years.

Aside from the legal requirements to count all votes, this urban legend ignores the fact that the presidential race is not the only thing on a state's ballot.

For example, a November general-election ballot in California in a typical presidential-election year contains races for:

- members of Congress
- members of the state legislature
- state, county, and local ballot propositions
- county and municipal offices
- various local school, college, hospital, and other boards
- state and county judges.

There were 10,965,856 votes cast in California in the November 2000 election. Although the uncounted "million" ballots that the blogger heard about could not have reversed Al Gore's 1,293,774-vote lead over George W. Bush in California, these ballots determined the outcome of numerous other races.

9.30.15. MYTH: Provisional ballots would be a problem under the Compact, because voters in all 50 states would matter in determining the winner.

QUICK ANSWER:

- Provisional ballots would be processed and counted in the same way under the National Popular Vote Compact as they are under the current state-by-state winner-take-all method of awarding electoral votes. Validation and counting of provisional ballots is completed in most states within 10 days after Election Day—that is, weeks before the federal Safe Harbor Day and the Electoral College meeting.
- Provisional ballots accounted for 0.5% of the total vote in the November 2022 general election, and 79% of them were validated.
- Because a few thousand votes in one, two, or three states often determine the presidency under the current system, there is a far greater chance that provisional ballots will create problems under the current system than in a nationwide vote.
- This myth that provisional ballots would be a problem under the Compact is one of many examples in this book of a criticism aimed at the Compact where the Compact would be equal or superior to the current system.

MORE DETAILED ANSWER:

The federal Help America Vote Act of 2002 (HAVA) permits a voter to cast a provisional ballot (sometimes also called an "affidavit ballot") under circumstances such as the following:

- The voter is not listed on the election roll for a particular precinct (perhaps because the voter recently moved).
- The voter arrives at the polling place on Election Day but previously requested

an absentee ballot (perhaps because the voter did not receive the absentee ballot or did not use it).

- The voter does not have the type of identification (if any) that may be required by state law.

After the voter fills out a provisional ballot, it 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 may also contain additional identifying information (e.g., a driver's license number).

Depending on state law, provisional ballots are counted two to 21 days after the election. Most states complete the process within 10 days after the election.[789]

Processing provisional ballots is a tedious administrative process. The *Miami Herald* reported that each provisional ballot takes about 30 minutes to review and inspect.[790] The first step is usually to visually compare the signature on the outside of the envelope with registration records before the provisional ballot is accepted. 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. The specific additional processing required depends on the reason why the provisional ballot was cast in the first place.

According to the federal Election Assistance Commission:

> "**The percentage of ballots that were cast by provisional voters has been steadily declining over the past three election cycles**; 2018 EAVS data show that 1.3% of voters who cast a ballot did so by provisional ballot, and that percentage declined to 0.8% of the electorate in the 2020 EAVS and **0.5% for the 2022** EAVS.
>
> "The total number of provisional ballots cast has declined correspondingly, from 1,852,476 in the 2018 EAVS to 1,712,857 in the 2020 EAVS to **702,042 in the 2022** EAVS."[791] [Emphasis added]

In the November 2022 general election, 0.5% of the ballots were cast by provisional voters, and 78.6% of these provisional ballots cast were accepted and counted (either fully or partially).[792] Thus, the net effect is that about 0.4% of the total vote in the November 2022 general election came from provisional ballots.

Hans von Spakovsky of the Heritage Foundation has stated that a national popular vote for President:

---

[789] The National Conference of State Legislatures (NCSL) has a summary of state laws and practices concerning provisional ballots. See National Conference of State Legislatures. 2020. *Provisional Ballots*. https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#don't%20use

[790] 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

[791] Election Administration and Voting Survey Comprehensive Report. Pages 16–17. https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf

[792] *Ibid*. Page 17.

> "would … lead to … contentious fights over provisional ballots."[793]

He has also stated:

> "Every additional vote found anywhere in the country could make the difference to the losing candidate."[794]

We agree with von Spakovsky that any vote "anywhere in the country could make the difference" in a national popular vote for President. Indeed, an important reason to adopt the National Popular Vote Compact 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 something to be avoided.

Von Spakovsky continued:

> "**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."[795] [Emphasis added]

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.

In any event, provisional ballots are far more likely to be outcome-determinative under the current state-by-state winner-take-all system than under a national popular vote.

Under the current system, the outcome of the national election regularly ends up depending on the outcome of one, two, or three closely divided battleground states. The number of provisional ballots in a closely divided state is frequently larger than the margin of victory generated by the non-provisional ballots in that state.

For example, table 9.41 shows the four states in 2020 where Biden's percentage lead was less than 0.8% (the percentage of provisional ballots cast that year).

Of course, the test for whether provisional ballots are outcome-determinative is *not* whether the winner's percentage lead was less than the percentage of provisional ballots cast.

---

[793] Von Spakovsky, Hans. 2011. Popular vote scheme. *The Foundry*. October 18, 2011.

[794] Von Spakovsky, Hans. 2011. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[795] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

Table 9.41 The four states in 2020 where Biden's percentage lead was less than 0.8%

State	Biden	Trump	Biden margin	Biden percentage margin
Georgia	2,473,633	2,461,854	11,779	50.12%
Arizona	1,672,143	1,661,686	10,457	50.16%
Wisconsin	1,630,866	1,610,184	20,682	50.32%
Pennsylvania	3,458,229	3,377,674	80,555	50.59%

For one thing, only about 79% of provisional ballots are accepted.

More importantly, provisional ballots are not unanimous in favor of one candidate. Instead, the leading candidate's percentage of provisional ballots is usually fairly close to that candidate's lead among non-provisional ballots.

Let's do the arithmetic:

- Assume 0.8% of the ballots were provisional (that is, the actual percentage in 2020);
- Assume 79% of the provisional ballots were accepted; and
- assume the provisional ballots divided 55%–45% in favor of one candidate.

In that case, the entire pool of provisional ballots would have contributed only 0.064% to the leading candidate's margin.

A change of 0.064% is equal to only about half of Biden's 50.12% lead in Georgia, only about a third of Biden's 50.16% lead in Arizona, only a fifth of Biden's 50.32% lead in Wisconsin, and only about a tenth of Biden's 50.59% lead in Pennsylvania.

Thus, the total pool of provisional ballots would not have been outcome-determinative in any of the four closest states in 2020.

Similarly, a difference of 0.064% is even less likely to be outcome-determinative in a nationwide election. For example, in the closest national election in the 20th or 21st centuries (that is, the 1960 election), the national-popular-vote margin was 0.17%—three times larger than 0.064%.

Moreover, von Spakovsky's assertion about a nationwide flurry of litigation over provisional ballots is unrealistic.

Provisional ballots do not offer a disgruntled and litigious candidate much promise. Provisional ballots have been in widespread use since the 2004 presidential election. Almost all of the situations that give rise to provisional ballots have been previously encountered, analyzed, adjudicated, and cataloged—thereby establishing precedents on how the vast majority of situations are to be handled. It would be remarkable if some new legal theory could affect more than a tiny fraction of the provisional ballots.

Even if the number of disputed provisional ballots were potentially outcome-determinative, all litigation involving presidential elections must be conducted and decided so as to reach a conclusion inside the overall national schedule for finalizing the results of presidential elections established by the U.S. Constitution and the Electoral Count Reform Act of 2022. This schedule applies equally to elections conducted under the current state-

by-state winner-take-all system as well as those conducted under the National Popular Vote Compact.

9.30.16. MYTH: The ballot access difficulties of minor parties would create a logistical nightmare for the Compact.

QUICK ANSWER:

- Presidential candidates who have significant national support generally qualify for the ballot in all (or almost all) states.
- For example, the Libertarian Party received the most votes nationwide of any minor-party in 2020 and 2016. It was on the ballot for President in all 50 states in 2020 and 2016 (when it received 1% and 3% of the nationwide vote, respectively).
- The process of getting onto the ballot has become considerably easier in recent years. In 2024, an independent or minor-party presidential candidate can get onto the ballot in two-thirds of the states by submitting a petition with between 0.1% and 0.5% of the state's 2020 presidential vote. A petition with between 1.0% and 1.5% of the state's 2020 presidential vote is sufficient in 12 other states. No petition at all is required in four states.
- No logistical nightmare is created when a candidate is not on the ballot in a particular state. The treatment of a candidate who is not on the ballot in a particular state is identical under *both* the current system and the National Popular Vote Compact. The absence of a minor-party or independent candidate from the ballot in a few states does not prevent that candidate from accruing popular and electoral votes from every state in which they receive votes.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, told a Delaware Senate committee that the Compact would create:

> "Logistical nightmares [that] could haunt the country."
>
> "There are … inconsistencies among states' ballots that would skew the election results. … States differ in their requirements for ballot qualification."[796]

Candidates with significant national support generally get on the ballot in all (or almost all) states.

Presidential candidates who have significant national support generally qualify for the ballot in all 50 states (or all but a few states).

- Most recently, the Libertarian Party received the most votes nationwide of any minor-party. It was on the ballot for President in all 50 states in 2020 (when Jo Jorgensen received about 1% of the national popular vote). In 2016 (when Gary

[796] Written testimony submitted by Tara Ross to the Delaware Senate on June 16, 2010.

Johnson received about 3% of the national popular vote), the Libertarian Party was also on the ballot for President in all 50 states.

- Ross Perot was on the ballot in all 50 states in both 1992 (when he received 19% of the national popular vote) and 1996 (when he received 8%).
- George Wallace was on the ballot in all 50 states in 1968 (when he received 13% of the national popular vote).
- John Anderson was on the ballot in all 50 states (when he received 7% of the national popular vote in 1980).
- Lenora Fulani, the nominee of the New Alliance Party, was on the ballot in all 50 states in 1988.
- Robert LaFollette got onto state-printed ballots in all but two states in 1924 (Louisiana and North Carolina).
- In 1912, when then-former President Theodore Roosevelt ran as a third-party candidate and received 27% of the national popular vote, he was on state-printed ballots in all but two states (Oklahoma and North Carolina).
- Henry Wallace was on the ballot in all but three states in 1948.[797]
- Ralph Nader was on the ballot in 45 states in 2008 (when he received ½% of the national popular vote).
- Ralph Nader was on the ballot in 43 states in 2000 (when he received 2% of the national popular vote).

In 2020, there were 34 officially registered minor party or independent candidates for President. Only the Libertarian party's nominee (who received 1.2% of the national popular vote) was on the ballot in all 50 states. The combined total for the other 33 minor-party or independent candidates was 0.6%.

Requirements to get onto the ballot in 2024

Thanks to persistent litigation and lobbying by voting-rights advocates, minor parties, and independent candidates, the process of getting onto the ballot has become considerably easier in recent years.

Minor parties in some states automatically qualify to be on the ballot by virtue of having received a statutorily specified number of votes in a previous election.

State statutory requirements for ballot-access petitions are couched in various ways, including a fixed number of signatures, a certain percentage of the vote for a particular office in a specified previous election, and a certain percentage of the state's registered voters.

Richard Winger, Editor of *Ballot Access News*, has analyzed each state's requirements and restated them in terms of a percentage of the state's previous presidential vote.[798] A presidential candidate can get onto the ballot in the November 2024 presidential election by:

- filing a simple statement in one state;
- paying a filing fee in three states;

---

[797] The authors thank Richard Winger, editor of *Ballot Access News*, for this information.

[798] See Winger, Richard. 2022. Presidential Petition Requirements. *Ballot Access News*. April 1, 2022. Page 5.

- submitting a petition with between 0.1% and 0.5% of the state's 2020 presidential vote in 34 states;
- submitting a petition with between 0.5% and 1.0% of the state's 2020 presidential vote in eight states; and
- submitting a petition with between 1% and 1.5% of the state's 2020 presidential vote in four states.

Candidates get credit for votes wherever they get them under both the current system and the Compact.

Even if a particular minor-party or independent candidate is not on the ballot in all 50 states, Tara Ross is incorrect in saying that a "logistical nightmare" would be created because of differences in state ballot-access requirements.

The treatment of a candidate who is not on the ballot in a particular state is identical under *both* the current system and the National Popular Vote Compact.

- Each state's election officials certify every popular vote that is cast and every electoral vote that is earned for each candidate who received popular or electoral votes in their state. A state canvassing board or other designated board or official first certifies the results, and the state's Governor subsequently certifies them in the state's Certificate of Ascertainment.
- A candidate's failure to receive any popular or electoral votes from one state does not cause that candidate to forfeit the popular or electoral votes that he or she earned from another state. All of the popular and electoral votes that the candidate receives are added together to arrive at the candidate's nationwide total.

For example, in 1912, Theodore Roosevelt was not on the ballot in every state when he ran as the nominee of the Progressive (Bull Moose) Party. He nevertheless received 4,120,207 popular votes nationwide and 88 electoral votes from the six states that he carried.

In 1948, Strom Thurmond was not on the ballot in every state. He nevertheless received 1,169,114 popular votes nationwide and 39 electoral votes from the five states that he carried.

9.30.17. MYTH: A state's electoral votes could be awarded by the Compact to a candidate not on a state's own ballot.

QUICK ANSWER:

- This hypothetical scenario is politically implausible, because a presidential candidate who is strong enough to win the most popular votes throughout the entire United States would, almost certainly, have been on the ballot in all 50 states.

MORE DETAILED ANSWER:

In testimony to the Delaware Senate, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has raised the possibility that a

minor-party or independent presidential candidate might win the national popular vote without being on the ballot in Delaware:

> "Delaware could be required to cast its electoral votes for a candidate who did not qualify for the ballot in Delaware."[799]

It would be unlikely that a minor-party presidential candidate would be strong enough to win the most popular votes nationwide, while being incapable of collecting the 650 signatures necessary to qualify for the ballot in Delaware.

In fact, presidential candidates who have significant national support generally qualify for the ballot in all 50 states (or all but a few states), as detailed in section 9.30.16.

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 the presidential candidate who received the most popular votes nationwide.

9.31. MYTH THAT THE COMPACT COULD BE THWARTED BY A SINGLE STATE OFFICIAL OR STATE

9.31.1. MYTH: Governors have the "prerogative" to thwart the Compact by simply ignoring it.

QUICK ANSWER:

- Under the U.S. Constitution, the method of awarding a state's electoral votes is specified by state law.
- All state officials are legally bound to comply with their own state's laws for appointing presidential electors. No Governor has the personal "prerogative" to ignore the National Popular Vote Compact if it has been enacted as the state's law for awarding electoral votes.
- This myth about Governors is one of many examples in this book of a criticism aimed at the Compact that—even if valid—would be equally possible under the current system. That is, this criticism provides no reason to favor the current system over the Compact.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

Jason Willick, an opinion columnist, wrote in 2023 that a constitutional crisis could arise under the National Popular Vote Compact if Governors were to use what he called their "prerogative" to thwart the operation of the Compact by simply ignoring it.

In an opinion column entitled "This Blue-State Election Compact Could Create a Constitutional Crisis," Willick wrote:

---

[799] Written testimony submitted by Tara Ross to the Delaware Senate on June 16, 2010.

> "Would swing-state Democratic governors certify a Republican presidential candidate as the winner of their state's electoral votes if most voters in their states voted for the Democratic candidate? The **governors could claim a prerogative to ignore the compact**."[800] [Emphasis added]

Under the U.S. Constitution (Article II, section 1), the choice of method of awarding the state's electoral votes is specified by state law.

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."[801] [Emphasis added]

An interstate compact is both a state law and a legally binding contractual agreement with other states.

The fact that an interstate compact is, first of all, a state law is made clear by the wording typically used by states when adopting compacts—that is, that the compact:

> "Is hereby **enacted into law** and entered into." [Emphasis added]

All state officials, including Governors, are legally bound to comply with their own state's laws for appointing presidential electors—whether the law is a winner-take-all law that awards all of the state's electoral votes based on a statewide plurality, a law awarding electoral votes based on the congressional-district popular vote, or a law awarding electoral votes based on the nationwide popular vote.

In particular, state officials are obligated to comply with the method of awarding electoral votes specified by their state's law—regardless of whether they personally prefer a different method or think it is a poor policy choice.

Moreover, when a state appoints presidential electors, it is performing a function delegated to it by the U.S. Constitution (Article II, section 1).

Federal law requires that:

- A state's appointment of its presidential electors must be in accordance with state law.
- The state law must have been enacted prior to Election Day.

Specifically, section 5(a)(1) of the Electoral Count Reform Act of 2022 requires:

> "The executive of each State shall issue a certificate of ascertainment of appointment of electors, **under and in pursuance of the laws of such State** providing for such appointment and ascertainment **enacted prior to election day**." [Emphasis added]

In short, Willick's scenario would violate both state and federal law.

---

[800] Willick, Jason. 2023. This blue-state election compact could create a constitutional crisis. *Washington Post*. June 11, 2023. https://www.washingtonpost.com/opinions/2023/06/11/democratic-electoral-alliance-potential-constitutional-crisis/

[801] U.S. Constitution. Article II, section 1, clause 2.

The Governor's "prerogative"—even if it existed—provides no reason to favor the current system over the Compact.

In his opinion column entitled "This Blue-State Election Compact Could Create a Constitutional Crisis," Willick presented his hypothetical scenario involving a Governor's "prerogative" as a reason not to adopt the National Popular Vote Compact.

If it were true that state Governors have the personal prerogative to ignore the state's law for awarding electoral votes, then they would also have that prerogative today—under the *current* system.

Does Willick seriously believe that Maine's Democratic Governor in 2020 (Janet Mills) had the "prerogative" to refuse to certify the Republican presidential elector chosen by the voters of the state's 2nd congressional district in accordance with her state's existing law—merely by pointing to the fact that the "most voters in [her] state voted for the Democratic candidate"?

Does Willick believe that Nebraska's Republican Governor in 2020 (Jim Pillen) had the "prerogative" to refuse to certify the Republican Democratic presidential elector chosen by the voters of Nebraska's 2nd congressional district in accordance with that state's existing law? After all, the "most voters in [his] state voted for the Republican candidate."

Recall that Donald Trump won the most popular votes in Pennsylvania in 2016 while not winning the most popular votes nationwide. Does Willick believe that Pennsylvania's Democratic Governor in 2016 (Tom Wolf) had the personal prerogative to ignore Pennsylvania's existing winner-take-all law and award all of the state's electoral votes to the national-popular-vote winner?

If Willick actually believes that Governors have the "prerogative" to ignore state laws specifying the method of awarding electoral votes, he could have written the paragraph below rather than the paragraph quoted at the beginning of this section:

> "Would swing-state Democratic governors certify a Republican presidential candidate as the winner of their state's electoral votes if most voters ~~**in their states**~~ **nationally** voted for the Democratic candidate? The governors could claim a prerogative to ignore the ~~**compact**~~ **state's existing winner-take-all law**." [Emphasis added]

If Willick believes that Governors have this personal prerogative, why did he not acknowledge that the very same "constitutional crisis" lurks in the current system?

Willick's hypothetical scenario about Governor's possessing a personal "prerogative" to ignore the National Popular Vote Compact is one of many examples in this book of a criticism aimed at the Compact that—even if legally well-founded—would be equally possible under the current system.

Thought experiment about what would happen if a rogue Governor were to claim the prerogative to ignore the state's law for awarding electoral votes

For the sake of argument, let's consider what would happen if a Governor were to attempt to exercise the "prerogative to ignore the compact" that Willick claims to exist.

Suppose that a Governor were to issue a Certificate of Ascertainment awarding the

state's electoral votes to a candidate different from the one specified by the state's existing law.[802]

The presidential candidate disfavored by the Governor could obtain relief in either federal or state court.

In summarizing the "mechanisms in place to compel states to produce valid certificates" under the Electoral Count Reform Act of 2022, Kate Hamilton writes:

> "The ECRA creates a procedure by which federal courts can hear federal claims brought by presidential candidates 'with respect to a state executive's duty to issue and transmit to Congress the certification of appointed electors. In other words, if a presidential candidate brings a claim under federal law—which could be statutory or constitutional—and successfully argues that they are entitled to a state's electoral votes, then **the ECRA-created three-judge panel could order a state executive to issue a certificate of ascertainment. That court-ordered slate of electors would then become the state's single slate of electors to be counted by Congress, even if not initially certified before the federal deadline**."[803] [Emphasis added]

The Electoral Count Reform Act of 2022 created (in section 5) a special three-judge federal court for the specific purpose of deciding:

> "Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the **issuance** of the certification required under section (a)(1), or the **transmission** of such certification as required under subsection (b)." [Emphasis added]

This court is open only to aggrieved presidential candidates.

It has the power to revise a state's Certificate of Ascertainment. The 2022 Act also specifies that the court-ordered revised Certificate supersedes the original one.

This new court operates on a highly expedited schedule. Time-consuming delays (such as the five-day notice required by 28 U.S.C. 2284b2) do not apply.[804]

There is expedited appeal to the U.S. Supreme Court.

Given that the Constitution requires that the Electoral College meet on the same day in every state, the 2022 Act also requires that all of the actions of both the three-judge court and the Supreme Court be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

---

[802] The unlikely possibility of a Governor refusing to issue any Certificate is discussed separately in section 9.31.2.

[803] Hamilton, Kate. 2023. State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond. *The Yale Law Journal Forum*. November 22, 2023. Pages 271–272. https://www.yalelawjournal.org/forum/state-implementation-of-the-electoral-count-reform-act-and-the-mitigation-of-election-subversion-risk-in-2024-and-beyond#_ftnref11

[804] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

In her discussion of "mechanisms in place to compel states to produce valid certificates," Kate Hamilton also points out that, in many (but not all) states, the disfavored presidential candidate could obtain a writ of mandamus compelling the Governor to carry out the ministerial duty of issuing the Certificate of Ascertainment in accordance with state law.[805]

> "Aggrieved candidates could turn to state courts to force any recalcitrant state officials to perform their legal duties under state law. As Derek T. Muller has written, the writ of mandamus—a remedy issued to public officials requiring them to perform the 'clear legal duty' with which they are tasked by state law—is a potentially useful tool for combatting election subversion caused by state officials refusing to perform their nondiscretionary duties.[806] Mandamus has a clear use as a remedy in the event that a public official—for example, an administrator or member of a board of elections—refuses to perform the ministerial duty required of them by state law, such as canvassing or certifying election results."[807]

9.31.2. MYTH: A rogue Governor could thwart the Compact by simply refusing to issue the state's Certificate of Ascertainment.

QUICK ANSWER:

- Long-standing federal law requires that each state Governor issue an officially certified count of the popular votes cast in the state for each presidential-vice-presidential slate. Specifically, the Electoral Count Reform Act of 2022 requires that each state Governor issue a Certificate of Ascertainment containing the number of popular votes received by each candidate no later than six days before the Electoral College meeting.
- The National Popular Vote Compact does not rely on the personal preference or gracious cooperation of state Governors, but, instead, on their complying with federal law.
- The myth about rogue Governors "throwing the system into chaos" by refusing to issue the state's Certificate of Ascertainment is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that—if

---

[805] A writ of mandamus can generally be issued by a state court against lower-level state officials (such as a Secretary of State) or boards (such as a canvassing board) in all states. However, in some states, state courts cannot issue a writ of mandamus against the Governor. See Myer, Edward J. 1905. Mandamus against a Governor. *Michigan Law Review*. June 1905. Volume 3. Number 8. Pages 631–645. https://www.jstor.org/stable/1273996. In those states, the remedy would lie with the federal judiciary under the Electoral Count Reform Act of 2022.

[806] Muller, Derek T. 2023. Election Subversion and the Writ of Mandamus. *William and Mary Law Review*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829

[807] Hamilton, Kate. 2023. State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond. *The Yale Law Journal Forum*. November 22, 2023. Pages 271–272. https://www.yalelawjournal.org/forum/state-implementation-of-the-electoral-count-reform-act-and-the-mitigation-of-election-subversion-risk-in-2024-and-beyond#_ftnref11

legally possible—would be equally possible under the current system. In fact, the current system would be *more vulnerable* to this scary scenario than the Compact would be. A presidential candidate's entire *electoral-vote* lead came from a single state in 17 elections, but a candidate's entire *national-popular-vote* lead came from a single state in only six elections.

- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has advanced the theory that a rogue state Governor can thwart the National Popular Vote Compact by simply refusing to issue the state's Certificate of Ascertainment required by federal law.

In his testimony to the Connecticut Government Administration and Elections Committee in 2014, Parnell said:

> **"A very simple way for any non-member state to thwart the Compact, either intentionally or unintentionally,** would simply be to not submit their Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos**."[808] [Emphasis added]

Parnell wrote the following in 2021 in a memo on the Save Our States Blog:

> "**There are many ways non-member states could accidentally or intentionally interfere with NPV.**"
>
> "**NPV relies on the full cooperation and uniform vote reporting of every state**—including states that refuse to join the compact. This would **lead to an electoral crisis if any state is unable or unwilling to report vote totals cast, counted, and certified in the manner assumed by NPV**."[809] [Emphasis added]

In written testimony to the Michigan House Elections Committee on March 7, 2023[810]

---

[808] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

[809] Save Our States. 2021. Can non-member states thwart the NPV compact? Accessed May 22, 2021. https://saveourstates.com/uploads/Non-member-states.pdf

[810] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

and similar testimony in Nevada on May 2, 2023,[811] and Alaska on April 25, 2023,[812] Sean Parnell again asserted that the Compact could be thwarted:

> "If a state is simply refusing to cooperate with the compact."[813]

Under the 12th Amendment, the threshold required to win the presidency in the Electoral College is *not* an absolute majority of the number of electoral votes (as is often stated in informal discussions), but instead a "majority of the whole number of Electors *appointed*."

Thus, the failure of a state to appoint presidential electors would lower the number of electoral votes required to win the presidency in the Electoral College.

If it were true that a Governor had the unilateral power to prevent the appointment of his state's presidential electors, then any Governor whose personal preference differed from that of a plurality of that state's voters could unilaterally lower the number of electoral votes needed by his favored candidate.

A rogue Governor refusing to issue the state's Certificate of Ascertainment would not succeed in thwarting the Compact.

Contrary to the impression created by Save Our States, the process of certifying popular-vote counts does not rely on the personal preference or gracious cooperation of state Governors, but instead on their complying with existing federal law—as required by the Supremacy Clause of the U.S. Constitution.[814]

The Electoral Count Reform Act of 2022 requires:

> "§5(a)(1) Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment** of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

---

[811] Parnell, Sean. 2023. *Testimony of Sean Parnell Senior Director, Save Our States Action to the Legislative Operations and Elections Committee, Nevada Senate, Re: AJR6 (The National Popular Vote interstate compact), May 2, 2023.* Page 2. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=68316&fileDownloadName=SenLOE_AJR6Testimony_SeanParnell_SeniorDirector_SaveOurStatesAction.pdf

[812] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact), April 25, 2023.* Page 3. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238. Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[813] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[814] The Supremacy Clause of the U.S. Constitution (Article VI, clause 2) provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> "(2) Form of certificate—Each certificate of ascertainment of appointment of electors shall (A) set forth the names of the electors appointed and the canvass or other determination 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…."[815] [Emphasis added]

The 2022 Act also requires:

> "§5(b)(1) Transmission—It shall be the duty of the executive of each State—(1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors."[816,817] [Emphasis added]

The National Archives is, in turn, required to make the Certificates "public" and "open to public inspection."[818]

As described in more detail in section 9.30.1, the Electoral Count Reform Act of 2022 created a special three-judge federal court whose sole function is to enforce the federal requirement for the timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment.

The rogue Governor scenario—even if legally possible—provides no reason to favor the current system over the Compact.

The myth about rogue Governors "throwing the system into chaos" by refusing to issue the state's Certificate of Ascertainment is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that—even if legally possible—would be equally applicable to the current system.

If state Governors could refuse to issue their state's Certificate of Ascertainment under the National Popular Vote Compact, then they would necessarily possess this power today under the current system.

Almost every election provides numerous examples of states whose Governors belong to the political party opposite to the party that won their state in the presidential election.

In 2020, for example, Joe Biden won the Electoral College with 36 more electoral votes than the 270 required. Nonetheless, Biden's ascension to the presidency depended on certifications by Republican Governors. Republican Governors certified 42 of Biden's electoral votes in 2020, namely:

- Arizona—11 electoral votes—Governor Doug Ducey (R)
- Georgia—16 electoral votes—Governor Brian Kemp (R)

---

[815] The Electoral Count Reform Act of 2022 may be found in appendix B of this book.

[816] The Electoral Count Reform Act of 2022 may be found in appendix B of this book.

[817] Section 5(b)(1) of the 2022 Act further requires the executive of each state "to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate."

[818] This section is similar to the wording of the earlier Electoral Count Act of 1887 (which was in effect between 1887 and 2022).

- Massachusetts—11 electoral votes—Governor Charlie Brown (R)
- Vermont—3 electoral votes—Governor Phil Scott (R)
- Nebraska—1 electoral vote from the 2nd congressional district—Governor Pete Ricketts (R)

Alternatively, for the sake of argument, suppose that Donald Trump in 2020 had won the three states that gave him his Electoral College majority in 2016, namely Michigan, Pennsylvania, and Wisconsin. If Trump had retained these three states in 2020, their 46 electoral votes would have given him eight votes more than the 270 required for election. Nonetheless, Trump's re-election to the presidency in 2020 would have depended on certifications of 68 electoral votes by eight Democratic Governors, namely:

- Kansas—6 electoral votes—Governor Laura Kelly (D)
- Kentucky—8 electoral votes—Governor Andy Beshear (D)
- Louisiana—8 electoral votes—Governor John Bel Edwards (D)
- North Carolina—15 electoral votes—Governor Roy Cooper (D)
- Michigan—16 electoral votes—Governor Gretchen Whitmer (D)
- Pennsylvania—20 electoral votes—Governor Tom Wolf (D)
- Wisconsin—10 electoral votes—Governor Tony Evers (D)
- Maine—1 electoral vote from the 2nd congressional district—Governor Janet Mills (D)

Moreover, if state Governors could refuse to issue their state's Certificate of Ascertainment, the current system would be *more vulnerable* to this scary scenario than the National Popular Vote Compact.

Indeed, a presidential candidate's entire *electoral-vote* lead came from a single state in 17 presidential elections, but a candidate's entire *national-popular-vote* lead came from a single state in only six elections (as shown in table 9.16 and table 9.17 in section 9.4.3).

9.31.3. MYTH: A Secretary of State could 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:

- The U.S. Constitution gives state legislatures the power to choose their state's method of awarding its electoral votes. No state legislature has delegated this power to its Secretary of State.
- The role of the Secretary of State in certifying the winning slate of presidential electors is ministerial. It does not matter whether the Secretary of State personally thinks that electoral votes should be allocated by congressional district, proportionally, by the winner-take-all rule, or by a national popular vote.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

The following concern about the National Popular Vote Compact has been raised by a participant of the *Election Law Blog*:

> "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 reelection, as the NPV agreement would have required?"[819]

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

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[820] [Emphasis added]

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. No state election law gives the Secretary of State the power to select the manner of appointing the state's presidential electors.

No Secretary of State has the power to ignore or override the National Popular Vote Compact if it is the law in the state, any more than he or she could ignore or override the statewide winner-take-all method of awarding electoral votes.

The role of the Secretary of State in certifying the winning slate of presidential electors is ministerial. That is, the role of the Secretary of State is to execute the state's existing law. It does not matter whether the Secretary of State personally thinks that electoral votes should be allocated by the winner-take-all rule, by congressional district, in a proportional manner, or by a national popular vote.

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 existing 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).[821]

Note that if this hypothetical scenario were legally permissible or politically plausible, it would have occurred previously *under the current system*.

In 2000, George W. Bush received 271 electoral votes (including Florida's 25 electoral votes)—just one more than the magic number of 270.

---

[819] The rules of the *Election Law Blog* do not permit attribution.

[820] U.S. Constitution. Article II, section 1, clause 2.

[821] Muller, Derek T. 2023. Election Subversion and the Writ of Mandamus. March 5, 2023. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829

In 2000, there were 10 states[822] that George W. Bush carried that had a Democratic Secretary of State (or chief election official).[823]

The electoral votes of *any one* of these 10 states would have been sufficient to give Al Gore enough electoral votes to become President.

Of course, none of these 10 Democratic Secretaries of State attempted to override their state's existing winner-take-all law by certifying the election of presidential electors who supported the presidential candidate who received the most popular votes nationwide.

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 have been nullified by a state court, and almost certainly would have led to the subsequent impeachment of the Secretary of State attempting such a maneuver.

Moreover, awarding electoral votes proportionally in any of nine states with a Democratic Secretary of State at the time would have been sufficient to give Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes).[824] 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. This is, of course, a policy argument in favor of proportional allocation of electoral votes—not a legal argument.

In addition, awarding electoral votes by congressional districts in any of three states with a Democratic Secretary of State at the time[825] 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 represented the will of the people of each of these three states more closely than the winner-take-all rule. Again, this is a policy argument in favor of a system that a state might adopt, but the states involved had not enacted.

If a state legislature enacts the National Popular Vote Compact, and if the presidential campaign is then conducted with voters and candidates knowing that the Compact will govern the awarding of electoral votes in that state, then the Secretary of State will faithfully execute the state's law.

In short, the hypothesized scenario has no basis in law or political reality.

9.31.4. MYTH: A state could greatly inflate the vote count by reporting the cumulative number of votes cast for all of its presidential electors.

QUICK ANSWER:

- The vote tabulation specified by National Popular Vote Compact is based on the number of popular votes received by each "presidential slate"—not the cumulative number of votes received by all of the separate candidates for presidential elector.

---

[822] Al Gore's home state of Tennessee, Alaska, Arkansas, Georgia, Kentucky, Mississippi, Missouri, New Hampshire, North Carolina, and West Virginia.

[823] In Alaska, there is no Secretary of State, and the Lieutenant Governor is the state's chief election official.

[824] All of those previously mentioned except Alaska.

[825] Georgia, Missouri, and North Carolina.

- The (much larger) *cumulative* number of votes cast for all of a state's numerous presidential electors is not relevant to the calculation specified by the Compact.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted in accordance with the law.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States and a Vice President of the Oklahoma Council on Public Affairs,[826] proposed the following in a memo entitled "Can Non-Member States Thwart the NPV Compact?" on May 22, 2021:

> "**There are many ways non-member states could accidentally or intentionally interfere with NPV**."
>
> "A non-member state could … **multiply each individual vote by the number of electors, dramatically inflating the reported vote count**. If Oklahoma had done this in 2016, Donald Trump would have received more popular votes nationally than Hillary Clinton."[827] [Emphasis added]

Sean Parnell, Senior Legislative Director of Save Our States, provided written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024, saying:

> "The Compact can be easily gamed or manipulated. … **The chief election official of a state [could] report on its 'official statement' each voter as having cast as many votes as the state has presidential electors.** Based on the 2020 results, if Wyoming's Secretary of State … were to do so, it would add nearly a quarter net million votes to the Republican national vote totals."[828] [Emphasis added]

Let's examine England's and Parnell's claim in relation to Oklahoma—the state where the Oklahoma Council on Public Affairs is located.[829]

Oklahoma has seven electoral votes.

In 2016, 949,136 Oklahoma voters voted for the Trump-Pence presidential slate.[830]

The *cumulative* number of votes for *all seven* Republican presidential electors in Oklahoma in 2016 was 6,643,952—that is, seven times the number of *people* (949,136) who voted for the Trump-Pence slate.

---

[826] See web site of the Oklahoma Council on Public Affairs at https://ocpathink.org/about

[827] England, Trent. 2021. Can non-member states thwart the NPV compact? *Save Our States Blog*. Accessed May 22, 2021. https://saveourstates.com/uploads/Non-member-states.pdf

[828] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 6. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[829] Oklahoma ballots (like those of 46 other states) do not show the names of each party's seven candidates for the position of presidential elector. In 2020, only three states (Arizona, Idaho, and South Dakota) listed the names of the elector candidates on their ballots. Figure 3.3 shows Idaho's 2020 presidential ballot.

[830] Oklahoma's 2016 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2016/ascertainment-oklahoma.pdf

The authors of this book concede that England's and Parnell's "one-person-seven-votes" plan would indeed be "dramatically inflating."

England continued his advocacy of the "one-person-seven-vote" plan in a 2023 memo referring to the 2020 election (in which the Trump-Pence presidential slate received 1,020,280 votes[831] in Oklahoma):

> "According to the compact, NPV states **'shall treat as conclusive an official statement' of election returns from other states**. So no discretion, right? … NPV states must accept whatever a non-compact state reports as its results then? No matter what? The problem here is obvious.
>
> "The simplest recourse for anti-NPV states would be to report votes for a presidential slate as a vote for each presidential elector on that slate. **In Oklahoma, that would mean that each voter is casting seven votes**. Instead of Donald Trump receiving 1,020,280 votes in Oklahoma in 2020, the state could have reported the total as 7,141,960."[832] [Emphasis added]

The "one-person-seven-votes" scheme would not disrupt the operation of the National Popular Vote Compact.

There is no ambiguity about the fact that the vote tabulation specified by the National Popular Vote Compact is the number of popular votes received by each "presidential slate"—not the cumulative number of votes received by all of the separate candidates for presidential elector in a state.

The (much larger) cumulative number of votes cast for all of a state's presidential electors is no more relevant to the calculation specified by the Compact than the temperature on the steps of the Oklahoma State Capitol on Election Day.

Article III, clause 1 of the Compact states:

> "[T]he 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]

Article V of the Compact defines the term "presidential slate" as follows:

> "**'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…." [Emphasis added]

---

[831] Oklahoma's 2020 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2020/ascertainment-oklahoma.pdf

[832] Save Our States. 2023. NPV Compact Quirks: Ignoring Non-Compact States. August 25, 2023. Accessed July 13, 2024. https://saveourstates.com/blog/npv-compact-quirks-ignoring-non-compact-states

Article III, clause 5 of the Compact says:

> "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**." [Emphasis added]

Recall that when Trent England described his plan for "dramatically inflating" Oklahoma's vote, he started by quoting seven words directly from the National Popular Vote Compact. The seven accurately quoted words are shown in green below. However, England then stopped quoting from the Compact and switched to vague words of his own invention (shown in red below). The relevant sentence in England's explanation is shown below:

> "According to the compact, NPV states 'shall treat as conclusive an official statement' of election returns from other states."[833]

The National Popular Vote Compact does not use the vague words "election returns." It uses the words "number of popular votes in a state for each presidential slate."

The "one-person-seven-votes" plan would not succeed in thwarting the National Popular Vote Compact.

Now, for the sake of argument, let's consider what would have happened if the National Popular Vote Compact had been in effect in 2020 and a hypothetical Oklahoma Governor had tried to implement England's and Parnell's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote.

That is, what would have happened if a Governor had issued a Certificate of Ascertainment containing the number 7,141,960 (the cumulative number of votes received by the seven Republican presidential electors) rather than 1,020,280 (the actual number of *people* who voted for the Trump-Pence slate in 2020)?

As a point of reference, let's start by looking at what Oklahoma's Governor actually did in 2020.

Governor J. Kevin Stitt issued an accurate Certificate in 2020 stating that the Trump-Pence presidential slate received 1,020,280 votes, as shown in figure 9.19, figure 9.20, and figure 9.21.[834]

There are two ways that a hypothetical Governor could have tried to implement England's "one-person-seven-votes" plan.

Case 1—The Governor is forthright and honest.

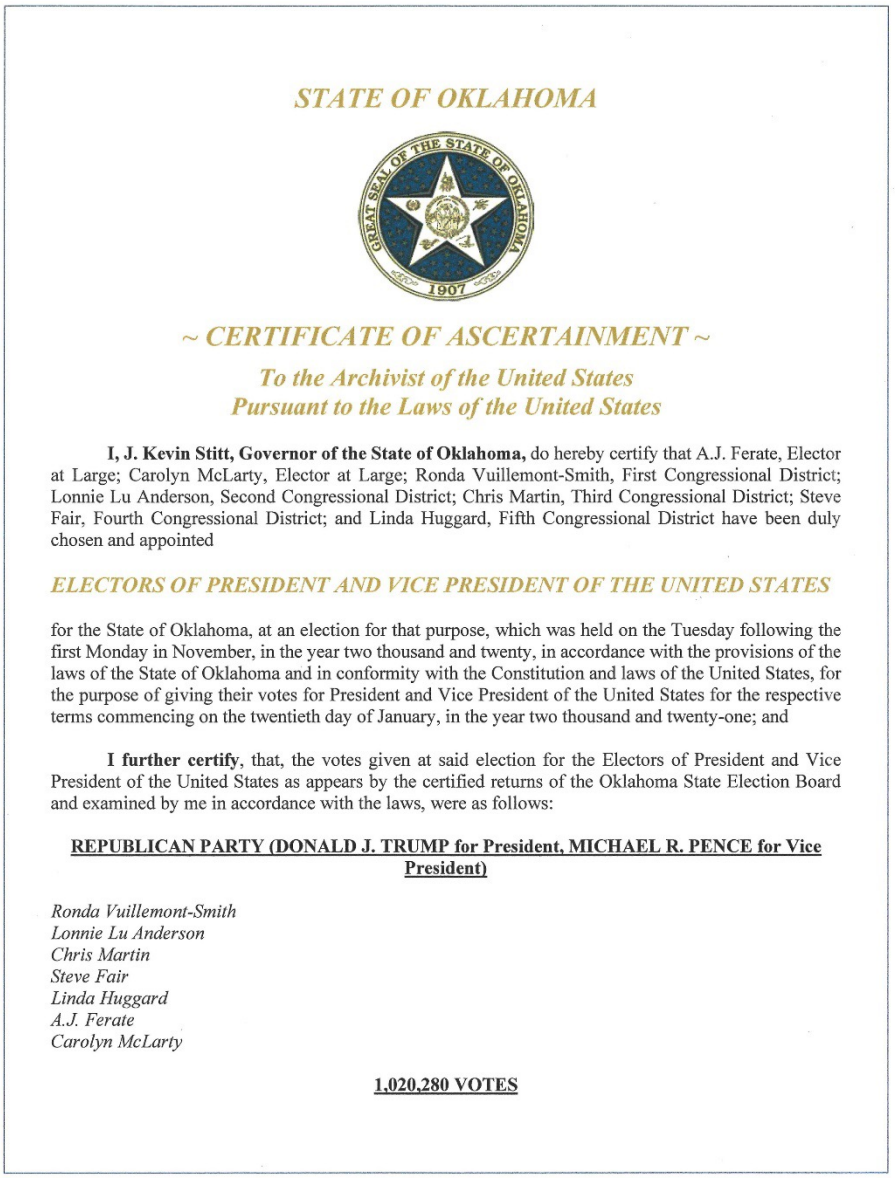
In Oklahoma (and every other state), the presidential vote count is compiled by some designated body (e.g., the state canvassing board) or official (e.g., the Secretary of State) and their employees.

In Oklahoma, the certified vote count is produced by the State Elections Board.

---

[833] Save Our States. 2023. NPV Compact Quirks: Ignoring Non-Compact States. August 25, 2023. Accessed July 13, 2024. https://saveourstates.com/blog/npv-compact-quirks-ignoring-non-compact-states

[834] Oklahoma's 2020 Certificate of Ascertainment may be also be viewed at the National Archives web site at https://www.archives.gov/files/electoral-college/2020/ascertainment-oklahoma.pdf



STATE OF OKLAHOMA

~ CERTIFICATE OF ASCERTAINMENT ~

To the Archivist of the United States
Pursuant to the Laws of the United States

I, J. Kevin Stitt, Governor of the State of Oklahoma, do hereby certify that A.J. Ferate, Elector at Large; Carolyn McLarty, Elector at Large; Ronda Vuillemont-Smith, First Congressional District; Lonnie Lu Anderson, Second Congressional District; Chris Martin, Third Congressional District; Steve Fair, Fourth Congressional District; and Linda Huggard, Fifth Congressional District have been duly chosen and appointed

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

for the State of Oklahoma, at an election for that purpose, which was held on the Tuesday following the first Monday in November, in the year two thousand and twenty, in accordance with the provisions of the laws of the State of Oklahoma and in conformity with the Constitution and laws of the United States, for the purpose of giving their votes for President and Vice President of the United States for the respective terms commencing on the twentieth day of January, in the year two thousand and twenty-one; and

I further certify, that, the votes given at said election for the Electors of President and Vice President of the United States as appears by the certified returns of the Oklahoma State Election Board and examined by me in accordance with the laws, were as follows:

REPUBLICAN PARTY (DONALD J. TRUMP for President, MICHAEL R. PENCE for Vice President)

Ronda Vuillemont-Smith
Lonnie Lu Anderson
Chris Martin
Steve Fair
Linda Huggard
A.J. Ferate
Carolyn McLarty

1,020,280 VOTES

Figure 9.19 Oklahoma's actual 2020 Certificate of Ascertainment—Page 1

The Board's role as the source of the state's popular-vote count is explicitly acknowledged on page 1 of Governor Stitt's 2020 Certificate of Ascertainment (figure 9.19), which referred to "the certified returns of the Oklahoma State Election Board."

The minutes of the Board (figure 6.1) show that the Board met a week after Election Day in 2020 and certified 1,020,280 votes for the Trump-Pence slate.[835]

[835] The Oklahoma State Board of Elections met on November 10, 2020. The agenda of the meeting https://oklahoma.gov/content/dam/ok/en/elections/agendas/agendas-2020/agenda-11102020.pdf The "meeting packet"

LIBERTARIAN PARTY (JO JORGENSEN for President, JEREMY SPIKE COHEN for Vice President)

Erin Adams
Danny Chabino
Drew Cook
Kevin Hobbie
Rex Lawhorn
Jay Norton
Victoria Whitfield

24,731 VOTES

DEMOCRATIC PARTY (JOSEPH R. BIDEN for President, KAMALA D. HARRIS for Vice President)

Judy Eason McIntyre
Eric Proctor
Jeff Berrong
Christine Byrd
Demetrius Bereolos
Pamela Iron
Shevonda Steward

503,890 VOTES

INDEPENDENT (JADE SIMMONS for President, CLAUDELIAH J. ROZE for Vice President)

Shanda Carter
Terrence Stephens
Hope Stephens
Elizabeth Stephens
Dakota Hooks
Phalanda Boyd
Quincy Boyd

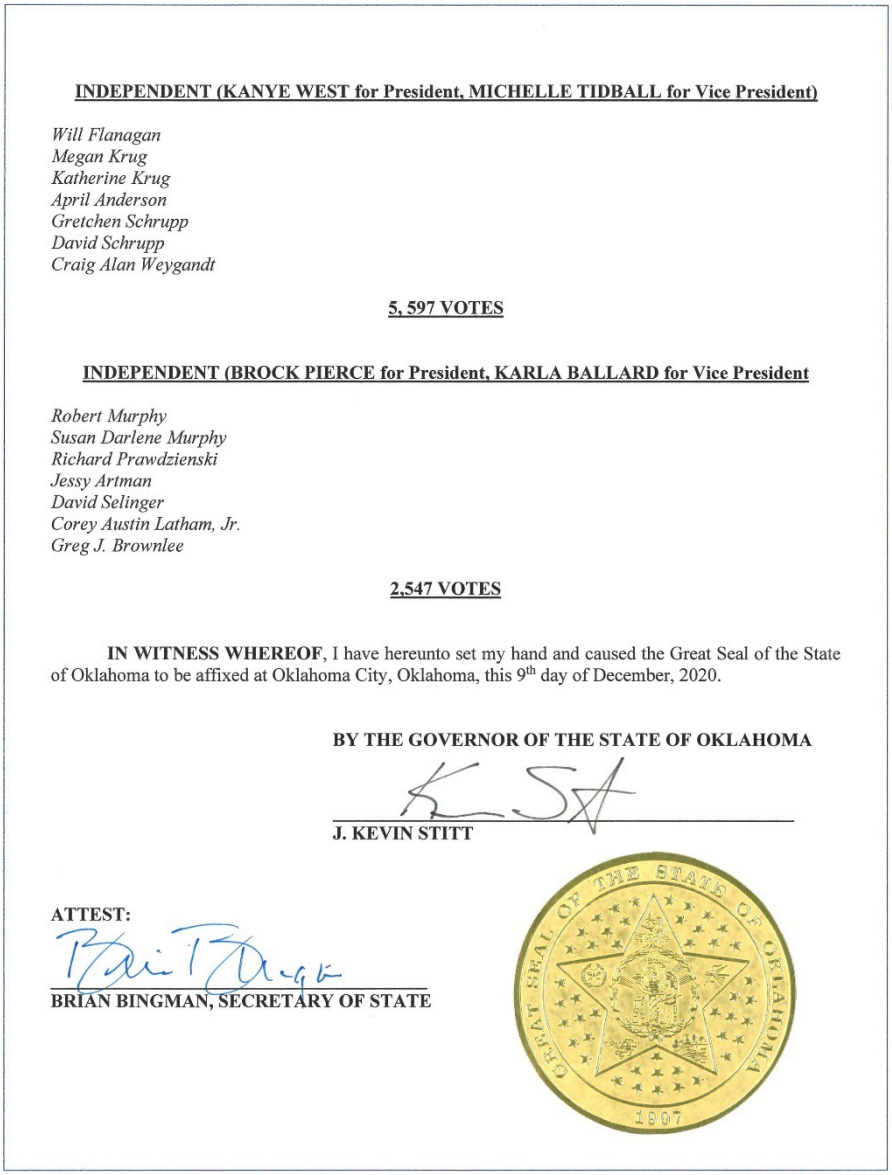
3,654 VOTES

Figure 9.20 Oklahoma's actual 2020 Certificate of Ascertainment—Page 2

If the hypothetical Governor were forthright, the state's Certificate of Ascertainment would make clear that the Trump-Pence slate had received 1,020,280 votes—just as Governor Stitt's actual 2020 Certificate did.

---

containing the statewide vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/election-results/2020-election-results/2020-general-election-results/meeting-packet-11102020.pdf The minutes of the meeting showing the Board's certification of the vote counts are at https://oklahoma.gov/content/dam/ok/en/elections/minutes/2020-minutes/minutes-11102020.pdf



INDEPENDENT (KANYE WEST for President, MICHELLE TIDBALL for Vice President)

Will Flanagan
Megan Krug
Katherine Krug
April Anderson
Gretchen Schrupp
David Schrupp
Craig Alan Weygandt

5, 597 VOTES

INDEPENDENT (BROCK PIERCE for President, KARLA BALLARD for Vice President

Robert Murphy
Susan Darlene Murphy
Richard Prawdzienski
Jessy Artman
David Selinger
Corey Austin Latham, Jr.
Greg J. Brownlee

2,547 VOTES

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 9th day of December, 2020.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

J. KEVIN STITT

ATTEST:

BRIAN BINGMAN, SECRETARY OF STATE

GREAT SEAL OF THE STATE OF OKLAHOMA 1907

Figure 9.21 Oklahoma's actual 2020 Certificate of Ascertainment—Page 3

A Governor conceivably might gratuitously include the much larger number (7,141,960) in his Certificate. When properly labeled, the cumulative number of votes cast for the seven Republican candidates for presidential elector would simply be unneeded and irrelevant, but harmless, additional information.

Upon examining Oklahoma's Certificate, the officials of states belonging to the National Popular Vote Compact would, of course, follow their own state's law (that is, the Compact) and use the number specified by the Compact in their calculation of the national popular vote. That is, the officials of states belonging to the Compact would ignore

the irrelevant inflated number (7,141,960) and uneventfully record 1,020,280 votes for the Trump-Pence slate. They would use:

> "the number of popular votes in a state for each presidential slate."[836]

In short, Trent England's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote in order to "interfere with NPV" would fizzle if the Governor were forthright and honest.

Case 2—The Governor is not forthright.

In fact, outright deception is the only way to try to execute England's and Parnell's plan for "dramatically inflating" Oklahoma's vote.

The obvious way to try to execute the deception would be for the hypothetical Governor to issue a Certificate containing Oklahoma's historically used wording (such as used in 2016[837] and 2020 and earlier years) and then insert the inflated cumulative number (7,141,960) in lieu of the actual number of *people* who voted for the Republican presidential slate (1,020,280).

England and Parnell apparently think that inserting a fraudulent number (considerably larger than the state's population) would go unnoticed and unchallenged.

At least two groups would be keenly interested in the fraudulent number.

Lawyers and political operatives working with each presidential campaign routinely scrutinize the actions of canvassing boards, canvassing officials, and Governors throughout every step of the vote-counting and vote-certification process.[838] These scrutineers would have been aware that the Oklahoma State Election Board certified the fact that the Trump-Pence slate received 1,020,280 votes on November 10, 2020 (a week after Election Day).

More importantly, if the National Popular Vote Compact were in effect, the chief election officials of states belonging to it would also be aware that the Oklahoma Board had certified 1,020,280 votes for the Trump-Pence slate.[839] The officials of the states belonging to the Compact would have the minutes of the Oklahoma State Election Board in their possession.

Because the inflated number (7,141,960) in the fraudulent Certificate eventually issued by the hypothetical Governor is manifestly not the number that the Compact requires to be used to compute the national popular vote total, the chief election officials of the states belonging to the Compact would simply use the correct number already in their possession from the state's canvassing board.

---

[836] National Popular Vote Compact. Article III, clause 5.

[837] Oklahoma's 2016 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2016/ascertainment-oklahoma.pdf

[838] 7,141,960 is almost twice Oklahoma's population of 3,959,353 (2020 census).

[839] While the chief election official of each member state might choose to individually monitor the vote-counting and vote-certification process in every other state, it is far more likely—as a matter of practicality and efficiency—that these officials would have pre-designated (by executive agreement) one or two of their members (perhaps on a rotating basis, from year to year) to act as a clearinghouse to collect and distribute certified copies of the officially certified vote count produced by each state's canvassing board or official.

The result would be that England's and Parnell's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote in order to "interfere with NPV" would have no effect on the operation of the Compact.

Although England's and Parnell's plan would have fizzled in terms of interfering with the operation of the Compact, the presidential candidate who won the national popular vote would almost certainly want to see an official correction made in the fraudulent Certificate issued by the hypothetical Governor.

To do this, the disfavored candidate could use state courts. However, a disfavored candidate today would more likely use the special three-judge federal court created by the Electoral Count Reform Act of 2022. This court is open only to presidential candidates and was specifically created to consider cases concerning the "issuance" of a state's Certificate of Ascertainment and its timely "transmission" to the National Archives. The 2022 Act gives this court the power to revise a Governor's fraudulent Certificate.

This new court is to operate on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[840] do not apply. There is expedited appeal to the U.S. Supreme Court. Given that the Constitution requires that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

9.31.5. MYTH: Keeping election returns secret could thwart the Compact.

QUICK ANSWER:

- Lobbyists opposing the National Popular Vote Compact have promoted legislation in four states aimed at thwarting the Compact by keeping the popular-vote count secret during the 42 days between Election Day and the Electoral College meeting.
- Federal law guarantees that each state's popular-vote counts would be made public before the Electoral College meets.
- The secret-elections bill promoted by opponents of the Compact would have violated the 1887 federal law that applied at the time it was first proposed. The Electoral Count Reform Act of 2022 provides additional protections against secret elections.
- The secret-elections bill had numerous practical flaws that would have prevented it from ever becoming operational.
- The proposal for conducting secret elections is an antidemocratic parlor game untethered to the real world of law, politics, or public opinion.

[840] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, testified before a Connecticut state legislative committee on February 24, 2014, saying:

> "**A very simple way for any non-member state to thwart the Compact**, either intentionally or unintentionally, would simply be to not submit their Certificate or release it to the public until after the electoral college has met. **This simple act would leave states that are members of the compact without vote totals from every state, throwing the system into chaos**."[841] [Emphasis added]

The first state legislative bill to implement Parnell's plan for secret elections was introduced in New Hampshire on January 8, 2020.[842]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, wrote in the *Daily Signal* on January 14, 2020:

> "New Hampshire legislators have introduced an election bill that would be **completely unacceptable under normal circumstances. But these are not normal times**.
>
> "Constitutional institutions, especially the Electoral College, are under attack.
>
> "**Extraordinary action may be needed.** Thus, some New Hampshire legislators have proposed to withhold popular vote totals at the conclusion of a presidential election. The numbers would eventually be released, but not until after the meetings of the Electoral College.
>
> "**The idea sounds crazy and anti-democratic. In reality, however, such proposals could save our republic**: They will complicate efforts to implement the National Popular Vote legislation that has been working its way through state legislatures."[843] [Emphasis added]

We agree with Ross that the idea of secret elections is "crazy," "anti-democratic," and "completely unacceptable." We disagree with her call to action to save the Republic.

An article in the conservative publication *Townhall* on January 18, 2020, entitled "National Popular Vote Opponents Are Afraid of the Constitution" took exception to the New Hampshire secret-elections bill:

> "The tinfoil hat wearers, the faction that includes moon-landing deniers and the kind of crackpots William F. Buckley Jr. and Russell Kirk expelled from mainstream conservatism, has set its sights on derailing the National Popu-

---

[841] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

[842] New Hampshire House Bill 1531 of 2020 entitled "Relative to the release of voting information in a presidential election." https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/

[843] Ross, Tara. 2020. New Hampshire Is Fighting Back to Defend the Electoral College. *Daily Signal*. January 14, 2020. https://www.dailysignal.com/2020/01/14/new-hampshire-is-fighting-back-to-defend-the-electoral-college/

> lar Vote Interstate Compact. … **One pundit is actually suggesting that the Granite State defy federal law,** specifically section 3, title 3 of the U.S. code—a provision in effect since 1887—to throw a monkey wrench into the final nationwide tally for president. **This particularly nutty idea** would involve New Hampshire refusing to submit the state's official vote count until after electors meet."[844] [Emphasis added]

Shortly thereafter, the New Hampshire House committee unanimously rejected the bill.[845]

Meanwhile, in South Dakota on February 10, 2020, South Dakota Senator Jim Stalzer urged a Senate committee to pass a similar bill:

> "This is a small way we can slow down, delay or even prevent the National Popular Vote from undoing what the founders so carefully put together."[846]

The executive director of the South Dakota Newspaper Association, Dave Bordewyk, testified in opposition to the secret-elections bill, saying:

> "Our concern with this bill is the withholding of the actual votes from the public after an election."
>
> "[Withholding vote totals would raise] suspicions in the minds of those who participated in the election."[847,848]

On February 12, 2020, the South Dakota Senate killed the bill by a 31–1 vote.[849]

In 2021, a similar secret-elections bill was introduced in Mississippi, but it died in committee.[850]

However, a similar bill gained some traction in North Dakota in 2021.[851]

---

[844] Herzog, Ashley. 2020. National Popular Vote Opponents Are Afraid of the Constitution. *Townhall*. January 18, 2020. https://townhall.com/columnists/ashleyherzog/2020/01/18/national-popular-vote-opponents-are-afraid-of-the-constitution-n2559694

[845] On January 28, 2020, former Michigan Republican Chair Saul Anuzis testified on behalf of the National Popular Vote organization against the bill. See Testimony Against the Secret Presidential Elections Bill (HB1531) by Saul Anuzis at the New Hampshire House Committee on Election Law https://www.nationalpopularvote.com/sites/default/files/testimony-nh-bill-hb1531-secret_elections-2020-1-28.pdf

[846] Hess, Dana. 2020. GOP bill keeps presidential election vote totals a secret in state. *Rapid City Journal*. February 10, 2020. https://rapidcityjournal.com/news/local/gop-bill-keeps-presidential-election-vote-totals-a-secret-in/article_d557b7d1-19b8-5f57-ae23-e4867bdd7c97.html

[847] *Ibid*.

[848] Heidelberger, Cory Allen. 2020. SB 103: Stalzer Sabotaging National Popular Vote by Keeping South Dakota Vote Count Secret? *Dakota Free Press*. February 10, 2020. https://dakotafreepress.com/2020/02/10/sb-103-stalzer-sabotaging-national-popular-vote-by-keeping-south-dakota-vote-count-secret/

[849] South Dakota SB103 of 2020. Limit the disclosure of presidential election results and to provide for a suspension of such disclosure. http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=103&Session=2020

[850] Mississippi SB2549 of 2021. Election results; prohibit the release of the number of votes cast for the Office of President of the United States. http://billstatus.ls.state.ms.us/2021/pdf/history/SB/SB2549.xml

[851] North Dakota SB2271 of 2021. An Act relating to withholding vote totals for presidential elections. https://ndlegis.gov/assembly/67-2021/regular/bill-overview/bo2271.html?bill_year=2021&bill_number=2271

In written testimony to the North Dakota Senate Government and Veterans Affairs Committee on February 11, 2021, Tara Ross said:

> "**The Electoral College is under attack, and this legislative body can do something about it**. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement."
>
> "**The goal of withholding vote totals is to confuse NPV's efforts to tabulate a national popular vote, without which the compact fails**."[852] [Emphasis added]

Former North Dakota State Senator Curtis Olafson provided written testimony saying:

> "Senate Bill 2271 is intended to thwart the NPVIC should it ever reach 270 Electoral College votes."[853]

On February 10, 2021 (one day before a North Dakota Senate committee hearing), Sean Parnell summarized the Save Our States effort to pass secret election legislation:

> "**What if a state was deliberately trying to thwart the compact? Could they deny NPV compact states access to the vote totals they needed to operate?** Last year legislation was introduced in New Hampshire, HB 1531, that would prevent the release of vote totals prior to the meeting of the Electoral College. Two more states, Mississippi and North Dakota, have similar bills this year (HB 1176 and SB 2271, respectively).
>
> "**This legislation is specifically aimed at thwarting NPV**."[854] [Emphasis added]

The only written testimony submitted to the North Dakota Senate committee hearing on February 11 on the secret-elections bill was the supportive testimony from Tara Ross and former State Senator Olafson. The committee approved the bill, and five days later, the North Dakota Senate passed it by a 43–3 vote.

The Senate-passed bill required that the popular-vote count be kept secret until after the Electoral College meeting (which is currently 42 days after Election Day). It read:

> "Unless a recount has been requested under chapter 16.1-16 or a contest is initiated under this chapter, **a public officer, employee, or contractor of this state or of a political subdivision of this state may not release to the**

---

[852] Ross, Tara, 2021. Written testimony on SB 2271 to the North Dakota Senate Government and Veterans Affairs Committee. February 11, 2021. https://ndlegis.gov/assembly/67-2021/testimony/SGVA-2271-20210211-6352-F-ROSS_TARA.pdf

[853] Olafson, Curtis. 2021. Written testimony on SB 2271 to the North Dakota Senate Government and Veterans Affairs Committee. February 11, 2021. https://ndlegis.gov/assembly/67-2021/testimony/SGVA-2271-20210211-6349-F-OLAFSON_CURTIS.pdf

[854] Parnell, Sean. 2021. States consider preemptive measures against National Popular Vote. *Save Our States Blog*. February 10, 2021. Accessed July 13, 2024. https://saveourstates.com/blog/states-consider-preemptive-measures-against-national-popular-vote

> **public the number of votes cast in the general election** for the office of the president of the United States **until after the times set by law for the meetings and votes of the presidential electors in all states**. After the votes for presidential electors are canvassed, **the secretary of state may release the percentage of statewide votes cast for each set of presidential electors to the nearest hundredth of a percentage point**, a list of presidential candidates in order of increasing or decreasing percentage of the vote received by presidential electors selected by the candidates, and the presidential candidate whose electors received the highest percentage of votes."
>
> "**This Act becomes effective** upon certification by the secretary of state to the legislative council of the adoption and enactment of substantially the same form of **the national popular vote interstate compact has been adopted and enacted** by a number of states cumulatively possessing a majority of the electoral college votes."[855] [Emphasis added]

The North Dakota House then held a hearing at which both supporters and opponents of the bill testified.

The web site of the group opposing the secret-elections bill ("No Secret Elections") said:

> "SB2271 is a bill moving through the North Dakota Legislature that would make presidential election vote totals secret until about seven weeks after Election Day, when the Electoral College meets.
>
> "Proponents of the bill think it could stop implementation of the National Popular Vote Interstate Compact, which is progressing towards enactment, by preventing the ascertainment of the national vote for president. They are wrong.
>
> "Whatever one thinks about the National Popular Vote Interstate Compact, the "secret elections" bill, SB2271, is a downright scary idea: It threatens the foundations of North Dakota elections, and it could rob North Dakota voters of their voice in presidential elections.
>
> "Bills almost identical to SB2271 were defeated in the South Dakota Senate by a 32–1 vote in 2020, rejected unanimously by a New Hampshire House committee in 2020, and died in committees in the Mississippi House and Senate already in 2021. North Dakota would be wise also to reject the bizarre idea of keeping election results secret."[856]

---

[855] Engrossed Senate bill SB2271. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-02000.pdf

[856] See https://www.nosecretelections.com/

Various editorials, op-eds, public comments, and news articles covered the debate.[857,858,859,860]

After the public hearing, the House deleted everything in the Senate bill and replaced it with a bill urging Congress to oppose the National Popular Vote Compact. The House's substitute bill stated:

> "The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution."[861]

A House–Senate conference committee then met to reconcile the differences between the two bills.

The conference committee adopted the House-passed bill expressing the legislature's opposition to the National Popular Vote Compact and added the following provision calling for a study:

> "During the 2021-22 interim**, the legislative management shall consider studying how to defeat the effort of the national popular vote interstate compact** to ensure the electoral college process is preserved as prescribed in the United States Constitution. **The study also must include** examination of how states report presidential election results and **whether states report the results using vote percentages or vote totals**."[862] [Emphasis added]

The conference committee's bill then passed the Senate by a 39–8 vote, and the House by an 80–12 vote, and the Governor signed it.

After the legislature adjourned, "the legislative management" quietly decided not to bother with the study.

---

[857] Tribune editorial: Keeping vote count secret a bad solution. *Bismark Tribune*. March 10, 2021. https://bismarcktribune.com/opinion/editorial/tribune-editorial-keeping-vote-count-secret-a-bad-solution/article_b085761c-21c5-545f-abcd-cc6f9af7d638.html

[858] Hennen, Scott. 2021. Bizarre election bill, SB2271, must be defeated. *Minot Daily News*. February 20, 2021. https://www.minotdailynews.com/opinion/community-columnists/2021/02/bizarre-election-bill-sb2271-must-be-defeated/

[859] Port, Bob. 2021. Plain Talk: North Dakota Senate has passed a bill hiding presidential vote counts. *Inforum*. February 24, 2021. https://www.inforum.com/opinion/plain-talk-north-dakota-senate-has-passed-a-bill-hiding-presidential-vote-counts

[860] Gerszewski, Matt. 2021. Letter to editor. *Inforum*. March 3, 2021. https://www.inforum.com/opinion/letter-death-to-north-dakotas-secret-election-act

[861] Engrossed Senate bill SB2271 with House amendments. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-03000.pdf

[862] Engrossed Senate bill SB2271 with conference committee amendments. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-04000.pdf

The first way that the secret-elections bill violates federal law is that the law requires the state's Certificate of Ascertainment to contain the actual number of popular votes—not percentages.

The law that eventually passed in North Dakota in 2021 asked the legislative leadership to consider conducting an interim study as to:

> "whether states report the results using vote percentages or vote totals."

An elaborate study is not necessary to answer the question of whether a state may report the results of its presidential election using percentages rather than the actual number of votes.

Both the Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 are identical in that they require each state to report the number of votes cast—not percentages.

Both the 1887 law and the 2022 law are identical in that they require:

> "The **canvass** or other determination 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."[863] [Emphasis added]

North Dakota's 2020 Certificate of Ascertainment (figure 9.22) is an example of a certificate that complies with federal law in that it shows the number of popular votes that each candidate received. As can be seen from North Dakota's 2020 Certificate, the state Board of Canvassers met on November 13 (shortly after Election Day) and certified the number of popular votes won by each presidential slate. A week later (November 20), the Governor and Secretary of State signed the state's Certificate of Ascertainment.

As in most states, North Dakota's Certificate was issued well before the so-called Safe Harbor Day of December 8, 2020, and well before the Electoral College meeting date of December 14, 2020.

The second way that the secret-elections bill violates federal law is that the law requires the state's Certificate of Ascertainment to be issued no later than six days before the Electoral College meets.

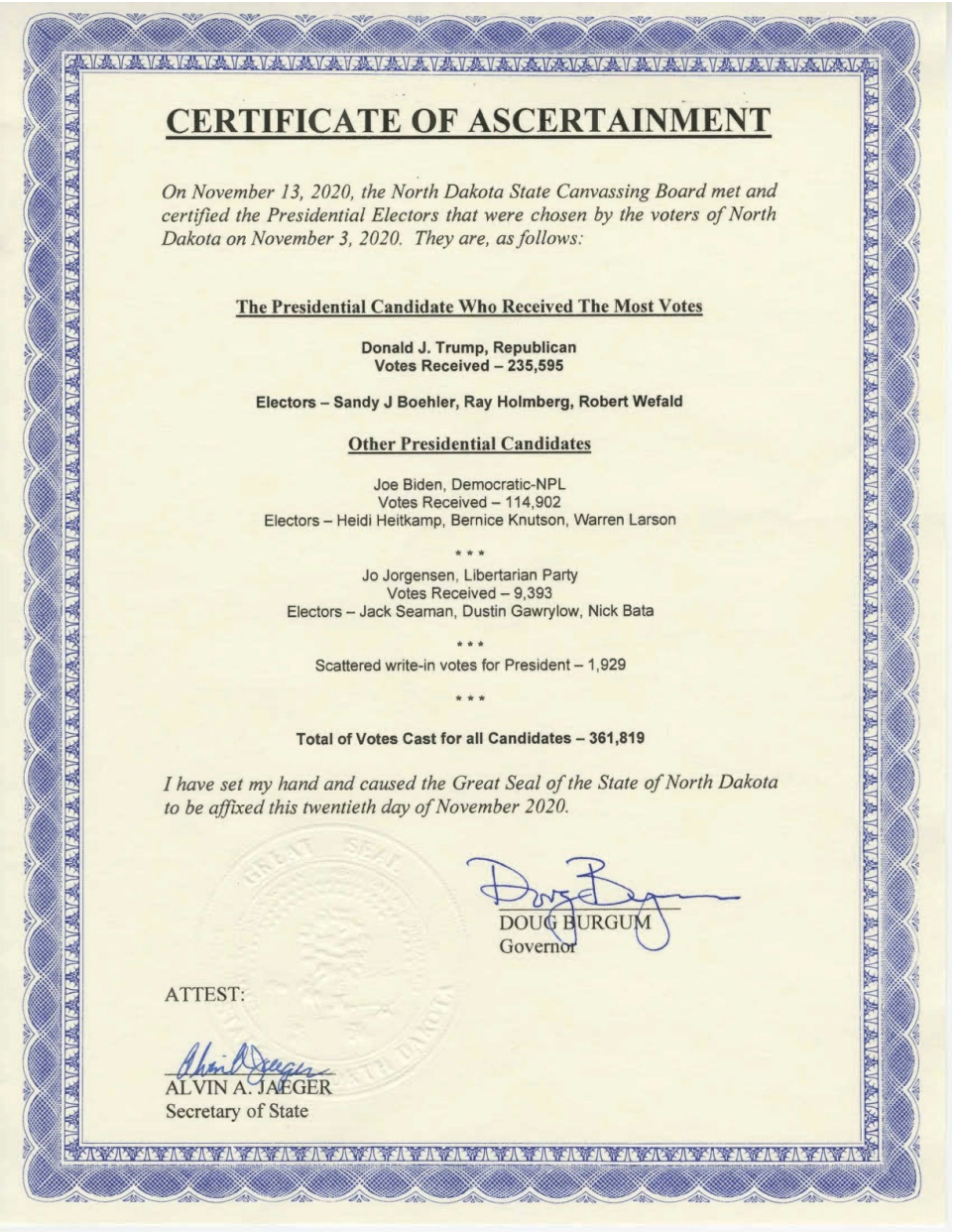
No state may play "hide the ball" with its popular-vote counts.

The Electoral Count Reform Act of 2022 requires:

> "§5(a)(1) Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment** of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

---

[863] The Electoral Count Reform Act of 2022 is found in appendix B of this book. The earlier Electoral Count Act of 1887 is found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition



CERTIFICATE OF ASCERTAINMENT

On November 13, 2020, the North Dakota State Canvassing Board met and certified the Presidential Electors that were chosen by the voters of North Dakota on November 3, 2020. They are, as follows:

The Presidential Candidate Who Received The Most Votes

Donald J. Trump, Republican
Votes Received – 235,595

Electors – Sandy J Boehler, Ray Holmberg, Robert Wefald

Other Presidential Candidates

Joe Biden, Democratic-NPL
Votes Received – 114,902
Electors – Heidi Heitkamp, Bernice Knutson, Warren Larson

* * *

Jo Jorgensen, Libertarian Party
Votes Received – 9,393
Electors – Jack Seaman, Dustin Gawrylow, Nick Bata

* * *

Scattered write-in votes for President – 1,929

* * *

Total of Votes Cast for all Candidates – 361,819

I have set my hand and caused the Great Seal of the State of North Dakota to be affixed this twentieth day of November 2020.

DOUG BURGUM
Governor

ATTEST:

ALVIN A. JAEGER
Secretary of State

Figure 9.22 North Dakota's 2020 Certificate of Ascertainment

"(2) Form of certificate—Each certificate of ascertainment of appointment of electors shall (A) set forth the names of the electors appointed and the canvass or other determination 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]

The third way that the secret-elections bill violates federal law is that the law prevents the state's Certificate of Ascertainment from being kept secret until after the Electoral College meeting.

As previously mentioned, the North Dakota Governor and Secretary of State signed the Certificate on November 20, 2020—weeks before the Safe Harbor Day of December 8, 2020, and the Electoral College meeting date of December 14, 2020.

However, even if the Governor and Secretary of State had kept the signed Certificate secret until the Safe Harbor Day (or even if they had delayed issuing the Certificate until that day), they would have been unable to continue to keep North Dakota's vote counts secret.

Federal law requires that the Certificate be "immediately" transmitted to the National Archives in Washington using "the most expeditious method available." A courier from any state capital would take, at most, overnight.

The Electoral Count Reform Act of 2022 requires:

> "§5(b)(1) Transmission—It shall be the duty of the executive of each State—(1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors."[864] [Emphasis added]

Certificates received by the National Archives must be open to public inspection according to section 6 of the 2022 Act.

The requirement for immediate transmission of the Certificate was adopted as a committee amendment during the Senate Administration Committee's consideration of the Electoral Count Reform Act of 2022 in order to prevent secret elections.

As a result of this amendment, a Governor cannot, for example, delay the start of the Certificate's journey to Washington until after the Electoral College meets (and then belatedly send it by "the most expeditious method available").

Thus, if the Governor complies with federal law, the Certificate will arrive at the National Archives in Washington no later than the morning of the fourth day before the Electoral College meeting.

A secret-elections bill would not succeed in keeping a state's vote count secret, because presidential candidates have direct access to a new three-judge federal court whose sole role is to enforce the timely issuance and immediate transmission of Certificates of Ascertainment.

The Electoral Count Reform Act of 2022 created a special three-judge federal court that is open only to presidential candidates.

The new court's sole functions are to guarantee rapid enforcement of the requirement for:

---

[864] Section 5(b)(1) of the 2022 Act further requires the executive of each state "to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate."

- timely "issuance" and
- prompt "transmission" of each state's Certificate of Ascertainment to federal officials.

These are precisely the issues that would be presented by an attempt to keep presidential vote counts secret.

This court is to operate on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[865] do not apply. There is expedited appeal to the U.S. Supreme Court.

Given that the Constitution provides that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

Secret election laws would deny voters the right to have their vote count.

All 50 states and the District of Columbia currently allow their voters to cast a vote for President. However, each state legislature has the power (under Article II, section 1 of the U.S. Constitution) to choose the method for selecting the state's presidential electors.

Thus, the legislature could authorize itself—instead of the people—to select the state's presidential electors. Indeed, state legislative appointment of presidential electors was the method used by several states in the early years of the Republic.

However, once a state legislature allows its voters to choose the state's presidential electors, each voter acquires the fundamental right to have his or her vote counted.

The U.S. Supreme Court has noted:

> "[I]t is 'as equally unquestionable that **the right to have one's vote counted is as open to protection … as the right to put a ballot in a box**.'" *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) (quoting *United States v. Mosley*, 238 U.S. 383, 386 (1915))." [Emphasis added]

In the Voting Rights Act, Congress codified the definition of the right to vote to:

> "include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to … having such ballot counted properly and **included in the appropriate totals of votes cast**."[866] [Emphasis added]

Secret elections would deprive the state's voters of the full value of their votes.

---

[865] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

[866] 52 U.S. Code section 10310(c)(1).

The secret-elections bill would never become operational, because its secrecy provision is automatically suspended if any candidate initiates a recount or a contest. The defects of the original Senate version of North Dakota's secret-elections bill go far beyond noncompliance with federal law.

The author of the North Dakota bill (and the similar bills introduced in New Hampshire, South Dakota, and Mississippi) recognized the inherent conflict between secrecy and the ability to recount or contest an election.

Thus, the North Dakota bill provided that its secrecy requirement would be automatically suspended if a recount (an administrative proceeding) were to be requested or a contest (a judicial proceeding) were to be initiated.

That is, a single presidential candidate could unilaterally disable operation of the North Dakota secret-elections bill merely by requesting a recount or initiating a contest—regardless of the request's merits or its ultimate disposition. Specifically, the bill provided:

> "**Unless a recount has been requested under chapter 16.1-16 or a contest is initiated under this chapter**, a public officer, employee, or contractor of this state or of a political subdivision of this state may not release to the public the number of votes cast in the general election for the office of the president of the United States until after the times set by law for the meetings and votes of the presidential electors in all states." [Emphasis added]

Of course, the Republican presidential nominee would be especially anxious to see North Dakota's popular votes included in the national popular vote total.

Although the current state-by-state winner-take-all method of awarding electoral votes makes North Dakota politically irrelevant in present-day presidential campaigns, the state's overwhelming Republican margin would be very important in a national popular vote for President.

The state of North Dakota gave the 2020 Republican nominee (Trump) a lead of 120,693 votes over the 2020 Democratic nominee (Biden). This margin of 120,693 was considerably greater than Biden's combined margin (42,918) in the three closest states that Biden carried (Georgia, Arizona, and Wisconsin), as shown in table 9.42. These three states together provided Biden with his entire margin of victory in the Electoral College.[867]

Table 9.42 Biden's lead in the three closest states he carried in 2020

State	Trump	Biden	Democratic lead	Electoral votes
Georgia	2,461,854	2,473,633	11,779	16
Arizona	1,661,686	1,672,143	10,457	11
Wisconsin	1,610,184	1,630,866	20,682	10
Total			**42,918**	**37**

[867] Georgia, Arizona, and Wisconsin together possessed 37 electoral votes. Without those three states, Biden's 306–232 victory in the Electoral College would have become a 269–269 tie in the Electoral College. In the event of a tie in the Electoral College, the presidential election would have been thrown into the U.S. House of Representatives (with each state having one vote). In the House, the Republican Party had the 26 votes required to elect a President on January 6, 2021.

Table 9.43 Biden's lead in the four closest states he carried in 2020

State	Trump	Biden	Republican lead	Electoral votes
Georgia	2,461,854	2,473,633	11,779	16
Arizona	1,661,686	1,672,143	10,457	11
Wisconsin	1,610,184	1,630,866	20,682	10
Pennsylvania	3,377,674	3,458,229	80,555	20
Total			**123,473**	**57**

In fact, North Dakota's 120,693-vote Republican margin was almost equal to Biden's combined margin in the *four* closest states that he carried, as shown in table 9.43.

The secret-elections bills contain no plan for running a system of voting and counting that is half-public and half-secret.

Members of Congress, state legislators, numerous other officials, and ballot propositions are on the ballot at the same time as the President.

North Dakota election law specifically requires that each step of the election process for non-presidential offices and ballot propositions be public.

Watchdog groups, candidates, political parties, the media, and ordinary citizens expect to have timely access to the vote counts for non-presidential offices and ballot propositions.

However, the secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota contained no plan for simultaneously conducting and counting secret and non-secret elections.

At the minimum, voting for President would almost certainly have to be conducted using ballots that are separate from those used for the non-secret voting being conducted at the same time and place.

There would be the cost of printing separate ballots for President. The ballots for President would then have to be counted separately from the ballots for other offices—thereby adding to the time required to process the ballots after the polls close.

If electronic voting devices were used (either for everyone or perhaps disabled voters), voting for President would have to be conducted using separate devices. Thus, there would be a cost associated with having a second set of devices.

In short, the secret-elections bills fail to specify how to operate a system of voting and counting that is half-public and half-secret—probably because there is no workable (much less any economic or efficient) way to do that.

The secret-elections bills contain no penalty for the crime of revealing vote counts.

Secrecy can only be maintained if there is some consequence for violating that requirement.

Thus, every "public officer, employee, or contractor of this state or of a political subdivision of this state" involved in conducting a secret presidential election would have to be subject to some fine, jail time, or other penalty for violating the law. However, the secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota contain no penalties.

The secret-elections bills are flawed, because they fail to muzzle the presidential candidates.

Existing North Dakota law provides for both recounting votes[868] and contesting elections in court.[869]

North Dakota law concerning recounts specifically permits the presence of a candidate "personally, or by a representative."

However, the secret-elections bill in North Dakota (and the similar bills in New Hampshire, South Dakota, and Mississippi) did not require secrecy by the candidate or the candidate's representative in either recounts or contests.

Instead, the secrecy requirement would have applied only to a limited group of people, namely:

> "a public officer, employee, or contractor of this state or of a political subdivision of this state."

There is no politically plausible way by which a state could succeed in muzzling a presidential candidate in the midst of a recount or a legal challenge to an election.

Secret court proceedings would necessarily be required for a secret-elections bill to work.

Professor Norman Williams of Willamette College in Oregon recognized that a secret-elections bill could not possibly succeed in achieving its goal without also requiring secret court proceedings. Williams pointed out the necessity of:

> "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 [National Popular Vote Compact] by keeping other states from knowing the official vote tally."[870] [Emphasis added]

The secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota did not contain provisions to make court proceedings secret or to require non-disclosure agreements—a tacit acknowledgment that this kind of legislation has no possibility of ever actually going into effect.

---

[868] North Dakota Century Code section 16.1-16-01. https://law.justia.com/codes/north-dakota/2015/title-16.1/chapter-16.1-16/

[869] North Dakota Century Code section 16.1-16-02. https://law.justia.com/codes/north-dakota/2015/title-16.1/chapter-16.1-16/

[870] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 213.

Inadvertent errors or fraud could remain undiscovered until after the state's electoral votes were cast in the Electoral College.

Secret vote counts conflict with the principle of having "many eyes" monitor elections.

Today, inadvertent errors (and even fraud) can be uncovered by watchdog groups, candidates, political parties, the media, and ordinary citizens who diligently compare the officially reported vote with what was observed on Election Day at local voting places.

Under all of the proposed secret-elections bills, the counting authority at the state level (e.g., the Board of Canvassers, Secretary of State) would receive the secret counts from local voting places, add them up in secret, and keep both the local and statewide counts secret until after the Electoral College meets.

If vote counts were successfully kept secret at local voting places, the bill would make it impossible for such independent monitoring to occur.

Because the required secrecy would not end until after the Electoral College meeting, inadvertent errors would remain undiscovered.

Supporters of secret elections assume that the public has 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 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.

Secret vote counts would conflict with provisions of some state constitutions.

In some states, secret vote counts would conflict with the state constitution.

The first secret-elections bill was introduced in New Hampshire.

The New Hampshire Constitution (Article 8) provides:

> "The public's right of access to governmental proceedings and records shall not be unreasonably restricted."

The North Dakota secret-elections bill would not have succeeded in concealing the state's popular-vote count.

Even if the original North Dakota secret-elections bill (and virtually identical bills in New Hampshire, South Dakota, and Mississippi) complied with federal law, and even if there were a solution to the practical and legal problems of implementing secret elections, the proposed legislation would not have succeeded in achieving its goal of concealing the state's popular-vote count.

The reason is that none of these bills required enough secrecy.

The polling books at each local voting location show the total number of voters who voted. This number is closely monitored by candidates, political parties, watchdog groups, the media, and the supporters and opponents of the various statewide ballot measures.

The total number of voters who voted is particularly important, because it provides an absolute cap on the largest number of votes that can possibly be legitimately cast for each race on the ballot. This number is an inherent part of the process of monitoring the security and integrity of elections. It is available at each local voting location.

More importantly, this number is publicly reported on a statewide basis on the

web sites of the North Dakota Secretary of State and the federal Election Assistance Commission.[871,872]

The officially reported statewide total of the number of people who voted in North Dakota in the November 2020 election was 364,499.

Simple arithmetic applied to the *official statewide percentages* that would have been publicly released under the terms of the secret-elections bill would immediately reveal the lowest and highest possible number of votes that each presidential candidate possibly could have received.

If the North Dakota secret-elections bill had been in effect in 2020, 36 votes would have been the difference between the highest and lowest number of popular votes that a presidential candidate could have received.

Nationally, there were 158,224,999 votes cast for President in 2020.

In table 9.44:

- Column 2 shows the number of popular votes received in North Dakota in 2020 by each presidential candidate. These numbers are colored red to indicate that they would have been kept secret under the terms of the North Dakota secret-elections bill. For example, Donald Trump received 235,595 votes. The total number of votes cast for President was 361,819.[873]
- Column 3 shows the percentage of the popular votes received by each candidate to the nearest hundredth of a percent. For example, Trump received 65.11% of the vote. This percentage would have been publicly disclosed under the specific terms of the secret-elections bill. This column and subsequent columns in this table are colored green to indicate that this information would not have been secret under the terms of the secret-elections bill.

Table 9.44 Analysis of North Dakota secret-elections bill

Candidate	Votes	Percent of the candidate's vote rounded off to nearest hundredth	Smallest percent of votes candidate could have received	Largest percent of votes candidate could have received	Smallest number of votes candidate could have received	Largest number of votes candidate could have received	Diff
Status	**Secret**	**Public**	**Public**	**Public**	**Public**	**Public**	**Public**
Trump	**235,595**	**65.11%**	65.105%	65.115%	237,308	237,343	35
Biden	**114,902**	**31.76%**	31.755%	31.765%	115,747	115,783	36
Others	**11,322**	**3.13%**	3,125%	3.135%	11,391	11,427	36
Total	**361,819**	**100.00%**					

[871] North Dakota Secretary of State. *Official 2020 General Elections Results—November 3, 2020*. Accessed July 13, 2024. https://www.sos.nd.gov/elections/election-results

[872] U.S. Election Assistance Commission. 2021. *The Election Administration and Voting Survey: 2020 Comprehensive Report*. Page 28. https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf. Also see https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys

[873] Note that the total number of votes cast for President was 361,819, and that this number is about 99% of those who voted.

- Column 4 shows the *smallest percentage* of votes that each candidate could have received, namely 0.005% less than the percentage in column 3. For example, this percentage for Trump is 65.105%.
- Column 5 shows the *largest percentage* of votes that candidate could have received, namely 0.005% greater than the percentage in column 3. For example, this percentage for Trump is 65.115%.
- Column 6 shows the *smallest number* of votes that a candidate could possibly have received in North Dakota, given the percentage shown in column 4 and the known official number of voters who voted as reported by the Secretary of State (364,499). For Trump, this number was 237,308 votes.
- Column 7 shows the *highest number* of votes that a candidate could possibly have received in North Dakota, given the percentage shown in column 4 and the known official number of voters who voted. For Trump, this number was 237,343 votes.
- Column 8 shows the difference between the lowest possible number of votes from column 6 and the highest possible number of votes from column 7.

Thus, if the North Dakota secret-elections bill had been in operation for the 2020 presidential election, the *publicly available official* information from the state of North Dakota would have established that:

- Trump received somewhere between 237,308 and 237,343 votes—a difference of 35
- Biden received somewhere between 115,747 and 115,783 votes—a difference of 36
- Other candidates together received somewhere between 11,391 and 11,427 votes—a difference of 36.

The popular-vote count from the other 49 states and the District of Columbia in 2020 (shown in table 4.16) was:

- Trump—73,980,280
- Biden—81,153,684
- Others—2,729,216.

When we add in the largest and smallest possible numbers of popular votes for each candidate based on the *publicly available official* information from North Dakota, the nationwide totals will contain 35 or 36 votes of uncertainty:

- Trump—between 74,217,588 and 74,217,623—a difference of 35
- Biden—between 81,269,431 and 82,269,467—a difference of 36
- Others—between 2,740,607 and 2,740,643—a difference of 36.

Thus, the lowest possible nationwide total for Biden would have been 81,269,431, and the highest possible nationwide total for Trump would have been 74,217,623—that is, a nationwide lead for Biden of 7,051,808.

Thus, an accurate designation of the national popular vote winner could be confidently made based on the *publicly available official* information from North Dakota.

Accordingly, if the National Popular Vote Compact had been in effect in 2020, Biden

would have been designated as the "national popular vote winner," and all of the electoral votes of all the states belonging to the Compact would have been awarded to him.

Theoretically, the resulting appointment of presidential electors could be contested; however, the precondition to litigation is the existence of an aggrieved party.

There could only be an aggrieved presidential candidate in the extraordinarily unlikely situation in which the 36 votes were critical to deciding the "national popular vote winner" out of 158,224,999 votes cast nationally.

If the 36 votes (out of 158,224,999 votes cast nationally) could not possibly affect the correctness of the designation of the national popular vote winner, there would be no aggrieved candidate. At most, this would be a case of "no harm, no foul."

Of course, if 36 votes were to matter at the national level, the three-judge federal court (described previously) would use its power to obtain access to North Dakota's actual vote counts and then, if appropriate, use its power to revise the Certificates of Ascertainment submitted by the states belonging to the Compact to reflect the correct national popular vote winner.

9.31.6. MYTH: Abolition of popular voting for President or abolition of the short presidential ballot are "Achilles' heels" that would thwart the Compact.

QUICK ANSWER:

- The National Popular Vote Compact was specifically drafted to prevent a single non-member state from affecting its operation by abolishing popular voting for President or by abolishing the short presidential ballot.

MORE DETAILED ANSWER:

All 50 states and the District of Columbia currently permit the people to vote for President.

Professor Norman 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."[874] [Emphasis added]

We agree that Williams' proposal is "dramatic."

Dicta in the U.S. Supreme Court decision in *McPherson v. Blacker* indicate that abandonment of popular voting for presidential electors would be constitutional.[875] It is a his-

---

[874] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 209–210.

[875] A contrary view of the dicta in *McPherson v. Blacker* can be found in Bohnhorst, Mark; Fitzgerald, Michael W.; and Soifer, Aviam. 2023. Gaping Gaps in the History of the Independent State Legislature Doctrine: *McPherson v. Blacker*, Usurpation, and the Right of the People to Choose Their President. 49 *Mitchell*

torical fact that, in the nation's first presidential election in 1789, presidential electors were chosen by the state legislature in three states (Connecticut, Georgia, and South Carolina).

An equally dramatic proposal has been advanced by 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 (section 2.14).

For example, the use of the short presidential ballot in California permits a voter to cast a convenient single vote for the Trump-Vance slate and to have that single vote be deemed to be a vote for each of the 54 Republican candidates for presidential elector. The short presidential ballot eliminates the burden of casting separate votes for 54 candidates for presidential elector. If the short presidential ballot were not used, a certain number of voters would inevitably get tired or confused while voting separately for 54 candidates. Some voters might vote for candidate(s) for presidential elector from different parties. Other voters might vote for just one elector—an error that was quite common before the short presidential ballot came into universal use.

In any case, the 54 winning elector candidates would inevitably receive slightly different numbers of votes. Consequently, there would be no single number of popular votes attributable to a given presidential-vice-presidential slate 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**."[876] [Emphasis added]

Belenky's proposed ballot would be, of course, constitutional. Indeed, for most of American presidential history, voters cast votes for individual presidential-elector candidates rather than for presidential candidates. The short presidential ballot did not come into widespread use until the middle of the 20th century.[877]

The presidential ballot in Alabama in 1960 (figure 3.10a and figure 3.10b in section 3.13) shows how a ballot would look under Belenky's proposal. Note that the names of the actual candidates (e.g., John F. Kennedy and Richard Nixon) did not appear on the ballot. Voters were expected to cast 11 separate votes for presidential electors.

Hamline Law Review. Volume 49. Issue 1. Pages 257–315. https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1314&context=mhlr

[876] Belenky, Alexander S. The Achilles Heel of the popular vote plan. *Metro West Daily*. January 29, 2009. https://www.metrowestdailynews.com/story/opinion/columns/2009/01/30/belenky-achilles-heel-popular-vote/41227933007/

[877] The last state to adopt the short presidential ballot was Vermont (in 1980).

Ballots requiring that the voter cast a separate vote for each presidential elector were abolished for the obvious reason that they were inconvenient, confusing, and error prone.

However, neither Williams' nor Belenky's proposal represents 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 constructed to prevent a single state from thwarting its operation 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:

> "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 as follows:

> "'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 not required by the U.S. Constitution) and also to vote for "presidential slates" rather than individual candidates for presidential elector (something else obviously not required by the Constitution).

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 is not constitutionally 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 permitting its own voters to vote for President.[878]

The National Popular Vote Compact addresses both of these unlikely possibilities by

---

[878] The 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.

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 National Popular Vote Compact). That state would, therefore, be automatically included in the "national popular vote total" computed under the National Popular Vote Compact.

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. Its presidential electors would cast their votes for President in the Electoral College, and their electoral votes would be counted along with those cast by presidential electors from every other state. Meanwhile, the National Popular Vote Compact would operate as intended for the remaining states.

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.

Both Williams' and Belenky's proposals assume that there would be a Governor and state legislature that is so fanatically opposed to a nationwide vote for President that public opinion 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 (section 9.22).

In support of his proposal to abolish popular voting for President, Professor Williams asserts:

> "**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**.[879] [Emphasis added]

---

[879] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 214–215.

Professor Williams is apparently unaware that 70% of Utah voters have favored a national popular vote for President, including 66% of Utah Republicans. He also is apparently unaware that 75% of Vermont voters have favored a national popular vote for President and that Vermont has enacted the National Popular Vote Compact (section 9.22).

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 the general-election campaign.

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 had 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—coincidentally the exact margin by which Obama won the Electoral College in 2008.

State legislatures have the legal power, *under the current system*, of abolishing popular voting for President.

If abolishing the people's vote for President were politically plausible in the 21st century, as Professor Williams maintains, the Republican Party could have simply appointed 95 Republican presidential electors and saved the expense, effort, and uncertainty of campaigning for President in these six closely divided states. These 95 electoral votes would have effectively guaranteed the presidency to Mitt Romney in 2012.

Yale Law Professor 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."[880] [Emphasis added]

---

[880] 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. Page 249.

Professor Williams is undoubtedly 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.

However, a one-party state would be the last place where it would make political sense to do so.

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 when the Compact is in effect, it would cost the Republican nominee for President almost a half million votes.[881]

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 Professor Williams, the national committee and prospective presidential candidates of the party that would ordinarily win that state's popular vote would exert enormous pressure on the legislature and Governor 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.

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 Compact.

9.32. MYTHS ABOUT ADJUDICATION OF ELECTION DISPUTES

9.32.1. MYTH: The Compact is flawed, because it does not establish a commission to resolve disputes about popular vote counts.

QUICK ANSWER:

- If, hypothetically, the National Popular Vote Compact had established a commission to try to resolve disputes about popular vote counts, such a commission would prove to be totally superfluous for two reasons. First, this non-judicial commission would be obligated by the Full Faith and Credit Clause of the U.S. Constitution to honor the rulings already made in the state-of-origin. Second, anything a non-judicial commission might try to decide would be immediately appealed to a court, which would then make the final decision.
- Interstate compacts that are intended to execute a small number of very specific actions typically do not have commissions. Compacts that are intended to manage ongoing business operations or to generate a continuing stream of regulations typically have commissions (and also typically have a dedicated staff and budget).

---

[881] As another example, North Dakota gave the 2020 Republican nominee (Trump) a lead of 120,693 votes over the Democratic nominee (Biden). This margin of 120,693 was considerably greater than Biden's combined margin (42,918) in the three closest states that Biden carried (Georgia, Arizona, and Wisconsin), as shown in table 9.42.

MORE DETAILED ANSWER:

Opponents of the National Popular Vote Compact have argued that it is flawed, because it does not establish a commission to resolve conflicts.

About half of all interstate compacts are administered entirely by pre-existing state officials and agencies, while the other compacts have commissions.

In his book *Interstate Cooperation: Compacts and Administrative Agreements*,[882] Joseph F. Zimmerman points out that the interstate compacts that have commissions are typically one of two types:

- Facility-management compacts—that is, there is an ongoing need to manage business operations (e.g., bridges, tunnels, airports, seaports, railroads, ferries, marine facilities, office buildings, radioactive waste storage facilities, and industrial development projects). Examples are the New York–New Jersey Port Authority Compact of 1921[883] and the Southwestern Low-Level Radioactive Waste Disposal Compact, where one state operates a storage facility used by other states.[884]
- Regulatory compacts—that is, the compact is intended to create a continuing stream of regulations. Examples include the Interstate Insurance Product Regulation Compact[885] and the Potomac River Compact.[886]

Interstate compacts with commissions typically have dedicated budgets and staff to carry out their functions.

In contrast, what Zimmerman calls "compacts *sans* commissions" are typically those in which the compact is intended to execute one (or a very small number) of precisely defined policies.

There are only three functions that would be performed by the states belonging to the National Popular Vote Compact. They would take place once every four years during a very limited period of time. These functions are well-defined and ministerial in nature, namely to:

(1) **determine the number of votes** for each presidential-vice-presidential slate in each state and the District of Columbia (clause 1 of Article III of the Compact),

(2) **add these numbers together** to get the nationwide total number of votes received by each presidential slate and identify the presidential-vice-presi-

---

[882] Zimmerman, Joseph F. 2002. Interstate Cooperation: Compacts and Administrative Agreements. Westport, CT: Praeger Publishers. Chapters 4 and 5.

[883] New York–New Jersey Port Authority Compact of 1921. https://compacts.csg.org/compact/new-york-new-jersey-port-authority-compact-of-1921/ See also https://www.panynj.gov/port-authority/en/index.html

[884] Southwestern Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/

[885] Interstate Insurance Product Regulation Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/ The Commission's web site is https://www.insurancecompact.org/

[886] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

dential slate that received the most votes (clause 2 of Article III of the Compact), and

(3) **certify the appointment** in that official's own state of the slate of presidential electors nominated in that official's own state in association with the national popular vote winner (clause 3 of Article III of the Compact).

The second and third functions are, on their face, unambiguous and ministerial. The first function is made unambiguous and ministerial by the fifth clause of Article III of the Compact:

> "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."

This is not to say that vote counts cannot be challenged.

Questionable state vote totals can be challenged under the Compact in five ways, including administrative proceedings (e.g., recounts, audits) and proceedings in lower state courts, state supreme courts, lower federal courts, and the U.S. Supreme Court (section 9.30.2).

These five ways of challenging election results are the same ones that are available today under the current system.

Thus, if the popular vote count from a particular state is disputed, that dispute would be adjudicated in the state-of-origin—not in the compacting states.

Once the popular vote count from another state is litigated in the state-of-origin, the Full Faith and Credit Clause of the U.S. Constitution requires every other state to accept the outcome of the litigation in the state-of-origin. The Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[887]

The three functions of the chief election officials of the compacting states listed above are performed *after* each state's final determination of its popular vote count.

Opponents of the National Popular Vote Compact have argued that it is flawed, because it did not create a commission (presumably to second-guess the outcome of litigation already conducted in the state-of-origin).

However, the reality is that a commission would be totally superfluous for two independent reasons:

First, this non-judicial commission would be obligated by the Full Faith and Credit Clause of the U.S. Constitution to honor the rulings already made in the state-of-origin.

Second, anything a non-judicial commission might try to decide would be immediately appealed to a court, which would then make the final decision.

---

[887] U.S. Constitution. Article IV. Section 1.

9.32.2. MYTH: States will be able to challenge elections in other states under the Compact.

QUICK ANSWER:

- The National Popular Vote Compact does not create any basis for litigation between states.

MORE DETAILED ANSWER:

A group called "Democrats for the Electoral College" works closely with Save Our States. This group is headed by Jasper Hendricks, who is also Executive Director of the Black Legislative Leadership Network—a group funded by Save Our States.[888]

Hendricks claims that "States could sue other states" as a result of the National Popular Vote Compact:

> "Today, one state cannot sue another state to challenge its election process or results. NPV would change this by requiring states to use results from other states. For the first time, **states would have justiciable interests in other states' elections, leading to endless lawsuits across state lines**."[889] [Emphasis added]

The first sentence above is correct concerning the situation today.

Indeed, this aspect of our federal system of government was illustrated on December 7, 2020—a week before the Electoral College meeting.

At that time, Texas Attorney General Ken Paxton asked the U.S. Supreme Court to allow the state of Texas to file a complaint challenging Pennsylvania's election processes and popular vote count.[890]

Paxton's complaint was an attempt to challenge the election returns from Pennsylvania that showed that Joe Biden had carried the state in November.

The U.S. Constitution gives the Supreme Court original jurisdiction over cases between states.

The Supreme Court ordinarily gives states the chance to present their case.

However, on December 11, 2020, the Court refused Texas' request to file its bill of complaint, saying:

> "The State of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. **Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections**."[891] [Emphasis added]

---

[888] Black Legislative Leadership Network web site. Accessed July 19, 2024. https://www.blln.org/sar_membership

[889] Democrats for the Electoral College. 2023. Accessed July 13, 2024. https://www.dems4ec.com/

[890] *Texas vs. Pennsylvania*. Motion for Leave to File Bill of Complaint. https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf

[891] *Texas v. Pennsylvania*. December 11, 2020. Order 155-ORIG. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

Nothing on Jasper Hendricks' web site provides any support for his assertion that the National Popular Vote Compact gives any state government a "justiciable interest" in another state's election.

Each state reaches its final determination of its popular vote count (through its Board of Canvassers or other designated board or official).

The Compact certainly does not empower any member state to judge the election returns of any other state—much less initiate litigation disputing another state's returns. Instead, the Compact explicitly forecloses any such effort:

> "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…."[892] [Emphasis added]

There is no shortage of ways today to challenge a state's election returns. Indeed, popular-vote counts may be challenged today in the state-of-origin in five ways:

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings that start in the state-of-origin, and
- federal proceedings at the U.S. Supreme Court.

All five ways were used in both 2000 and 2020.[893]

All five of these existing avenues for litigation will continue to exist under the National Popular Vote Compact.

Once the validity of a state's vote count has been litigated in the state-of-origin, that state cannot possibly complain if its own certified vote count is accepted at face value by states belonging to the Compact.

So, if a vote count has already been litigated in the state-of-origin, and if the states belonging to the Compact are obligated to treat the officially certified vote count of each state as "conclusive," what state does Hendricks think has a "justiciable interest" in the matter?

In any case, there is certainly no shortage of *non-state* litigants today who can challenge election processes or results. In addition, the Electoral Count Reform Act of 2022 explicitly guarantees the presidential candidates themselves direct access to a special three-judge court.

Even if state governments were to acquire the power to challenge the election processes or vote counts of other states, the only practical effect would be to change the identity of the litigants—not the issues to be litigated.

In short, the National Popular Vote Compact does not create any basis for litigation between states. However, even if it did, it is not clear that such a change would have any practical effect.

---

[892] National Popular Vote Compact. Article III, clause 5. The full text of the Compact is in table 6.1 and may also be found at https://www.nationalpopularvote.com/bill-text

[893] See The Ohio State University's Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

9.32.3. MYTH: The Compact is flawed, because it is silent as to how disputes between states would be adjudicated.

QUICK ANSWER:

- The National Popular Vote Compact is silent as to how disputes between states would be adjudicated, because that question is answered by the U.S. Constitution.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States (the leading group employing lobbyists to oppose the adoption of the National Popular Vote Compact), testified against the Compact at a Connecticut legislative hearing on a related question:

> "While **the compact creates potential conflicts between states**, it is silent as to how to adjudicate these disputes."[894] [Emphasis added]

The National Popular Vote Compact is indeed silent about this matter.

The reason is that there is no need for the Compact to say anything, because the U.S. Constitution already provides the answer:

> "**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."[895] [Emphasis added]

Federal law additionally states:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."[896]

9.32.4. MYTH: The courts will be overwhelmed with litigation under the Compact.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes creates unnecessary controversy and litigation because it makes the presidency depend on a few thousand votes in one, two, or three decisive states.
- For example, the winner in the Electoral College in 2020 was decided by margins of 11,779 in Georgia, 10,457 in Arizona, and 20,682 in Wisconsin. Recounts, hair-splitting lawsuits, and doubt would have been far less likely if the disgruntled losing candidate had to overcome a nationwide margin such as the national-popular-vote winner's 7,052,7116 margin in 2020.

---

[894] England, Trent. 2013. Testimony at Connecticut Government and Administration Committee. February 25, 2013.

[895] U.S. Constitution. Article III, section 2, clause 2.

[896] 28 U.S.C. §1251(a).

- The reason that there are so many lawsuits under the current system is that America's 158,000,000 voters are divided into 51 separate state-level elections. In each presidential election, only a dozen-or-so states are close enough to warrant campaigning by the presidential candidates (that is, within about eight or fewer percentage points). Several of these battleground states frequently end up being very close on Election Day, thereby inviting doubt, recounts, hair-splitting lawsuits, and loss of confidence—even when there was no doubt at all about which candidate won the nationwide popular vote.
- Note that opponents of the National Popular Vote Compact such as Save Our States claim that the Compact will overwhelm the courts with litigation, while the same people simultaneously claim that there is no means of adjudicating disputes under the Compact.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has said that, because of the Compact:

> "Lawyers would rush into state and federal courts seeking partisan advantage."[897]

These words most accurately describe the *current* state-by-state winner-take-all method of awarding electoral votes.

As UCLA Law Professor Richard L. Hasen and editor of the *Election Law Blog* wrote in 2022:

> "Election litigation rates in the United States have been soaring, with rates nearly tripling from the period before the 2000 election compared to the post-2000 period. In 2020, election litigation rates increased almost 26 percent over rates in 2016."[898]

In 2020, there were 64 lawsuits and numerous additional administrative proceedings involving the presidential election. They were filed in eight closely divided battleground states—Arizona, Georgia, Michigan, Minnesota, Nevada, New Mexico, Pennsylvania, and Wisconsin.[899,900]

---

[897] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[898] Hasen, Richard L. 2022. Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come? *Election Law Journal: Rules, Politics, and Policy*. February 22, 2022. Pages 150–154. https://doi.org/10.1089/elj.2021.0050

[899] Ohio State University Moritz College of Law Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

[900] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

In 2016, the courts considered ordering recounts in three states (Pennsylvania, Michigan, and Wisconsin), and allowed a recount in one state (Wisconsin).

In 2000, the dispute over Florida's 25 electoral votes was considered by:

- administrative proceedings by Florida election officials,
- state court proceedings in lower courts,
- state court proceedings in the Florida Supreme Court,
- federal court proceedings in lower federal courts, and
- proceedings in the U.S. Supreme Court.

The reason there are so many lawsuits under the current system is that America's 158,000,000 voters are divided into 51 separate state-level elections.

In any given election year, a dozen-or-so states are close enough (say, 8 percentage points or less) to give candidates a reason to campaign in those states. Several of these battleground states frequently end up being very close on Election Day. For example:

- Biden's win in the Electoral College in 2020 was decided by margins of 11,779 votes in Georgia, 10,457 in Arizona, and 20,682 in Wisconsin.[901]
- Trump's win in the Electoral College in 2016 was decided by margins of 10,704 votes in Michigan, 22,748 in Wisconsin, and 44,292 in Pennsylvania.
- Bush's win in the Electoral College in 2004 was decided by a margin of 118,601 votes in Ohio.
- Bush's win in the Electoral College in 2000 was decided by a margin of 537 votes in Florida.

Recounts and hair-splitting legal disputes would have been far less likely if the lawyers for the disgruntled loser had to surmount a nationwide margin such as:

- 7,052,711 votes in 2020
- 2,868,518 in 2016
- 4,983,775 in 2012
- 9,549,976 in 2008
- 3,012,179 in 2004
- 543,816 in 2000.

Note that Save Our States simultaneously argues that the National Popular Vote Compact will overwhelm the courts and that there is no means of adjudicating disputes under the Compact.

Sean Parnell, Senior Legislative Director of Save Our States, said in written testimony to the Minnesota Senate Elections Committee on January 31, 2023:

> **"NPV provides no mechanism for resolving** differences or **disputes**. … NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and

[901] Biden's margins in three additional states were also somewhat close in 2020, namely 33,596 votes in Nevada, 80,555 in Pennsylvania, and 154,188 in Michigan.

similar issues, makes it **fatally flawed and dangerous to democracy**."[902] [Emphasis added]

Trent England, Executive Director of Save Our States, joined Parnell in saying:

"Even if state officials knew or suspected that a state's reported vote total was incorrect, **the compact offers no recourse**."[903] [Emphasis added]

9.33. MYTHS ABOUT ADJUDICATION OF THE CONSTITUTIONALITY OF THE COMPACT

9.33.1. MYTH: The constitutionality of the Compact would not be decided until after it is used.

QUICK ANSWER:

- Presidential candidates must know whether an upcoming election is to be conducted on the current state-by-state winner-take-all basis or a nationwide basis. Under the current system, candidates would only solicit votes in a dozen-or-so closely divided states; however, they would solicit votes from every state in the case of a nationwide vote.
- Challenges as to how an upcoming election is to be run—such as what districts are to be used, which candidates will be on the ballot, and how electoral votes are awarded—have historically been decided, by the courts, *before* the election involved. This principle is illustrated by the constitutional challenges to the method of awarding electoral votes that courts decided *before* the 1892 presidential election (when the constitutionality of the congressional-district method of awarding electoral votes was litigated), before the 1968 election (when the constitutionality of the winner-take-all rule was litigated), and before the 2020 election (when the enforceability of state laws concerning faithless presidential electors was litigated and when the constitutionality of the winner-take-all rule was re-litigated). Moreover, the courts have generally rigorously applied the doctrine of *laches* to reject challenges in which the plaintiff was aware of the issue before the election, but waited until after the election results were known to initiate litigation.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a meeting at the Heritage Foundation on May 19, 2021, that the system could be gamed by challenging the constitutionality of the National Popular Vote Compact *after* the first election in which it is used.

---

[902] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[903] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

> "Somebody **sues after the election**. They say … 'We think this somehow violates our rights as California voters.' And you could have one judge just strike the compact down."[904] [Emphasis added]

In general, issues about how an election is to be conducted—such as which districts are to be used, which candidates are on the ballot, and how electoral votes are awarded—have historically been decided by the courts, *before* the election involved. In fact, the only logical time to resolve such issues is before the election.

This principle is illustrated by the fact that challenges to the constitutionality of the method of awarding electoral votes were decided by the courts *before* the 1892, 1968, and 2020 presidential elections.

1892 challenge to the congressional-district method of awarding electoral votes

In 1892, Michigan repealed its existing winner-take-all law and changed to a congressional-district method of awarding the state's electoral votes. In June 1892, the Michigan Supreme Court upheld the constitutionality of that law. Opponents of the new law appealed to the U.S. Supreme Court. Because the November 1892 presidential election was approaching, the U.S. Supreme Court decided the case of *McPherson v. Blacker* on October 11, 1892—that is, before Election Day. The U.S. Supreme Court upheld Michigan's law.[905]

1968 challenge to the state-level winner-take-all method of awarding electoral votes

Similarly, in 1968, the constitutionality of the state-level winner-take-all method of awarding electoral votes was challenged on equal protection grounds. The case of *Williams v. Virginia State Board of Elections* was promptly heard by a three-judge federal court (the usual type of judicial panel for hearing constitutional issues at the time). On July 16, 1968, that court issued its decision upholding the winner-take-all method.[906] See section 2.15.4, section 9.1.13, section 9.1.14, and section 9.25.

2018 challenge to the state-level winner-take-all method of awarding electoral votes

In 2018 (two years before the 2020 election), Equal Citizens, a non-profit organization founded by Harvard Law Professor Lawrence Lessig, organized a coalition of law firms, organizations, academics, and others that brought lawsuits in Massachusetts, Texas, South Carolina, and California, asking that federal courts declare existing state winner-take-all laws unconstitutional.

---

[904] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 49:16. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

[905] *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

[906] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 - Dist. Court, ED Virginia 1968. This decision was affirmed by the U.S. Supreme Court at 393 U.S. 320 (1969) (*per curiam*).

The four substantially similar lawsuits[907,908] were based on an equal protection claim somewhat different from the 1968 case.

The lawsuits were heard by four federal district courts in the states involved. All four district courts reached the same conclusion, namely that the state-by-state winner-take-all method of awarding electoral votes is constitutional.

Equal Citizens then appealed each of the four adverse district-court decisions to the appropriate U.S. Circuit Court of Appeals.

By mid-2020, each of the four appellate courts upheld the decisions reached by their respective district courts. The U.S. Supreme Court declined to review the rulings of the appellate courts. As a result, the 2020 presidential election was conducted under existing winner-take-all laws.

2020 Supreme Court case about faithless electors

Faithless electors played a prominent and controversial role when the Electoral College met on December 19, 2016 (section 3.7).

Litigation ensued after the election as to the power of the states to require presidential electors to vote for the nominees of the political party that nominated the elector.

In the ensuing litigation, there was a conflict between the conclusions reached by the U.S. Court of Appeals for the Tenth Circuit and the Washington State Supreme Court.

With the 2020 presidential election on the horizon, there was increasing concern that unsettled questions concerning faithless electors might play a decisive role in the upcoming election. A number of academic and political organizations filed briefs in the U.S. Supreme Court, urging it to hear and decide the issue before the 2020 election.

As a result, the U.S. Supreme Court heard the cases concerning faithless electors on May 13, 2020. It issued its decision in *Chiafalo v. Washington*[909] on July 6, 2020—thus settling the question prior to Election Day. See section 3.7.8.

Doctrine of *laches*

As explained in Dobbs and Robert's Law of Remedies, Damages, Equity, Restitution:

> "*Laches* is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant."[910]

---

[907] The Equal Citizens web site contains the complaints, briefs, and decisions in all four of these cases. See https://equalvotes.us/legal-documents/

[908] Lessig, Lawrence. 2018. Electoral College confusions. *The Hill*. October 31, 2018. https://thehill.com/blogs/congress-blog/politics/413998-electoral-college-confusions?fbclid=IwAR0rpdunHHcISOQ2jf3y1auTqvdCrwI4_oT9zssHqdYys5ve4PEyCJxVlB8#.W9mgbFEI_n4.facebook

[909] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

[910] Dobbs, Dan B. and Roberts Captice L. 1993. *Law of Remedies, Damages, Equity, Restitution*. St. Paul, MN: West Academic Publishing.

As UCLA Law Professor Richard L. Hasen and editor of the *Election Law Blog* explains concerning election litigation:

> "laches … prevent[s] litigants from securing options over election administration problems."[911]

In matters of election litigation, the courts generally apply the doctrine of *laches* to reject challenges in which the plaintiff was aware of an issue before an election but waited to see the election results before raising the issue in court. Thus, the only time to raise such election challenges is before the election involved.

9.33.2. MYTH: Every state and federal court at every level will be bogged down with litigation concerning the constitutionality of the Compact.

QUICK ANSWER:

- Litigation about the constitutionality of the National Popular Vote Compact would most likely involve one case brought in one court (or be quickly consolidated into one case).

MORE DETAILED ANSWER:

In speaking in opposition to the National Popular Vote Compact in Connecticut, State Senator Michael McLachlan said during the Senate floor debate:

> "You could make a fortune as a lawyer running around to states defending the Electoral College, or in the case of NPV you could make a fortune trying to make a fortune trying to defend that. … This is going to be such a legal train wreck that you can't imagine how incredible that's going to be. Just a legal train wreck. **Every state court, state Supreme Court, district courts, Supreme Court is going to be bogged down with this discussion for years**."[912] [Emphasis added]

Senator McLachlan's concern about every state and federal court at every level being "bogged down" is especially inapplicable to the National Popular Vote Compact, because any legal challenge to it would, almost certainly, be initiated by an Attorney General from a non-compacting state (arguing that the non-compacting state would be injured in some way). In that event, the U.S. Constitution directs cases between states to one court:

> "**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."[913] [Emphasis added]

---

[911] Hasen, Richard L. 2005. Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown. *Washington and Lee Law Review*. Volume 62, Issue 3. Summer 2005. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1284&context=wlulr

[912] Transcript of the floor debate on HB 5421 in Connecticut Senate. May 5, 2018. Page 32.

[913] U.S. Constitution. Article III, section 2, clause 2.

In any event, even if more than one lawsuit were initiated, the litigation would be quickly consolidated into one case.

Connecticut State Representative Daniel Fox observed:

> "Litigation is a fact of life after any legislation is proposed … as it is with any other law or statute that's passed by this body or others."[914]

9.34. MYTHS ABOUT RECOUNTS

9.34.1. MYTH: Recounts would be frequent under a national popular vote.

QUICK ANSWER:

- 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 method of awarding electoral votes.
- The number of votes that are likely to be changed by a nationwide recount can be estimated by standard statistical methods applied to historical data. The result of such analysis is that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.
- To say it another way, the probability is very low (0.26% or approximately one chance in 369) that a nationwide recount would change the initial winner's lead by more than 24,294 votes.
- Also, the probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, one nationwide presidential election every 1,296 years would be close enough to be reversed by a recount.
- Recounts come to mind in connection with presidential elections only because a few thousand votes in a handful of closely divided states regularly decide the presidency under the current state-by-state winner-take-all system.
- Incorrect statements about recounts are often based on misinformation as to how rare recounts are in practice, how few votes are ever changed by recounts, and how few recounts ever change the outcome of an election.
- The myth that recounts would be frequent under a national popular vote is one of many examples in this book of a criticism of the National Popular Vote Compact where the Compact would be distinctly superior to the current state-by-state winner-take-all method of awarding electoral votes.

[914] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 121.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, testified before the Alaska Senate:

> "A direct election system … would result in … **constant recounts**."[915] [Emphasis added]

As we will show in this section, recounts would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

In fact, the probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, one nationwide presidential election every 1,296 years would be close enough to be reversed by a recount.

Incorrect statements about recounts are often based on misinformation as to how rare recounts are in practice, how few votes are ever changed by recounts, and how few recounts ever change the outcome of an election.

Thus, we start the discussion of recounts with actual historical data about recounts. The "Facts about recounts" section below will show that recounts:

- are rare;
- change very few votes; and
- rarely reverse the original outcome.

We then apply standard statistical methods to show that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.

To say it another way, the probability is very low (0.26% or approximately one chance in 369) that a nationwide recount would change the initial winner's lead by more than 24,294 votes.

Facts about recounts

FairVote has compiled historical data on elections[916] that shows that there have been 6,929 statewide general elections[917] in the 24-year period from 2000 to 2023.

Table 9.45 shows the number of statewide general elections by year.

Table 9.46 shows the specific elective office or ballot proposition involved in the 6,929 statewide general elections between 2000 and 2023.

---

[915] Oral and written testimony presented by Tara Ross at the hearing of the Alaska Senate State Affairs Committee in February 2011.

[916] Otis, Deb. 2023. *An Analysis of Statewide Elections Recounts 2000—2023*. FairVote. https://fairvote.org/report/election-recounts-2023/. There is a spreadsheet with additional details at https://docs.google.com/spreadsheets/d/1ZSpGqPk7tElu__dRC3ulb3czFFJ72BCsybygpn1IorA/edit#gid=1833378664

[917] FairVote defines a "statewide general election" as a state-level election that provides the opportunity for all citizens—no matter where they live in the state—to vote for the same candidates or to vote on the same ballot question. A majority of such elections occur in November of even-numbered years. However, some elections occur in November of odd-numbered years, and some occur at other times (often the spring) of both even-numbered and odd-numbered years. In addition, statewide ballot propositions sometimes appear on primary election ballots, and there are occasional special statewide general elections (e.g., recalls). Note that a race for the U.S. House of Representatives is a "statewide general election" only if the state has just one seat in the House.

Table 9.45 The number of statewide general elections 2000–2023

Year	Number of elections
2000	538
2001	52
2002	554
2003	79
2004	448
2005	59
2006	598
2007	70
2008	449
2009	40
2010	708
2011	60
2012	419
2013	46
2014	511
2015	56
2016	470
2017	36
2018	523
2019	62
2020	453
2021	67
2022	559
2023	72
Total	**6,929**

Table 9.46 The 6,929 statewide general elections 2000–2023 by type of election

Office	Number of statewide general elections
President*	300
U.S. Senator	421
U.S. Representative	91
Governor	317
Lieutenant Governor	196
Secretary of State	220
Attorney General	262
Treasurer	214
Auditor	148
Comptroller	56
Public Service Commissioner	51
Agriculture or Industries Commissioner	71
Labor Commissioner	21
Insurance Commissioner	56
Public Lands Commissioner	29
Tax Commissioner	7
Corporation Commissioner	29
Railroad Commissioner	14
Public Utilities Commissioner	10
Mine Commissioner	6
Superintendent of Public Instruction or Education	77
Board of Education or Governors	33
University Regent	26
Trustee	10
Judicial positions and retention	1,762
Ballot questions	2,476
Other	26
Total	**6,929**

* Note that the recount of the presidential vote in Florida in 2000 shown in the table was the automatic recount that was required by Florida law and that was held shortly after Election Day. This mechanical recount reduced Bush's initial 1,784-vote lead by 1,247 to a 537-vote lead. This mechanical recount did not involve a hand inspection of each ballot. The Gore campaign subsequently requested a hand recount. This hand recount was halted by the U.S. Supreme Court, thus leaving Bush's 537-vote statewide margin as the final result in Florida.

Table 9.47 shows the number of recounts by year.

There were only 36 recounts among the 6,929 statewide general elections during the 24-year period from 2000 to 2023.[918]

That is, the probability of a recount in a statewide general election is 1-in-192.

[918] Not all recounts are conducted because the apparent losing candidate believes that he or she has any realistic probability of reversing the outcome. Some states conduct automatic recounts that are triggered because the original difference between the top candidates is less than some specified percentage (often 0.1% but sometimes as large as 0.5%) or some specified number of votes. The government pays for automatic recounts. One reason that states conduct automatic recounts is to increase public confidence in elections. Another reason is that recounts provide state officials and the public with the periodic opportunity to audit the operation of the state's election process.

Table 9.47 The number of statewide recounts by year

Year	Number of statewide general 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	40	1
2010	708	3
2011	60	1
2012	419	
2013	46	1
2014	511	4
2015	56	
2016	470	1
2017	36	
2018	523	3
2019	62	
2020	453	2
2021	67	1
2022	559	2
2023	72	
Total	**6,929**	**36**

Table 9.48 shows the change in the initial winner's votes in the 36 statewide recounts between 2000 and 2023. The recounts are listed in chronological order.

- Columns 1, 2, and 3 show the year, state, and race involved in the recount.
- Column 4 shows whether the original result was upheld or reversed.
- Column 5 shows the total number of votes cast for the initial (pre-recount) winner and the initial loser.
- Column 6 shows the initial winner's lead over the initial loser.
- Column 7 shows the final (post-recount) winner's lead over the final loser.
- Column 8 shows the change in the initial winner's lead resulting from the recount. In the case of a recount that does not reverse the original outcome, a negative number in this column indicates that the initial winner's lead was reduced by the recount, and a positive number indicates that the initial winner's lead was increased by the recount. In the case of a recount that reversed the original outcome, the number in this column will always be negative.

Table 9.48 Change in the initial winner's votes in all 36 recounts of statewide general elections 2000–2023

Year	State	Race	Effect of the recount	Total votes	Initial winner's lead	Final winner's lead	Change in initial winner's votes
2000	CO	Education Board	Upheld	1,536,619	1,211	90	–1,121
2000	FL	President	Upheld	5,816,486	1,784	537	–1,247
2000	MT	Public Instruction	Upheld	63,080	64	61	–3
2000	WA	Secretary of State	Upheld	2,137,677	10,489	10,222	–267
2000	WA	U.S. Senator	Upheld	2,396,567	1,953	2,229	276
2004	AK	U.S. Senator	Upheld	289,324	9,568	9,349	–219
2004	AL	Amendment 2	Upheld	1,380,750	1,850	1,846	–4
2004	GA	Court of Appeals	Upheld	414,484	348	363	15
2004	WA	Governor	Reversed	2,742,567	261	129	–390
2004	WY	Amendment A*	Upheld	218,433	858	803	–55
2004	WY	Amendment C	Upheld	233,955	1,282	1,232	–50
2005	VA	Attorney General	Upheld	1,941,449	323	360	37
2006	AL	Amendment	Upheld	816,102	2,642	3,150	508
2006	NC	Court of Appeals	Upheld	1,539,190	3,416	3,466	50
2006	VT	Auditor	Reversed	222,835	137	102	–239
2008	MN	U.S. Senator	Reversed	2,422,965	215	225	–440
2008	OR	Measure 53	Upheld	978,634	550	681	131
2009	PA	Superior Court	Upheld	1,821,869	83,693	83,974	281
2010	AZ	Proposition 112	Upheld	1,585,522	128	194	66
2010	MN	Governor	Upheld	1,829,620	8,856	8,770	–86
2010	NC	Court of Appeals	Upheld	1,079,980	5,988	6,655	667
2011	WI	Supreme Court	Upheld	1,497,330	7,316	7,004	–312
2013	VA	Attorney General	Upheld	2,207,389	165	907	742
2014	MO	Amendment	Upheld	996,249	2,067	2,375	308
2014	NC	Supreme Court	Upheld	2,474,117	5,427	5,410	–17
2014	NM	Public Lands Comm	Upheld	499,330	656	704	48
2014	OR	Initiative	Upheld	1,506,176	802	837	35
2016	WI	President	Upheld	2,785,823	22,177	22,748	571
2018	FL	Agriculture Comm	Upheld	8,059,156	5,326	6,753	1,427
2018	FL	Governor	Upheld	8,119,910	33,600	32,463	–1,137
2018	FL	U.S. Senator	Upheld	8,188,978	12,600	10,033	–2,567
2020	GA	President	Upheld	4,935,716	12,780	12,284	–496
2020	NC	Supreme Court	Upheld	5,391,556	416	401	–15
2021	PA	Commonwealth Court	Upheld	2,561,068	16,804	22,354	5,550
2022	AZ	Attorney General	Upheld	2,508,715	511	280	–231
2022	AZ	Public Instruction	Upheld	2,502,987	8,967	9,188	221
		Average		**2,380,628**	**7,368**		**57**

* The two entries for Wyoming in 2004 require explanation. 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. In other words, failure to vote on a constitutional amendment is effectively a "no" vote. In November 2004, 245,789 votes were cast in Wyoming, 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. 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 small shortfall (0.3491% of 245,789) triggered an automatic recount of Amendment A. The recount of Amendment A only changed 55 votes (0.0223% of 245,789). Thus, Amendment A was defeated—that is, the recount did not change the outcome. 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 small 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). Thus, Amendment C was passed—that is, the recount did not change the outcome.

Table 9.48 shows that recounts change very little:

- The outcome of the election was reversed in only three of the 36 recounts—that is, only one in 12 recounts reversed the outcome. In other words, the outcome of only one statewide general election in 2,309 was reversed by a recount.
- As one would expect, the initial winner gained votes in about half of the recounts (17 of the 36) and lost votes in the others (as shown in column 8).
- As one would expect, after adding up the gains and losses, the average change in the initial winner's number of votes due to a recount is *near-zero*. Specifically, it is 57 votes—a mere 0.002% of the average number of votes cast in the recounted race (that is, 2,380,628, as shown in column 5). This 57-vote change is a mere 0.8% of the initial winner's average lead (that is, 7,368, as shown in column 6).[919]
- As one would expect, the average *magnitude* (absolute value) of the change in the initial winner's number of votes due to a recount is also near-zero. Specifically, it is 551 votes—a mere 0.02% of the average number of votes cast in the recounted race (that is, 2,380,628). This 551-vote change is also a small fraction of the initial winner's average lead (that is, 7,368).

The only three recounts that overturned the original outcome during the 24-year period were of the:

- 2004 Governor's race in Washington State, where the initial (pre-recount) winner's 261-vote lead became a 129-vote loss;
- 2006 state Auditor's race in Vermont, where the initial winner's 137-vote lead became a 102-vote loss; and
- 2008 U.S. Senate election in Minnesota, where the initial winner's 215-vote lead became a 225-vote loss.

Not surprisingly, the initial winners' leads in the recounts that overturned the outcomes (261, 137, and 215, respectively) were all quite small in comparison to the average lead of all the initial winners in the table (that is, 7,368, as shown in column 6).

In summary, in the 6,929 statewide general elections in the 24-year period between 2000 and 2023:

- There were only 36 recounts. That is, the probability of a statewide general-election recount is 1-in-192.
- The average change in the initial winner's vote count was 57 votes.
- Only 1-in-12 recounts reversed the original result.

[919] The average of the absolute values in column 1 is 551.

Statistics of recounts

The distribution of the number of votes gained or lost by the initial winner as a result of a statewide recount (that is, column 8 of table 9.48) can be characterized by two numbers—the average (mean) and the standard deviation.

The standard deviation of a distribution (called "sigma" or "σ") is a widely used statistical measure of the amount of variation in a set of data. It is described in any elementary textbook on statistics and in numerous tutorials.[920] The standard deviation, σ, of a set of data can be easily computed by spreadsheet software, such as Excel.

The standard deviation of the distribution of changes in the initial winner's number of votes as a result of state-level recounts is 1,134 votes.

As previously mentioned, the average (mean) of the distribution of changes in the initial winner's votes as a result of state-level recounts is 57 votes.

How many votes are likely to be changed by a nationwide recount?

Once we know the standard deviation and mean of distribution of changes produced by state-level recounts, we can estimate the likely number of votes that would be changed if 51 state-level recounts were conducted—that is, if a nationwide recount were conducted.

The number of votes that are likely to be changed by a nationwide recount can be estimated by standard statistical methods applied to data about actual recounts and the data about popular-vote margins in presidential elections.

The results of this analysis are:

- The probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.
- The probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, the outcome of only one nationwide presidential election in 1,296 years is likely to be changed by a recount.

Details of the statistical analysis

This section explains how the above conclusion was reached.

The fundamental theorem of statistics (also known as the "Central Limit Theorem") provides a way of computing what is likely to happen when a statistical process (in this case, a state-level recount) is repeated numerous times.

---

[920] For example, see *Wikipedia* at https://en.wikipedia.org/wiki/Standard_deviation#Interpretation_and_application.

The Central Limit Theorem tells us that the likely distribution of changes in the initial winner's number of votes resulting from 51 state-level recounts (that is, a national recount) will be the familiar bell-shaped (Gaussian) curve.

In addition, the distribution of the changes in votes resulting from 51 state-level recounts is 8,098 votes. This number is obtained by multiplying 1,134 (the standard deviation associated with one statewide recount) by the square root of 51 (the number of repetitions of the process).

Figure 9.23 shows a Gaussian distribution with a standard deviation of 8,098 votes.

To simplify the explanation of this figure, we *temporarily* assume that the average (mean) of the distribution is zero (when it is, in fact, 57 votes).

The numbers along the horizontal axis at the very bottom of this figure represent the number of votes that the initial (pre-recount) winner would lose or gain as a result of 51 state-level recounts.

The horizontal axis ranges from three times the standard deviation of 8,098 (that is, 24,294) below the mean to three standard deviations above the mean. That is, the figure focuses on a change of –24,294 votes (the initial winner losing that number of votes) to 24,294 votes (the initial winner gaining that number of votes).

The numbers above the number of votes on the horizontal axis correspond to the number of standard deviations. They range from three standard deviations below the mean (–3σ, that is –24,294 votes) to three standard deviations above the mean (3σ, that is 24,294).

A key point about the Gaussian curve is that the *area* under the portion of the curve lying above two points on the horizontal axis equals the *probability* that a nationwide recount will change the number of votes between those two points on the horizontal axis.

For example, consider the portion of the Gaussian curve lying between –8,098 votes and 8,098 votes on the horizontal axis—that is, between one standard deviation below the

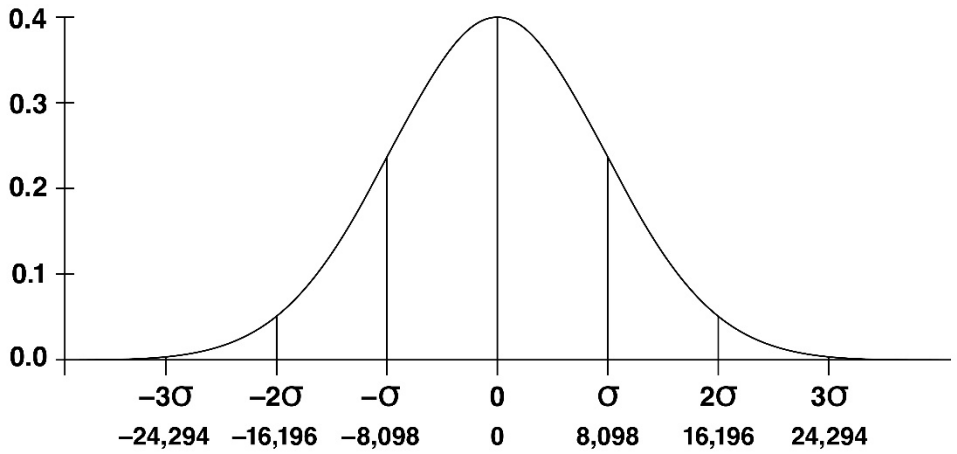


Figure 9.23 Probability that a nationwide recount changes a particular number of votes (assuming an illustrative mean of 0)

mean (zero) and one standard deviation above the mean. This portion of the curve constitutes approximately two-thirds of the area under the Gaussian curve. This tells us that the probability is approximately two-thirds that the initial winner's change in votes due to a nationwide recount will range between –8,098 and 8,098 votes (that is, within one standard deviation on either side of the mean).

Now consider the portion of the Gaussian curve lying between –24,294 votes and 24,294 votes (that is, three standard deviations on either side of the mean). This portion of the curve constitutes 99.74% of the area under the curve. This tells us that the probability is 99.74% that the initial winner's change in votes due to a nationwide recount will range from –24,294 votes to 24,294 votes.

Note that there is only a tiny probability that a recount will change more than 24,294 votes in one direction or the other. Specifically:

- The portion of the Gaussian curve to the left of –3σ accounts for 0.13% of the area under the Gaussian curve. In other words, there is a probability of 0.13% that a recount will subtract more than 24,294 votes from the initial winner's lead.
- The portion of the Gaussian curve to the right of +3σ accounts for the remaining 0.13% of the area under the curve. That is, there is a probability of 0.13% that a recount will add more than 24,294 votes to the initial winner's lead.

Taken together, 0.26% of the area under this curve lies outside of the range between –3σ and 3σ.

A probability of 0.26% corresponds to a chance of 1-in-369.

To put it another way, it is very unlikely (a chance of only 1-in-369) that a nationwide recount will change the initial winner's lead by more than 24,294 votes in one direction or the other.

The above discussion about the previous figure assumed, for simplicity, that the mean of the distribution was zero. That is, the previous figure did not reflect the impact of the near-zero change (57 votes) in the initial winner's number of votes for each recount.

We now make the calculation more precise by considering the impact of the 57 votes.

The average (mean) change in votes resulting from conducting 51 state-level recounts is simply 51 times the average change (57 votes) resulting from one recount—namely 2,907 votes.

Figure 9.24 shows a Gaussian distribution with a standard deviation of 8,098 votes and a mean of 2,907 votes.

This figure shows that the probability is 99.74% that the change in the initial winner's lead after a nationwide recount would be between:

- –21,387—that is, the mean (2,907) *minus* three standard deviations (8,098) and
- +27,201—that is, the mean (2,907) *plus* three standard deviations (8,098).

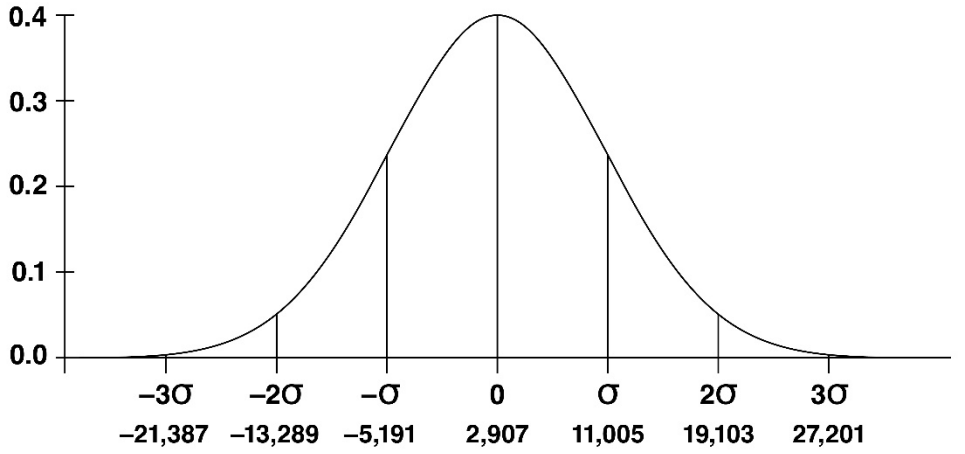


Figure 9.24 Probability that a nationwide recount changes a particular number of votes (with actual mean of 2,907)

Statistics about the winning margins in presidential elections

Table 9.49 shows the national popular vote for the Republican and Democratic presidential nominees for the nine elections between 1988 and 2020.[921]

Column 4 shows the difference in the number of votes between the Republican nominee and Democratic nominee—the "R–D lead."

Table 9.49 The national popular vote for President 1988–2020

Election	Republican	Democrat	R–D lead in votes	R–D lead as a percentage
1988	48,886,097	41,809,074	7,077,023	7.80%
1992	39,103,882	44,909,326	–5,805,444	–6.91%
1996	39,198,755	47,402,357	–8,203,602	–9.47%
2000	50,460,110	51,003,926	–543,816	–0.54%
2004	62,040,611	59,028,432	3,012,179	2.49%
2008	59,934,814	69,456,898	–9,522,084	–7.36%
2012	60,930,782	65,897,727	–4,966,945	–3.92%
2016	62,985,134	65,853,652	–2,868,518	–2.23%
2020	74,215,875	81,268,586	–7,052,711	–4.54%
Total	**497,756,060**	**526,629,978**		
Average			**–3,208,213**	**–2.74%**

As can be seen from the table, the mean (average) of the R–D leads in the 1988–2020 period was –3,208,213 votes.

The standard deviation of this distribution is 5,176,137 votes.

Figure 9.25 is a Gaussian distribution with a mean of –3,208,213 votes and a standard deviation of 5,176,137 votes.

[921] Between 1988 and 2020, the United States has been in an era of close presidential elections, as discussed in section 1.1.2.

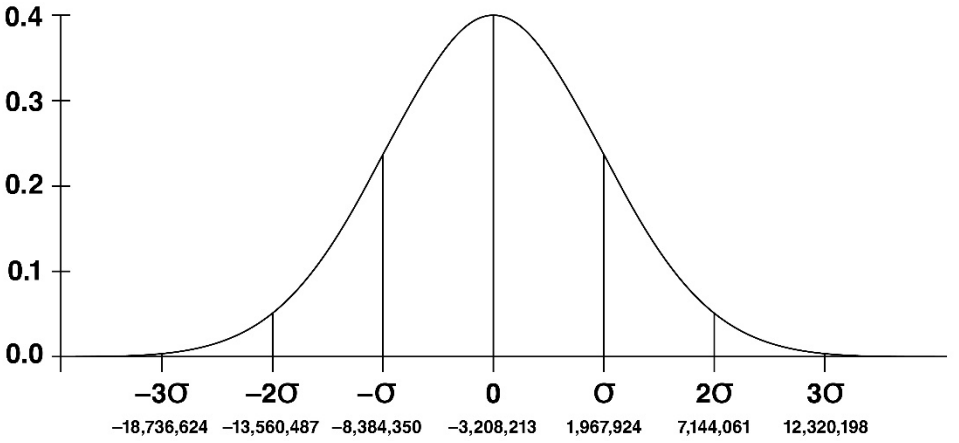


Figure 9.25 Probability that a nationwide presidential election produces various R–D leads in terms of number of votes

Probability that a nationwide recount would change the outcome of a presidential election

We now have the two pieces of information necessary to calculate the probability that a nationwide recount would reverse the outcome of a presidential election:

- statistics about the changes in the initial winner's lead due to a nationwide recount, and
- statistics about the popular-vote leads in recent presidential elections.

Specifically, we now know that a nationwide recount would likely only affect tens of thousands of votes, whereas the winner's nationwide lead in a presidential election ordinarily ranges over many millions of votes.

Thus, if the initial winner's lead is in the millions, it is very unlikely that a nationwide recount will reverse the result.

The laws of statistics give us a way to translate this intuition into a precise calculation of the probability that a nationwide recount will reverse the outcome.

Table 9.50 is based on the Gaussian distribution with a mean of –3,208,213 and a standard deviation of 5,176,137 shown in the previous figure.

- Column 1 shows various R–D leads that might occur. For example, an R–D lead of –18,736,624 corresponds to a Democratic landslide (a negative three-sigma event). An R–D lead of +12,320,198 corresponds to a Republican landslide (a positive three-sigma event).
- Column 2 restates the number of votes shown in column 1 in terms of sigma (the standard deviation).
- Column 3 is the height of the Gaussian curve for a given R–D lead.
- Column 4 provides a way to calculate the area under a selected portion of the Gaussian curve. The number in this column is the cumulative probability (area under the curve). The difference between two entries in this column is the area under a particular portion of the Gaussian curve—that is, it is the probability that the R–D lead in a presidential election lies between two selected values.

Table 9.50 Probability that a nationwide presidential election produces various R–D leads in terms of number of votes

R–D lead	Sigma	Height of Gaussian curve	Cumulative probability
–18,736,624	–3.0	0.004	0.00135
–13,560,487	–2.0	0.054	0.02275
–8,384,350	–1.0	0.242	0.15866
–3,208,213	0.0	0.399	0.50000
–24,294	0.61511	0.330	0.73076
0	0.61981	0.329	0.73231
24,294	0.62450	0.328	0.73385
1,967,924	1.0	0.242	0.84134
7,144,061	2.0	0.054	0.97725
12,320,198	3.0	0.004	0.99865

For example, consider the first and fourth rows of column 4 of this table. These rows correspond to an R–D lead of between –18,736,624 votes (three standard deviations below the mean) and –3,208,213 votes (the mean). The difference between the cumulative probabilities in column 4 is the area under the portion of the curve for this range of votes. This difference is 0.49865. That tells us that there is a 49.865% probability that the R–D lead lies between –18,736,624 votes and –3,208,213 votes.

Now consider the red-colored row of table 9.50. An R–D lead of 0 corresponds to a tie in the national popular vote. A nationwide tie occurs at the 0.61981 point on the sigma scale.

Recall that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.

In other words, if a nationwide recount is going to overturn the result of a nationwide election, the initial winner's R–D lead must be, for all practical purposes, within 24,294 votes of a nationwide tie.

The green-colored row in the table represents an R–D lead of –24,294 votes and corresponds to a sigma of 0.61511.

The blue-colored row in the table represents an R–D lead of 24,294 votes and corresponds to a sigma of 0.62450.

Figure 9.26 highlights the critical area between an R–D lead of –24,294 votes and 24,294 votes.

The area under the (very tiny) portion of the Gaussian curve between the green-colored vertical line and the blue-colored vertical line in the figure is the probability that the R–D lead in a presidential election is between –24,294 votes and 24,294 votes. This area under this portion of the curve is the difference in cumulative probabilities shown in column 4 of the green-colored row and the blue-colored row—that is, the difference between 0.73385 and 0.73076, namely 0.00309. That is, the probability that the R–D lead is between –24,294 votes and 24,294 votes is 0.309% or 1-in-324.

In other words, the probability is very high (99.74%) that a nationwide recount would reverse the outcome of one presidential election in 324.

In the context of presidential elections that occur every four years, a probability of 1-in-324 corresponds to one presidential election in 1,296 years.

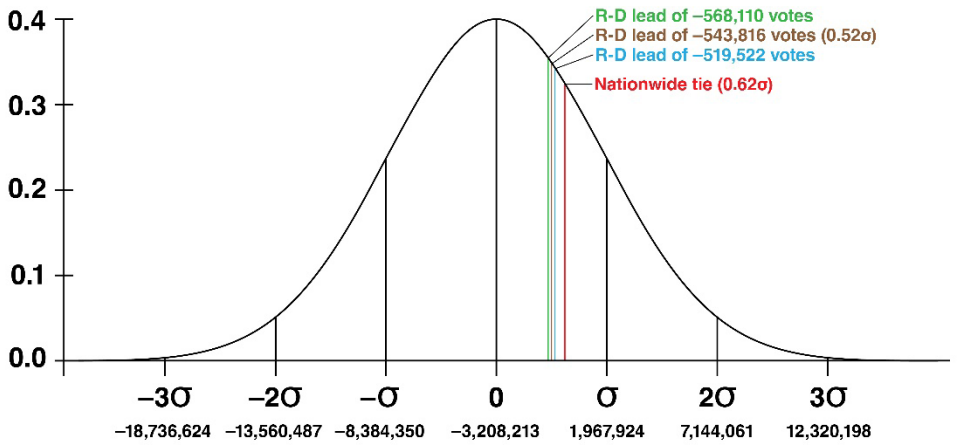


Figure 9.26 Probability that a nationwide election produces a R–D lead of between 24,294 votes in favor of the Democratic nominee and 24,294 votes in favor of the Republican nominee. Note that this figure was inadvertently omitted from the first printing of this edition of this book.

To put it another way, the probability is very high (99.74%) that a nationwide recount would not change the outcome of 323 presidential elections out of 324.

Probability that a nationwide recount would have changed the national popular vote winner in 2000

The question arises as to whether a nationwide recount would have been likely to change the national popular vote winner in 2000.

The 2000 presidential election was the closest election in terms of the national popular vote between 1988 and 2020, as shown in table 9.49. The R–D lead in that election was –543,816 votes. That is, Al Gore led George W. Bush by 543,816 popular votes nationwide.

Recall that we determined above that the probability is very high (99.74%) that the initial winner's lead would be changed by fewer than 24,294 votes in one direction or the other by a nationwide recount.

Therefore, the probability would be 99.74% that Gore's lead would be changed by fewer than 24,294 votes in one direction or the other by a nationwide recount—that is, Gore's lead would end up between 519,522 votes and 568,110 after a nationwide recount.

In short, it is very unlikely that a recount would change the outcome of an election when the initial (pre-recount) winner has a lead as large as 543,816 popular votes nationwide.

Figure 9.27 is a visualization of the conclusion that a nationwide recount of the 2000 election would not have come close to changing the outcome of the election. Even a loss of 24,294 votes would not have closed the gap.

- An R–D lead of 0 votes (that is, a nationwide tie) is represented by the red horizontal line located at a sigma of 0.61981.
- Gore starts with a pre-recount R–D lead of –543,816 votes—represented by a black horizontal line located at a sigma of 0.51475.

- The horizontal blue line at 0.51944σ represents an R–D lead of –519,522 votes—that is, Gore's lead was reduced by 24,294 votes due to the recount.
- The horizontal green line at –0.51005σ represents an R–D lead of –568,110 votes—that is, Gore's lead was increased by 24,294 votes due to the recount.

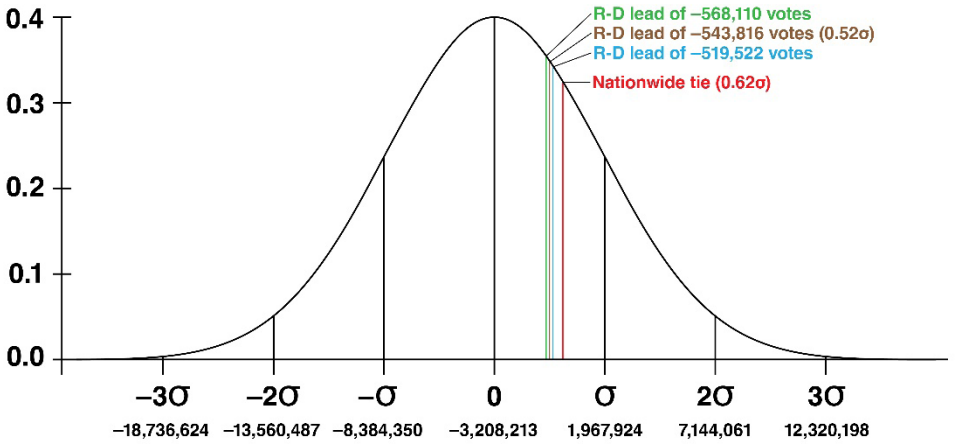


Figure 9.27 Likely result of a nationwide recount in 2000

Probability that a nationwide recount would change the outcome of a presidential election expressed as percentages

The calculations above were based on the *number of votes* that are likely to be changed by a recount in a presidential election.

Table 9.51 shows the *percentage change* in the initial winner's votes in all 36 recounts of statewide general elections between 2000 and 2023.

- Columns 1, 2, 3, and 4 are the same as in table 9.48.
- Column 5 shows the total number of votes for the initial (pre-recount) winner and the runner-up.
- Column 6 shows the change in the initial winner's lead resulting from the recount. This is the same information that appears in column 7 of table 9.48.
- Column 7 shows the change in the initial winner's lead resulting from the recount (column 6) as a percentage of the vote total (column 5).

As can be seen from column 7 of the table, the average (mean) of the distribution of *percentage* changes in the initial winner's vote is 0.00146% (that is, 0.0000146 of the total vote).

The standard deviation of the distribution of percentage changes in the initial winner's vote is 0.0485% (that is, 0.000485).

The average (mean) deviation of the distribution of the percentage changes in votes resulting from 51 statewide recounts (that is, a nationwide recount) is 51 times 0.00146%—that is, 0.0745%.

Table 9.51 Percentage change in the initial winner's votes in all 36 recounts of statewide general elections 2000–2023

Year	State	Race	Effect of the recount	Total votes	Change in initial winner's lead	Percentage change in initial winner's votes
2000	CO	Education Board	Upheld	1,536,619	–1,121	–0.0730%
2000	FL	President	Upheld	5,816,486	–1,247	–0.0214%
2000	MT	Public Instruction	Upheld	63,080	–3	–0.0048%
2000	WA	Secretary of State	Upheld	2,137,677	–267	–0.0125%
2000	WA	U.S. Senator	Upheld	2,396,567	276	0.0115%
2004	AK	U.S. Senator	Upheld	289,324	–219	–0.0757%
2004	AL	Amendment 2	Upheld	1,380,750	–4	–0.0003%
2004	GA	Court of Appeals	Upheld	414,484	15	0.0036%
2004	WA	Governor	Reversed	2,742,567	–390	–0.0142%
2004	WY	Amendment A	Upheld	218,433	–55	–0.0252%
2004	WY	Amendment C	Upheld	233,955	–50	–0.0214%
2005	VA	Attorney General	Upheld	1,941,449	37	0.0019%
2006	AL	Amendment	Upheld	816,102	508	0.0622%
2006	NC	Court of Appeals	Upheld	1,539,190	50	0.0032%
2006	VT	Auditor	Reversed	222,835	–239	–0.1073%
2008	MN	U.S. Senator	Reversed	2,422,965	–440	–0.0182%
2008	OR	Measure 53	Upheld	978,634	131	0.0134%
2009	PA	Superior Court	Upheld	1,821,869	281	0.0154%
2010	AZ	Proposition 112	Upheld	1,585,522	66	0.0042%
2010	MN	Governor	Upheld	1,829,620	–86	–0.0047%
2010	NC	Court of Appeals	Upheld	1,079,980	667	0.0618%
2011	WI	Supreme Court	Upheld	1,497,330	–312	–0.0208%
2013	VA	Attorney General	Upheld	2,207,389	742	0.0336%
2014	MO	Amendment	Upheld	996,249	308	0.0309%
2014	NC	Supreme Court	Upheld	2,474,117	–17	–0.0007%
2014	NM	Public Lands Comm	Upheld	499,330	48	0.0096%
2014	OR	Initiative	Upheld	1,506,176	35	0.0023%
2016	WI	President	Upheld	2,785,823	571	0.0205%
2018	FL	Agriculture Comm	Upheld	8,059,156	1,427	0.0177%
2018	FL	Governor	Upheld	8,119,910	–1,137	–0.0140%
2018	FL	U.S. Senator	Upheld	8,188,978	–2,567	–0.0313%
2020	GA	President	Upheld	4,935,716	–496	–0.0100%
2020	NC	Supreme Court	Upheld	5,391,556	–15	–0.0003%
2021	PA	Commonwealth Court	Upheld	2,561,068	5,550	0.2167%
2022	AZ	Attorney General	Upheld	2,508,715	–231	–0.0092%
2022	AZ	Public Instruction	Upheld	2,502,987	221	0.0088%
		Average		**2,380,628**	**57**	**0.00146%**

The standard deviation of the distribution of the percentage changes in votes resulting from a nationwide recount would, according to the Central Limit Theorem, be 0.0485% times the square root of 51—that is, 0.346%.

The average percentage R–D lead for the nine presidential elections between 1988 and 2020 is –2.74%, as shown in table 9.49. The standard deviation of this distribution of percentages is 5.08%.

9.34.2. MYTH: The Compact should be opposed, because it might not be possible to conduct a recount in every state.

QUICK ANSWER:

- Under the *current* system for electing the President, a timely recount of presidential ballots is usually not obtainable during the brief 42-day period between Election Day and the Electoral College meeting in mid-December. There have been numerous examples, under the current system, where a recount was requested, but never conducted, in closely divided states that decided presidential elections. Most famously, supporters of George W. Bush were able to use the courts to thwart a hand recount of his slender 537-popular-vote lead in the decisive state of Florida in 2000. In 2004, attempts to obtain a recount in the decisive state of Ohio were unsuccessful. In 2016, requests to obtain recounts in two of that election's three decisive states (Michigan and Pennsylvania) were successfully blocked in court by the candidate who was in the lead. In 2020, the results of six closely divided states were vigorously disputed, but a statewide recount was conducted in only one state—Georgia.
- The difficulty of obtaining a timely recount of a presidential election in the brief 42-day period between Election Day and the Electoral College meeting could theoretically be addressed by streamlining state recount laws in all 50 states and the District of Columbia. However, few legislatures have revised their recount laws in the two decades since the dispute over the never-held hand recount in Florida in 2000. A more practical approach would be for Congress to pass a federal law guaranteeing presidential candidates the right to a timely recount.
- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (as demonstrated in section 9.34.1). Indeed, there would be considerably less need for a recount in a nationwide election than under the current state-by-state winner-take-all method of awarding electoral votes.
- The fact that a recount might not be obtainable in every state is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the criticism also applies to the current system. In fact, given that a recount would almost never be needed under the Compact (section 9.34.1), the Compact is arguably superior to the current system in this respect.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the National Popular Vote Compact by saying:

> "States have different criteria for what does (or does not) trigger recounts within their borders. … 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?"[922] [Emphasis added]

Sean Parnell, the Senior Legislative Director of Save Our States, has written that in a nationwide election for President:

> "Some states would conduct recounts, while others would not."[923]

In fact, the ability to obtain a recount of a presidential vote "close enough to warrant a recount" is largely an illusion *under the current system*.

Indeed, there have been far more instances of a presidential-vote recount being requested than conducted.

In 2000, attempts to get a hand recount of George W. Bush's slender 537-vote margin of victory in the decisive state of Florida were challenged by the Bush campaign and successfully blocked by the U.S. Supreme Court.[924] Given this tiny 537-vote lead, if there ever was an election that warranted a recount, it was the presidential race in Florida in 2000.

In 2004, attempts to obtain a recount of the presidential vote in the decisive state of Ohio were unsuccessful.[925]

In 2016, attempts to obtain recounts of the three decisive states were successfully blocked in court in two of these three states (that is, Michigan and Pennsylvania). Only Wisconsin conducted a recount.[926]

In 2020, 64 lawsuits were filed in six closely divided states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) disputing the election.[927] However, there was a statewide recount for President in only one state—Georgia.[928]

Time is a major factor when it comes to recounting a presidential election.

It is not that a statewide recount takes much time (as discussed in detail in section

---

[922] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[923] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[924] Reagan, Robert Timothy; Margaret S. Williams; Leary, Marie; Borden, Catherine R.; Snowden, Jessica L., Breen, Patricia D., and Jason A. Cantone. 2023. The 2000 Election of the President. *Emergency Election Litigation in Federal Courts: From Bush v. Gore to COVID-19*. Washington, DC: Federal Judicial Center. Pages 1266–1273. https://www.fjc.gov/sites/default/files/materials/55/Emergency-Election-Litigation-in-Federal-Courts.pdf

[925] Reagan, Robert Timothy; Margaret S. Williams; Leary, Marie; Borden, Catherine R.; Snowden, Jessica L., Breen, Patricia D., and Jason A. Cantone. 2023. Complete Ohio 2004 Presidential Recount. *Emergency Election Litigation in Federal Courts: From Bush v. Gore to COVID-19*. Washington, DC: Federal Judicial Center. Pages 1257–1260. https://www.fjc.gov/sites/default/files/materials/55/Emergency-Election-Litigation-in-Federal-Courts.pdf

[926] In the 2026 Wisconsin presidential recount, Trump increased his initial margin by 131 votes. Trump gained 844 votes (from 1,404,440 to 1,405,284), and Clinton gained 713 (from 1,381,823 to 1,382,536).

[927] A survey of the 64 lawsuits in the six states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) may be found in Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

[928] A recount of two counties in Wisconsin was conducted in 2020.

9.34.2). The problem is that legal maneuvering over whether to conduct a recount and other procedural issues consume some or all of the available time.

The U.S. Constitution requires that the Electoral College meet on the same day throughout the country—thus creating an immovable deadline for completing a recount. Article II, section 1, clause 4 states:

> "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**." [Emphasis added]

The date for the Electoral College meeting is specified in section 7 of the Electoral Count Reform Act of 2022 as the first Tuesday after the second Wednesday in December.[929]

In 1845, Congress established the Tuesday after the first Monday in November as the uniform nationwide day for appointing presidential electors—that is, Election Day. That date was retained in the Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 and is currently codified as section 1 of title 3 of the U.S. Code.

Thus, there are 42 days between Election Day and the date for the Electoral College meeting under current federal law. In 2024, Election Day is Tuesday, November 5, and the Electoral College meeting is Tuesday, December 17, 2024.

Because of this constitutional provision, all counting, pre-recount litigation, recounting, and post-recount litigation must be conducted so as to reach a final conclusion prior to the uniform nationwide date for the Electoral College meeting in mid-December.

These constitutional and statutory provisions, of course, apply equally to both the current state-by-state winner-take-all system of electing the President and the National Popular Vote Compact.

There are three practical reasons why the time available for conducting a recount of a presidential election is less than 42 days.

First, federal law diminishes the already-brief 42-day period by requiring each state to certify its popular-vote count within six days before the Electoral College meeting (the Safe Harbor Day). There are sound reasons for this six-day period. However, because of this six-day period, only 36 days are available between Election Day and the Safe Harbor Day.[930]

Second, more importantly, as the word "recount" implies, *there cannot be a recount until there is a count.*

Thus, an aggrieved presidential candidate cannot even begin the process of requesting a recount until after the official initial count is completed and certified.

It is true that unofficial vote counts are generally available from virtually every precinct in the country on Election Night or very shortly thereafter. However, various tasks must be performed before a state completes the official initial count.

The total number of days required to complete the official initial count varies by state, and depends on numerous factors determined by state law, including:

---

[929] The Electoral Count Reform Act of 2022 (United States Code. Title 3. Section 7) is found in appendix B of this book.

[930] In 2024, Election Day is Tuesday, November 5. The Safe Harbor Day is Wednesday, December 11. The Electoral College meeting date is Tuesday, December 17.

- whether pre-processing of mail-in ballots (i.e., verifying that the voter is registered and verifying the voter's signature) may occur before Election Day, while the polls are open during Election Day, or only after Election Day;
- whether actual counting of mail-in ballots may occur before Election Day, while the polls are open during Election Day, or only after Election Day;
- whether mail-in ballots may be counted if they are received within a certain number of days after Election Day (provided, of course, that they are postmarked by Election Day);
- whether there is an extended deadline for receiving and counting military or overseas ballots;
- how much time is allowed by the state to validate, adjudicate, and cure provisional ballots; and
- how much time, if any, is allowed to cure correctable errors that are identified in provisional ballots.

After all ballots are counted at the local level, official documents certifying the local count must be delivered to the official or body designated by state law. Then, the designated official or body adds the local counts together and certifies the result as the initial statewide count.

A few states (New Hampshire, Oklahoma, South Dakota, and Vermont) routinely complete their official initial account very quickly—sometimes within a week after Election Day. However, most states take several weeks.

The amount of delay is illustrated by the 2012 election. In that year, the Electoral College meeting was on December 18, and the Safe Harbor Day was December 12.

- Nine of the 12 battleground states of 2012[931] completed their official initial presidential count on or after November 29—thus leaving less than two weeks before the Safe Harbor Day.
- Two of the 12 battleground states did not complete their official initial presidential count until December 10—thus leaving only two days.
- One of the 12 battleground states did not complete its official initial presidential count until December 12—thus leaving no time at all.

Third, once the official initial count is completed and certified, the aggrieved candidate's request for a recount will almost inevitably be challenged by the candidate who is leading in the initial count. Such challenges often start at the administrative level but quickly find their way into either state or federal court—and sometimes both. And, of course, each administrative and judicial ruling may be appealed to various higher courts. A decision at the highest state court can often then be appealed to the federal courts. Lawyers for whichever candidate is leading initially are skilled at raising hair-splitting legal questions that generate delay and eventually run out the clock.

Fourth, even if the aggrieved candidate's request for a recount is granted, it may be impossible to obtain a recount in a presidential election matter because of other hurdles and delays built into the existing state recount laws.

---

[931] See section 1.2.3 for the list of the 12 battleground states of 2012.

One of the reasons that a recount of a presidential election is unobtainable in practice is that state recount laws were written with state and local offices primarily in mind. For state and local offices, there is no time pressure analogous to the U.S. Constitution's immovable requirement that the Electoral College meet on the same specified day in each state.

Indeed, recounts and associated legal challenges in races for offices other than President often meander on for months after Election Day. For example, the November 2008 Senate contest between Al Franken and Norm Coleman was not finally decided until June 20, 2009.[932]

The situation in Ohio in 2004 illustrates the legal difficulties for recounting or contesting a presidential election after the official initial count.

In Ohio in 2004, there were more than 150,000 provisional ballots. George W. Bush's final margin in the state was 118,601.[933]

Senator John Kerry recognized that historically about two-thirds of provisional ballots are typically judged to be valid. That is, it was likely that about 100,000 of these provisional ballots would eventually be accepted. Kerry also knew, based on historical voting patterns in Ohio, that he was likely to win the eventually accepted provisional ballots by, at the most, a 57%–43% margin. That is, Kerry knew that he would be able, at best, to eke out only about a 14,000-vote margin over Bush from the provisional ballots.

Accordingly, based on Bush's six-digit margin on Election Night and the known statistics concerning provisional ballots, Kerry conceded on the day after Election Day.

However, suppose Bush's apparent Election Night margin had been in the neighborhood of 14,000.

At that point, the many practical problems in Ohio's existing laws concerning recounts and contests would have come into play to frustrate the completion of a recount before the Electoral College meeting.

Professor Danial Tokaji of the Michael E. Moritz College of Law at Ohio State University identified some of the difficulties associated with trying to conduct a potential recount or contest for President 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).

---

[932] *Wikipedia*. 2008 United States Senate election in Minnesota/ Accessed July 13, 2024. https://en.wikipedia.org/wiki/2008_United_States_Senate_election_in_Minnesota#:~:text=After%20all%20the%20votes%20were,called%20the%20election%20for%20Coleman.

[933] Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

> 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**."[934] [Emphasis added]

The bottom line is that the presidential candidate who is leading in the initial count will usually be able to use existing statutory provisions to "run out the clock" with dilatory tactics until the Safe Harbor Day.[935]

Existing recount laws in other states contain similar unworkable and illogical provisions that make it almost impossible to get a timely recount in a presidential race.

Moreover, in many states, a candidate only has the right to request a recount if the apparent winning candidate's lead in the initial count is within a specified very small percentage. That is, recount laws in many states paradoxically offer the promise of correcting a small error in the initial count—but no way to correct a large error.

When a recount was requested in the closest of the three decisive states in the 2016 presidential election (Michigan), the initial winning candidate (Trump) pointed out that state law did not allow a recount in any precinct where there was a discrepancy between the number of votes cast and the number of people who signed the voting log. One would think that precincts with such a discrepancy would be precisely the ones that an aggrieved candidate might want to recount. Eight years after the 2016 election, a bill advanced in the Michigan legislature to correct this anomaly.[936]

In short, the possibility of conducting a timely recount of a presidential election is largely an illusion under existing state recount laws—regardless of whether the election is conducted under the current state-by-state winner-take-all method of awarding electoral votes or the National Popular Vote Compact.

As explained in section 9.34.1, there would be considerably less need for a recount under a national popular vote than under the current state-by-state winner-take-all method of awarding electoral votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result.

---

[934] 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

[935] An additional factor would have prevented a recount in Ohio in 2004. The initial count was not certified until the Safe Harbor Day. Thus, a recount would have been impossible in the decisive state of the 2004 presidential election had it been warranted.

[936] See Michigan Senate Bill SB603 of 2024. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-SB-0603&QueryID=159966389 and the Legislative Analysis of the Senate-passed bill by the House Fiscal Agency at https://www.legislature.mi.gov/documents/2023-2024/billanalysis/House/pdf/2023-HLA-0603-6C1B4E59.pdf

Nonetheless, opponents of the National Popular Vote Compact argue that the Compact should be opposed because it might not be possible to recount every state, while simultaneously defending the current state-by-state system under which recounts are usually unobtainable in practice.

The fact that a recount might not be obtainable in every state is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the criticism also applies to the current system. In fact, given that a recount would almost never be needed under the Compact (section 9.34.1), the Compact is arguably superior to the current system in this respect.

In section 9.34.7, we present proposed federal legislation that would guarantee a timely recount to an aggrieved presidential candidate.

9.34.3. MYTH: Conducting a nationwide recount would be a logistical impossibility.

QUICK ANSWER:

- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could reverse the initial result (as demonstrated in section 9.34.1).
- A recount can be conducted rapidly once an aggrieved presidential candidate surmounts the dilatory legal tactics that often block a recount. The history of presidential recounts in several states demonstrates that there is no logistical obstacle to conducting a recount in the 36-day period between Election Day and the Safe Harbor Day.
- For example, in 2020, Georgia conducted its initial count and two statewide recounts in the brief 36-day period between Election Day and the Safe Harbor Day. The initial statewide count was completed shortly after Election Day. In response to issues raised by Trump supporters, the Secretary of State initiated and completed a hand count of all of the state's nearly five million ballots in six days. Then, at the request of the Trump campaign, the state conducted a third statewide count. Statewide recounts of presidential ballots have been completed in between three and 10 days in other states.
- The personnel and other 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 another state is simultaneously conducting one.

MORE DETAILED ANSWER:

Once an aggrieved presidential candidate surmounts the legal obstacles to obtaining a recount, there is plenty of evidence that a statewide recount of a presidential election can be conducted expeditiously.

The task of recounting the votes cast for President is not a logistical impossibility—as evidenced by the fact that the original counts for *all* offices and ballot questions are routinely completed and certified within a few days after Election Day.

As a matter of prudent planning, the election officials of every state stand ready with contingency plans to carry out their duty to conduct a recount in a timely manner if one is required.

Moreover, no state needs the assistance of any personnel or resources from any other state in order to conduct a statewide recount inside its own borders. The personnel and resources necessary to conduct a recount are entirely indigenous to each state. Votes are counted in parallel at the local level, and recounts are generally conducted at the same local level as the original count. Thus, a state's ability to handle the logistics of a recount within its own borders is unrelated to whether recounts are being simultaneously conducted in other states.

Georgia 2020 statewide recounts

Georgia was a closely divided state in the 2020 presidential election.

The initial statewide count was completed shortly after Election Day.

Then, in response to issues raised by Trump supporters, Georgia Secretary of State Brad Raffensperger initiated a hand recount of 100% of the state's nearly five million ballots in the presidential race (technically a "risk-limiting audit").

This statewide hand count was executed during a period of six calendar days—specifically between Friday November 13 and Wednesday November 18.[937]

Like the original count on Election Night, the Secretary of State's hand recount was conducted separately by each of Georgia's 159 counties. That is, the work was conducted in parallel throughout the state.

Many of Georgia's counties did not take the full six days to finish their work.

The state's largest county (Fulton) finished its hand recount of 528,777 ballots in the first three days.[938,939] Fulton County accomplished its work with 172 two-person counting teams aided by 15 additional people.[940] That is, the task was accomplished with a total 1,077 workdays of effort—that is, at a rate of about 490 ballots per workday.

Similarly, DeKalb County, a large suburban area east of Atlanta, finished recounting its 370,000 ballots for President in three days.

Cobb County, a large suburban area north of Atlanta, finished counting its 393,000 ballots by the end of the fifth day.

---

[937] Fausset, Richard and Batra, Jannat. 2020. Examine Ballot. Recite Name. Sort Into Bin. Repeat 5 Million Times. *New York Times*. November 13, 2020. https://www.nytimes.com/2020/11/13/us/georgia-recount-presidential-election.html

[938] Hallerman, Tamar and Kass, Arielle. 2020. Recount Day 3: DeKalb, Fulton finish counting; other counties closing in. *Atlanta Journal*. November 15, 2020. https://www.ajc.com/politics/live-updates-georgia-recount-enters-third-day/IZYV2YQGZVBGDKKR4LPT466BQ4/

[939] Fausset, Richard. 2020. As Tensions Among Republicans Mount, Georgia's Recount Proceeds Smoothly. *New York Times*. November 17, 2020. https://www.nytimes.com/2020/11/16/us/politics/georgia-recount.html

[940] Murchison, Adrianne. 2020. Fulton finishes counting votes for presidential recount. *Atlanta Journal*. November 15, 2020. https://www.ajc.com/politics/live-updates-georgia-recount-enters-third-day/IZYV2YQGZVBGDKKR4LPT466BQ4/

> "Cobb County started the process Friday morning [November 13] with dozens of workers spread out at tables inside of an exhibit hall, sorting ballots into bins featuring the names of the presidential candidates. Approved poll watchers stood close by and looked over the shoulders of workers as they sorted ballots. A handful of members of the general public stood behind caution tape at the edge of the room."[941]

Bryan County, one of Georgia's smaller counties, finished its recount of 21,000 ballots by the afternoon of the first day.[942]

A total of 4.3 million of the state's ballots—almost 90%—were recounted by the end of the fourth day.

In most counties, the recount resulted in no change in the vote count for President. In two counties, the hand count resulted in a modest change. In Fayette County, President Trump gained 449 votes over Vice President Biden as a result of the discovery of a memory card with 2,755 votes that had not been included in the original count.[943]

This hand recounting of all of Georgia's ballots for President was finished throughout the state by Wednesday November 18—that is, within a total of six days.

The results were certified two days later.[944]

On November 22, the still-unsatisfied Trump campaign demanded yet another statewide count. This third count of Georgia's ballot (officially designated as a "recount") involved scanning the ballots by machine. CNN observed:

> "Georgia already conducted an audit of the presidential ballots…. The audit was more rigorous than the recount will be, as **the audit was a hand recount of every ballot, whereas the new recount will be done by a machine rescan**."[945] [Emphasis added]

Overall, Georgia conducted a total of three statewide counts between Election Day and the Safe Harbor Day:

- the original count starting on Election Night,
- the ballot-by-ballot hand count (audit) initiated by Secretary of State Raffensperger, and
- the machine recount demanded by the Trump campaign.

---

[941] Moffatt, Emil. With Biden Ahead, Georgia Begins Hand Recount Of Nearly 5 Million Ballots. *NPR*. November 13, 2020. https://www.npr.org/2020/11/13/934592764/with-biden-ahead-georgia-begins-hand-recount-of-nearly-5-million-ballots

[942] Lee, Michelle and Thebault, Reis. 2020. In Georgia, a laborious, costly and historic hand recount of presidential ballots begins. *Washington Post*. November 14, 2020. https://www.washingtonpost.com/politics/georgia-election-recount/2020/11/14/7fc1c82e-25c9-11eb-952e-0c475972cfc0_story.html

[943] Brumback, Kate. 2020. Second Georgia county finds previously uncounted votes. *Associated Press*. November 17, 2020. https://apnews.com/article/election-2020-georgia-elections-voting-machines-voting-018eac6ac24733d63d356ee76f485530

[944] Niesse, Mark; Peebles, Jennifer; and Wickert, David. 2020. Georgia manual recount confirms Biden victory. *Atlanta Constitution*. November 18, 2020. https://www.ajc.com/politics/breaking-georgia-manual-recount-confirms-biden-victory/B7LNNHYZOVGKZBUVAT7NZT3VZE/

[945] Bohn, Kevin. 2020. Trump campaign requests Georgia recount that's unlikely to change his loss in the state. CNN. November 22, 2020. https://www.cnn.com/2020/11/21/politics/georgia-presidential-election-recount/index.html

Wisconsin 2016 statewide recount

In 2016, Wisconsin conducted a full statewide recount in 10 days. As the Wisconsin Elections Commission announced on December 12, 2016:

> "Wisconsin Elections Commission Chair Mark Thomsen today certified results of the presidential election following **a 10-day recount process**, confirming Republican Donald J. Trump the winner in Wisconsin."
>
> "Donald Trump received 1,405,284 votes in the recount compared to 1,404,440 in the original canvass. Hillary Clinton received 1,382,536 votes in the recount compared to 1,381,823 in the recount. The original margin between the top two candidates was 22,617 votes. After the recount, the margin is 22,748. After the recount, Trump's margin over Clinton increased by just 131 votes."[946] [Emphasis added]

Wisconsin 2020 recount of two large counties

In late November 2020, a recount was conducted in Wisconsin's two biggest Democratic counties (Milwaukee and Dane counties) at the request of the Trump campaign.

The 2020 Wisconsin recount was conducted in seven days. It started on Friday November 20 and was completed (after a day off for Thanksgiving) on Friday November 27.[947]

These two counties accounted for about a quarter of the state's total vote.

If a full statewide recount had been requested in Wisconsin in 2020, each of Wisconsin's 72 counties would have separately and independently performed the work. That is, a statewide recount in Wisconsin could have been executed in essentially the same number of calendar days as was the geographically limited recount of Milwaukee and Dane counties. The personnel and other resources necessary to conduct a recount are indigenous to each county. Thus, a county's ability to conduct a recount inside its own borders is unrelated to whether some other county is simultaneously conducting one.

Lycoming County Pennsylvania's recount of 2020 ballots

A belated hand recount of all of Lycoming County Pennsylvania's 2020 presidential ballots was conducted in three days. As reported by the *New York Times* in 2023:

> "**Under pressure from conspiracy theorists and election deniers, 28 employees of Lycoming County counted—by hand—nearly 60,000 ballots. It took three days and an estimated 560 work hours**, as the vote-counters ticked through paper ballots at long rows of tables in the county elections department in Williamsport."

---

[946] Wisconsin Elections Commission. 2016. Wisconsin Recount Completed Ahead of Schedule with Relatively Small Changes to Final Totals. December 12, 2016. https://elections.wi.gov/news/wisconsin-recount-completed-ahead-schedule-relatively-small-changes-final-totals

[947] Martinez-Ortiz, Ana. 2020. Trump Sues Wisconsin After Election Recount. *Milwaukee Courier*. December 5, 2020. https://milwaukeecourieronline.com/index.php/2020/12/05/trump-sues-wisconsin-after-election-recount/

> "Mr. Trump ended up with seven fewer votes than were recorded on voting machines in 2020. Joseph R. Biden Jr. had 15 fewer votes. Overall, Mr. Trump gained eight votes against his rival. The former president, who easily carried deep-red Lycoming County in 2020, carried it once again with 69.98 percent of the vote—gaining one one-hundredth of a point in the recount.[948] [Emphasis added]

Lycoming County's reported total of 560 hours (70 workdays) corresponds to a processing rate of 857 ballots per workday.

Rate of processing ballots in a recount

The average processing rate for Fulton County's hand recount in 2020 and Lycoming County's hand recount in 2023 was 674 ballots per workday.

Summary concerning logistics of a nationwide recount

The history of presidential recounts in several states demonstrates that there is no logistical obstacle to conducting a rapid recount in the brief 36-day period between Election Day and the Safe Harbor Day. A statewide recount can be conducted in about a week.

There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. As demonstrated in section 9.34.1, the probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could reverse the original result. Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

Nonetheless, if there ever were a reason to conduct a nationwide recount, the recount could and would be handled in the same way as they are currently handled—that is, under generally serviceable laws.

In any case, if the national popular vote were ever to be close enough to warrant a nationwide recount, it is virtually certain that the vote would simultaneously be close enough to warrant statewide recounts in several closely divided states.

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.

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."[949]

---

[948] Gabriel, Trip. 2023. Driven by Election Deniers, This County Recounted 2020 Votes Last Week. *New York Times*. January 15, 2023. https://www.nytimes.com/2023/01/15/us/politics/2020-recount-lycoming-county.html?searchResultPosition=1

[949] *Congressional Record*. July 10, 1979. Pages 17706–17707. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

9.34.4. MYTH: The current system acts as a firewall that 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 method of awarding electoral votes repeatedly causes artificial crises and leads to unnecessary recounts.
- The current state-by-state winner-take-all method of awarding electoral votes regularly creates artificial crises, because a few thousand votes in one, two, or three states can decide the presidency. Because the current system divides the nation's voters into 51 separate state-level pools of votes, razor-close elections in a few states are an inevitable and recurring feature of the current system. After the Balkanization of the nationwide vote into 51 separate state-level pools, a certain number of these state-level races for President will inevitably be close. Thus, almost inevitably, a few thousand votes in one, two, or three closely divided states decide the presidency. The nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections.
- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1). Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.
- A single national pool of votes will drastically reduce the frequency of the artificial crises that are regularly produced by the current system.
- The question of recounts comes to mind in connection with presidential elections only because the current state-by-state system so frequently creates artificial crises and unnecessary disputes. If we were debating the question today of whether to elect Governors by a popular vote, the issue of recounts would never even come to mind, because 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. It is the winner-take-all rule—separately applied to 51 separate jurisdictions—that creates the frequent recounts of presidential ballots.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, 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."[950] [Emphasis added]

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

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, said in testimony to a Delaware Senate committee:

> "The Electoral College **typically produces** quick and **undisputed outcomes**."[951] [Emphasis added]

The web site of Save the Vote says that one of the advantages of the current system is:

> "**Stability and Certainty: The winner-takes-all approach** in most states ensures a clear winner. It also **prevents endless recounts and legal battles** that could arise from a purely popular vote system."[952] [Emphasis added]

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."[953]

Far from acting as a firewall that helpfully isolates recounts to particular states, the current state-by-state winner-take-all method of awarding electoral votes repeatedly creates unnecessary fires.

Our nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections.

The current system does not contain and isolate problems. Instead, it repeatedly creates artificial crises.

For example, the dispute over the 1876 presidential election was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes.

In that election, Democrat Samuel J. Tilden received 4,288,191 votes—254,694 more than Republican Rutherford B. Hayes (4,033,497). Tilden's nationwide percentage lead of 3.05% was not unsubstantial. It was, for example, greater than George W. Bush's 2004 lead of 2.8%.

The 1876 election was contested because Hayes had extremely narrow popular-vote margins in three states:

- 889 votes in South Carolina,
- 922 votes in Florida, and
- 4,807 votes in Louisiana.

The closeness of the 1876 presidential election in the Electoral College was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes.

The closest presidential election of the 20th century 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).

---

[951] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[952] The Save the Vote web site (accessed July 13, 2024) is at https://www.savethevote2024.com/home

[953] Loy, Brendan Loomer, "Count Every Vote—All 538 of Them" *Social Science Research Network*. September 12, 2007. Available at http://ssrn.com/abstract=1014431

The 1960 presidential election is remembered as being close because a shift of 4,430 voters in Illinois and 4,782 voters in South Carolina would have given Nixon a majority of the electoral votes. If Nixon had 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.

The 1960 election in Hawaii was challenged. Nixon led in the initial count. However, Hawaii conducted a recount under judicial supervision, and John F. Kennedy ended up with a 115-vote lead.[954] There would have been no recount in Hawaii in 1960 if the election had been based on the national popular vote, because Kennedy's six-digit nationwide margin was unlikely to be reversed by a recount (section 9.34.1).

The dispute over the 2000 presidential election was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes. The dispute arose because George W. Bush's total of 2,912,790 votes in Florida was a mere 537 more than the number of votes that Al Gore received in the state (2,912,353). Under the winner-take-all method of awarding electoral votes, Bush's 537-popular-vote lead entitled him to all 25 of Florida's electoral votes, which in turn gave Bush the presidency.

There was, however, nothing particularly close about the 2000 presidential election on a nationwide basis. Al Gore's nationwide lead was 543,816 popular votes (1,013 times larger) than Bush's 537-vote margin in Florida. Because a six-digit nationwide margin is unlikely to be reversed by a recount (section 9.34.1), no one would even have considered a recount in 2000 if the presidential election had been conducted on the basis of the national popular vote. Only almanac writers and trivia buffs would have cared whether Bush had, or had not, carried Florida by 537 popular votes.

Similarly, the disputes over the 2016 and 2020 presidential elections were created by the state-by-state winner-take-all method of awarding electoral votes—not because the national popular vote was close.

In particular, the 64 lawsuits filed in 2020 in six closely divided states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) were about the relatively small margins in those particular states.[955] However, Biden's margin of victory nationwide was 7,052,711 votes.

---

[954] As it happened, the judicial proceedings in Hawaii in 1960 were not completed until after the Electoral College had met. Hawaii's three electoral votes did not affect the outcome of the presidential election. Congress met in joint session on January 6, 1961, to count the electoral votes. The losing presidential candidate, Vice President Richard M. Nixon, presided over the joint session. He graciously permitted Hawaii's electoral votes to be counted in favor of John F. Kennedy (while ruling that this action would not constitute a precedent). A discussion of the similarities and differences between the Hawaii recount in the 1960 election and the "fake" elector slates in the 2020 election appears in Cheney, Kyle. 2022. See the 1960 Electoral College certificates that the false Trump electors say justify their gambit. *Politico*. February 7, 2022. https://www.politico.com/news/2022/02/07/1960-electoral-college-certificates-false-trump-electors-00006186

[955] A survey of the 64 lawsuits in the six states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) may be found in Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election.* July 2022. https://lostnotstolen.org/

Tara Ross told a Nevada Senate committee:

> "The Electoral College encourages stability and certainty in our political system. **Events such as those that occurred in 2000 are rare.**"[956] [Emphasis added]

The question of recounts comes to mind in connection with presidential elections only because the current state-by-state system so frequently creates artificial crises and unnecessary disputes. If we were debating the question today of whether to elect state Governors by a popular vote, the issue of recounts would never even come to mind, because 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.

9.34.5. MYTH: Unfinished recounts could thwart the operation of the Compact.

QUICK ANSWER:

- An unfinished recount would be handled under the National Popular Vote Compact in the same way that it is handled under the current system.
- Presidential recounts are generally scheduled and conducted by administrators and courts so as to reach a final determination of the state's vote count by the Safe Harbor Day (i.e., six days before the Electoral College meeting).
- In the unlikely event that a recount were to remain unfinished by the Safe Harbor Day, the state involved would nonetheless be obligated to comply with the requirements of the Electoral Count Reform Act of 2022 to issue a Certificate of Ascertainment by that day. Given that a recount can only occur after the completion of an initial certified count, and that the initial certified count is presumptively valid unless overturned, the initial certified count would appear in the state's Certificate. The treatment would be identical under both the current system and the Compact.
- A special three-judge federal court established by the Electoral Count Reform Act of 2022 has the power to revise a state's Certificate of Ascertainment. Thus, if an unfinished recount were to be completed in the six days between the Safe Harbor Day and the Electoral College meeting, the state's count could be expeditiously updated by the three-judge court before the Electoral College meeting.
- If the recount were not completed before the Electoral College meeting, the clock would simply have run out. The U.S. Constitution specifically requires that all presidential electors cast their votes on the same day throughout the country. Thus, if the clock were to run out, the initial official certified vote count would stand—as it did in Florida in 2000.
- The myth about unfinished recounts is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that applies equally to the current system.

---

[956] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

MORE DETAILED ANSWER:

In written testimony to the Michigan House Elections Committee on March 7, 2023, Sean Parnell, Senior Legislative Director of Save Our States, raised concerns about what would happen under the National Popular Vote Compact:

> "If for some reason there is not an 'official statement' available to obtain vote totals by the time the compact needs them—for example, if there is a **recount still underway or court challenges** to results."[957] [Emphasis added]

The answer to this hypothetical scenario applies equally to both the current system and the National Popular Vote Compact.

The U.S. Constitution explicitly requires that the Electoral College meet in each state on the same day throughout the country.

> "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**."[958] [Emphasis added] [Spelling as per original]

Congress has, by statute, determined that the Electoral College will meet on the first Tuesday after the second Wednesday in December.[959]

Historically, administrators and courts have scheduled and executed presidential recounts and litigation so as to reach a final determination of the state's vote count inside the brief 36-day period between Election Day and the Safe Harbor Day (i.e., six days before the Electoral College meeting). Such scheduling has been based on the presumption that each state wishes to enjoy the benefit of the safe harbor provisions of the Electoral Count Act of 1887.[960]

The Electoral Count Reform Act of 2022 increased the importance of the Safe Harbor Day by making it a firm deadline for a state to issue its Certificate of Ascertainment.

Section 5(a)(1) of the 2022 Act requires:

> "Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment**…" [Emphasis added]

Thus, starting in 2024, we can expect administrators and courts to schedule and execute presidential recounts and litigation so as to reach a final determination of the state's vote count inside the period between Election Day and the Safe Harbor Day.

Suppose that, for the sake of argument, a recount and the associated litigation is not finished prior to the federal statutory deadline.

---

[957] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[958] U.S. Constitution. Article II, section 1, clause 4. https://constitution.congress.gov/browse/article-2/section-1/clause-4

[959] The Electoral Count Reform Act of 2022 changed the Electoral College meeting date by one day.

[960] See section 6.2.3 for a discussion of the "legislative wish."

As the name implies, a "recount" can only occur after the completion and certification of the state's initial count. That is, a certified initial count necessarily already exists prior to the start of a recount.

In the unlikely event that a recount were to remain unfinished by the federal deadline, the state involved would nonetheless be obligated to comply with the deadline in the Electoral Count Reform Act of 2022.

Given that a recount can only occur after the completion of an initial certified count, and that an initial certified count is presumptively valid unless overturned, the state's Certificate of Ascertainment would necessarily contain the already-completed and already-certified initial count.

The Electoral Count Reform Act of 2022 recognized the possibility that Certificates of Ascertainment might need revision during the six-day period between the Safe Harbor Day and the Electoral College meeting. Therefore, section 5(c)(1)(B) of the 2022 Act provides:

> "Certificates issued pursuant to court orders—Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section."

If the unfinished recount is completed in the six days between the federal deadline and the Electoral College meeting, a special three-judge federal court established by the Electoral Count Reform Act of 2022 has the power to revise an already-issued Certificate of Ascertainment.

This new court—open only to aggrieved presidential candidates—has jurisdiction over the "issuance" of the Certificates of Ascertainment and its "transmission" to the National Archives.

This special court is required to operate on a highly expedited schedule, and there is an expedited appeal to the U.S. Supreme Court.

Given that the Constitution provides that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court (and possible Supreme Court review) are to be scheduled:

> "so that a final order … may occur on or before the day before the time fixed for the meeting of electors."

Specifically, the Electoral Count Reform Act of 2022 Act provides:

> "(1) In general—**Any action brought by an aggrieved candidate for President** or Vice President that arises under the Constitution or laws of the United States **with respect to the issuance of the certification** required under section (a)(1), **or the transmission of such certification** as required under subsection (b), shall be subject to the following rules:
>
> "(A) Venue—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

"(B) 3-judge panel—**Such action shall be heard by a district court of three judges**, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the Circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

"(C) Expedited procedure—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, **consistent with all other relevant deadlines established by this chapter** and the laws of the United States.

"(D) Appeals—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, **so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors**." [Emphasis added]

State law in at least one state (Michigan) empowers the state supreme court to order the issuance of a superseding Certificate of Ascertainment if a recount changes the previously certified results before the Electoral College meeting.[961]

As a practical matter, recounts are rare, and they change very few votes. An average of only 551 votes are changed in a statewide recount, according to data compiled by FairVote from all 36 recounts of statewide general elections in the 24-year period between 2000 and 2023 (section 9.34.1).

An unfinished state recount has the potential to slightly change the national popular vote total that each state belonging to the Compact reported on its Certificate of Ascertainment and issued by the Safe Harbor Day.

Given that 551 votes would be an infinitesimal fraction of the more than 158,000,000 votes cast nationally in a presidential election, it would be extremely unlikely that an unfinished state-level recount would change the winner of the national popular vote.

However, for the sake of argument, suppose that 551 votes were to change the winner of the national popular vote.

In that event, the special three-judge court created by the Electoral Count Reform Act of 2022 would provide the newly identified victor with a speedy mechanism for revising all the affected Certificates from the states belonging to the National Popular Vote Compact.

As previously mentioned, the U.S. Constitution specifically requires that all presidential electors cast their votes on the same day. Thus, if a recount were not completed before

[961] See Michigan Public Act 269 of 2023 at https://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0269.pdf The legislative history of this act (Senate Bill 529 of 2023) is at https://www.legislature.mi.gov/(S(ppccw5zb44mss3s3023wkug4))/mileg.aspx?page=getObject&objectName=2023-SB-0529

the Electoral College meeting, the clock would have run out—as it did in Florida in 2000. The originally certified vote count from the state would stand.

In any event, the hypothetical scenario involving unfinished recounting or unfinished litigation would be handled in an identical fashion under both the current system and the National Popular Vote Compact.

The myth about unfinished recounts is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that applies equally to the current system and would be handled in the same way as the current system.

9.34.6. MYTH: Resolution of a presidential election could be prolonged beyond inauguration day because of recounts under the Compact.

QUICK ANSWER:

- The U.S. Constitution and federal law establish a strict overall national schedule for finalizing the results of presidential elections. All counting, recounting, and administrative and judicial proceedings must be conducted so as to reach a final determination prior to the uniform nationwide date established for the Electoral College meeting in mid-December. This constitutional schedule would govern elections conducted under the National Popular Vote Compact in the same way that it controls the schedule of events under the current system.
- It may be argued that the schedule established by the U.S. Constitution and existing federal statutes could rush the count, prevent a recount of presidential ballots (as was the case in 2000, 2004, 2016, and 2020), and possibly even create injustice. However, there can be no denial that this schedule exists, and that it guarantees finality prior to the Electoral College meeting in mid-December.

MORE DETAILED ANSWER:

Brendan Loomer Loy speculates 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."[962]

In fact, Loy's scary scenario is precluded by the U.S. Constitution and existing federal law.

The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election.

This constitutional schedule would apply to elections conducted under the National Popular Vote Compact in the same way that it applies to elections conducted today under the current system.

---

[962] 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.

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.**"[963] [Emphasis added] [Spelling as per original]

Congress exercised its constitutional power to set the uniform nationwide date for the Electoral College meeting by enacting section 7 of the Electoral Count Reform Act of 2022:

> "The electors of President and Vice President of each State shall meet and give their votes on the **first Tuesday after the second Wednesday in December** next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day."[964] [Emphasis added]

Thus, all counting and recounting must be conducted so as to reach a final determination in the 42-day period between Election Day and the uniform nationwide date established for the Electoral College meeting in mid-December.

Note that the laws governing the final determination of the winner of a presidential election are entirely different from those governing, say, a disputed race for one of the 100 seats in the U.S. Senate or a disputed race for one of the 435 seats in the U.S. House.

For example, Al Franken, the winner of a recount of the 2008 U.S. Senate race in Minnesota, did not take office until July 7, 2009—more than six months after the beginning of a U.S. Senator's term on January 3.

It may be argued that the schedule established by the U.S. Constitution and existing federal statutes could rush the count, prevent a recount (as was the case in 2000, 2004, 2016, and 2020), and possibly even create injustice. However, there can be no denial that this schedule exists, and that it guarantees finality prior to the Electoral College meeting in mid-December.

9.34.7. MYTH: There is no way to guarantee a recount in every state.

QUICK ANSWER:

- One way to solve the problem of guaranteeing a timely recount in a presidential election would be for every state to revise its existing recount laws so as to guarantee an aggrieved presidential candidate a recount as a matter of right. However, state legislatures have not addressed this issue despite the inability of presidential candidates to obtain recounts in 2000, 2004, 2016, and 2020.
- Enactment of the National Popular Vote Compact could create the impetus for the states or the federal government to update recount procedures.
- Alternatively, Congress could use its authority over the count in presidential elections to enact a federal recount law that would give presidential candidates

[963] U.S. Constitution. Article II, section 1, clause 4.

[964] Under the Electoral Count Act of 1887, the Electoral College meeting was held one day earlier—that is, on the first Monday after the second Wednesday in December.

a right to obtain a candidate-paid recount that must be completed prior to the federal Safe Harbor Day.

- A federal recount law would be especially beneficial to the operation of the current state-by-state winner-take-all method for awarding electoral votes. Such a law would also be potentially beneficial under the National Popular Vote Compact, even though there is unlikely to ever be a need to conduct a nationwide recount under the Compact. Under the Compact, the probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1). Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

One way to solve the problem of guaranteeing a timely recount in a presidential election would be for every state to revise its existing laws so as to guarantee an aggrieved presidential candidate the right to a timely recount.

Unfortunately, state legislatures have not focused on this issue despite the demonstrated inability of candidates to obtain recounts in 2000, 2004, 2016, and 2020.

Another approach would be for Congress to act.

Although Congress does not control the method of awarding a state's electoral votes, it has constitutional authority over the counting of votes in presidential elections.

Since 1792, federal law has required each state to issue an appropriate certificate reporting its official results to the federal government.[965]

Both the Electoral Count Act of 1887 (which was in effect until 2022) and the Electoral Count Reform Act of 2022 illustrate the exercise of Congress' authority over the count in presidential elections. Both laws require each state to issue a Certificate of Ascertainment containing the state's final determination of the number of popular votes cast in the state for each presidential-vice-presidential slate (that is, the "canvass").

Each state's Certificate of Ascertainment provides supporting evidence for the state's appointment of the presidential electors under the state's chosen method of awarding electoral votes.

In the case of a state using the statewide winner-take-all method of awarding electoral votes, the Certificate contains the canvass of the statewide popular vote for President.[966]

---

[965] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

[966] For example, see figure 3.3 showing Vermont's 2008 Certificate of Ascertainment. The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

In the cases of states such as Maine and Nebraska that award some of their electoral votes by congressional district, the Certificate also contains the district-wide popular vote.[967]

A federal law would be especially beneficial to the operation of the *current* state-by-state winner-take-all method for awarding electoral votes, because it routinely creates close results in one, two, or three closely divided battleground states.

Each presidential election under the current system is really 51 separate state-level elections (as well as congressional-district-level elections in Maine and Nebraska). The nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections. Although the probability of a recount in any single statewide election is low (1-in-192 according to a study of the 6,929 statewide general elections in the 24-year period between 2000 and 2023 as discussed in section 9.34.1), the fact that each presidential election under the *current* state-by-state 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 Compact, even though the probability of recounts would be much lower with a single large national pool of votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1).

Time is of the essence in conducting a recount in a presidential election. The U.S. Constitution and federal law establish 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. Current federal law requires states to issue their Certificate of Ascertainment six days before the Electoral College meeting (that is, 36 days after Election Day).

Thus, the initial count, pre-recount litigation, the recount, and post-recount litigation proceedings must be conducted so as to reach a final determination in a relatively brief period.

One 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, the precondition for conducting a full ballot-by-ballot recount of a presidential election is rapid completion and certification of the initial count.

Taking all of the above considerations into account, we believe that it would be helpful if Congress were to enact a federal recount law for presidential elections with the following features.

First, a federal recount law should require that each state's chief election official prepare and publish a recount plan 180 days before Election Day. The plan would include:

- a schedule for completing and certifying the initial count of the presidential vote and a schedule for conducting a recount (if requested by any presidential candidate on the ballot in states possessing a majority of the electoral votes)

---

[967] The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

involving a one-by-one examination of every ballot (to the extent possible, given the state's voting equipment and procedures) that is completed five days before the federal Safe Harbor Day;

- the cost of the recount—such cost to be paid for, in advance, by the requesting candidate;
- comprehensive standards for determining voter intent for all cases that may be reasonably anticipated given the state's voting equipment and procedures.

Most problems associated with counting votes are well known to state election officials as a result of their years of experience in conducting elections and recounts using their own state's voting equipment and procedures. However, in many states, the standards for resolving these problems are a mixture of various state statutes, case law, administrative procedures at the state and local level, and unwritten practices. Clear 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.

The requesting presidential candidate should be required to pay for the recount. 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 quickly raising the money to pay for the requested actions.

The right to a recount of a presidential vote count should be given to the presidential candidates themselves, because they 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 recount. In practice, a candidate's request would be made on the basis of a mixture of political intelligence concerning actual returns reported by election officials; exit polls; estimates of the number of uncounted mail-in ballots, uncounted provisional ballots, and uncounted military ballots; and historical information and current polling indicating the likely composition of mail-in, provisional, and military ballots.

Note that it is not desirable or possible to impose any preconditions concerning the closeness of the results on requests by the presidential candidates. 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.

Second, 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.

Third, the special three-judge federal court (open only to presidential candidates) created by the Electoral Count Reform Act of 2022 should be designated as the forum for any litigation under the federal recount law.

Fourth, there should be a federal deadline for a state to complete and certify its initial vote count for President. Such a deadline would prevent state officials from preventing a recount merely by slow-walking the initial count.

The Compact could provide the impetus for the states or the federal government to update recount laws.

The observation that existing state recount laws are not currently 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 the proposed Celler-Bayh constitutional amendment in 1969 to establish a national popular vote for President, by a bipartisan 338–70 vote, there was no procedure for recounts in the amendment.

Similarly, when the U.S. Senate passed the proposed Lodge-Gossett constitutional amendment in 1950 to establish the fractional-proportional method for awarding electoral votes, by a bipartisan 64–27 vote, there was no procedure for recounts in the amendment.

The ratification of either constitutional amendment probably would have provided the impetus to update existing laws regarding timely recounts in presidential elections.

Similarly, the enactment of the National Popular Vote Compact would probably provide the impetus to update existing laws regarding timely recounts in presidential elections.

As Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, said:

> "**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."[968] [Emphasis added]

9.35. MYTHS ABOUT DURABILITY OF THE COMPACT

9.35.1. MYTH: A state could pop in or out of the Compact for partisan reasons prior to July 20 of a presidential election year.

QUICK ANSWER:

- The National Popular Vote Compact will govern the conduct of a presidential election if it is in effect in states possessing 270 electoral votes on July 20 of a presidential election year.
- This myth that a state legislature and Governor could "pop in and out of" the Compact based on short-term partisan considerations is predicated on the existence of polls that are capable of accurately predicting that the Electoral College vote and national popular vote will diverge in the upcoming November election.
- In fact, polls taken *days* before an election have failed to accurately foresee

[968] Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition. Page 159.

that the electoral vote will diverge from the national popular vote. As late as the week before the 2000 election, the polls were predicting that George W. Bush was going to win the national popular vote while losing the Electoral College—exactly the opposite of what happened. Similarly, in 2016, no polls predicted that Hillary Clinton would lose the Electoral College vote while winning the national popular vote. Indeed, the fact that 2016 would be a "wrong winner" election did not become apparent until late on Election Night.

- Under the current system, states can change their method of awarding electoral votes right up to *the Monday before Election Day.* If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the Compact's July 20 deadline is superior to the current system's deadline for changing the rules of the game. This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is superior to the current system.
- Because of state constitutional provisions and other scheduling issues in state legislatures, a decision to "pop in and out of" the National Popular Vote Compact would, in practice, have to be made considerably earlier than July 20 of the presidential election year.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, asserted in 2017:

> "States will be able to pop in and out of the compact. … The presidential election system would be in a constant state of upheaval."[969]

In a similar vein, David Gringer propounded a hypothetical scenario in 2008 in which the Republican-controlled Texas legislature might "perniciously" enact the National Popular Vote Compact on the basis of mid-year polling indicating that the Republican presidential nominee is poised to win the national popular vote while losing the Electoral College.

In his 2008 article, Gringer hypothesized a 2020 election cycle in which:

> "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."
>
> "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.

[969] Ross, Tara, 2017. Truth catches up with the effort to abolish the Electoral College. *Washington Examiner*. October 19, 2017.

> "With the addition of Texas, enough states now participate for the NPV to take effect."[970]

The Compact governs a given presidential election only if it is in effect in states possessing a majority of the electoral votes on July 20 of a presidential election year. The National Popular Vote Compact specifies that it will:

> "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."[971]

Moreover, if a state withdraws from the Compact during the six-month period between July 20 of a presidential election year and the following January 20 (Inauguration Day), the withdrawal will not take effect until after the Inauguration (as discussed in detail in section 9.25).

Thus, the question of whether the National Popular Vote Compact will govern a particular November presidential election is settled on July 20 of each presidential election year.

July 20 usually comes before events such as:

- the national nominating conventions of the major political parties;
- the debates between the candidates nominated at the conventions; and
- the day-to-day conduct of the campaign in the fall, including the numerous unexpected events that occur (e.g., the financial crisis in mid-September 2008).

Polls taken days before an election have consistently failed to accurately foresee that the electoral vote will diverge from the national popular vote. Hypothetical scenarios in which politically motivated states "pop in and out of" the Compact before July 20 of a presidential election year assume the existence of predictive techniques that are sufficiently accurate to convince a state legislature and Governor that the Electoral College vote will diverge from the national popular vote in November.

Both the 2000 and 2016 election illustrate that it is difficult to make an accurate prediction *days* before Election Day—let alone in July—about whether the electoral vote will diverge from the national popular vote.

In 2000, for example, George W. Bush had an average national-popular-vote lead of 2.1% in the 18 polls listed in *Polling Report* for the *five-day* period before Election Day. As shown in table 9.52, Bush was ahead in 14 of the 18 polls and tied in two, while Gore was ahead in only two polls.[972]

---

[970] 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.

[971] Article III, clause 9 of the National Popular Vote Compact. See section 6.3.3 for a detailed discussion.

[972] Election 2000. *Polling Report*. https://www.pollingreport.com/2000.htm In the table, a pound sign indicates a tracking poll; an asterisk indicates a poll taken without naming the running mate; and an ampersand indicates that undecided voters were allocated. The date is the ending day of the poll.

Table 9.52 National polls in the five days before the 2000 election

Poll	Bush	Gore	Nader	Buchanan	Bush lead over Gore	Day
CBS *	44	45	4	1	–1	Monday
CNN/USA TODAY/GALLUP # @	48	46	4	1	2	Monday
CNN/USA TODAY/GALLUP #	47	45	4	1	2	Monday
IBD/CSM/TIPP * # @	47.9	46	3.7		2	Monday
REUTERS/MSNBC * # @	46	48	5	1	–2	Monday
VOTER.COM * # @	50	45	3.5		5	Monday
VOTER.COM * #	46	41	4	0	5	Monday
ABC # *	48	45	3	1	3	Sunday
HARRIS * @	47	47	5		0	Sunday
HOTLINE *	45	42	4	1	3	Sunday
ICR *	46	44	7	2	2	Sunday
NBC/WALL ST. JOURNAL	47	44	3	2	3	Sunday
PEW @	49	47	4		2	Sunday
PEW	45	43	4		2	Sunday
WASHINGTON POST *	48	45	3	1	3	Sunday
FOX/OPINION DYNAMICS *	43	43	3	1	0	Thursday
MARIST COLLEGE	49	44	2	1	5	Thursday
NEWSWEEK	45	43	5		2	Thursday
Average	**46.7**	**44.6**	**4.0**	**0.7**	**2.1**	

Mike Shannon reported what the Bush campaign thought *six days* before Election Day:

> "**I was the keeper of the George W. Bush campaign map—our color-coded projection of electoral college votes based on our private state tracking polls**."
>
> "The map is a prime example of the uncertainty in projecting presidential races when there is a deeply divided electorate and the potential for late-fall surprises."
>
> "**That map proved wrong just six days later**."
>
> "**Florida, where our nightly polls had shown us holding a five-point lead**."
>
> "New Mexico (Solid Bush), Michigan (Lean Bush) and Wisconsin (Lean Bush) were ultimately won by Al Gore."
>
> "**My conviction … can be summed up in three words: Nobody knows anything.**"[973] [Emphasis added]

[973] Shannon, Mike. 2020. I tracked electoral votes for Bush. Beware of the 2020 forecasts. *Washington Post*. September 23, 2020. https://www.washingtonpost.com/outlook/2020/09/23/bush-gore-electoral-polls/

Two days before Election Day (Sunday November 5, 2000), the lead story on the front page of the *New York Times* said:

> "**Mr. Bush continued to hold leads ranging from one to five percentage points in all the national tracking polls**, in addition to his slight advantage in the electoral college calculations."
>
> "No fewer than a dozen states, with a total of 125 of the 270 electoral votes needed for election, were classified as tossups by politicians, pollsters and academic specialists interviewed by the *New York Times*."[974] [Emphasis added]

Meanwhile, in 2000, the Bush campaign was actively planning for the possibility of losing the Electoral College while winning the national popular vote.

In an article entitled "Bush Set to Fight an Electoral College Loss," the *New York Daily News* reported on Wednesday November 1, 2000:

> "**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."

---

[974] Apple, R.W. Jr. 2000. The 2000 campaign: The game plan; Dozen states too close to call in the final days. *New York Times*. November 5, 2000. https://www.nytimes.com/2000/11/05/us/2000-campaign-game-plan-dozen-states-seem-too-close-call-final-days.html?searchResultPosition=10

> "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."[975] [Emphasis added]

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."[976] [Emphasis added]

Similarly, when the polls closed on Election Day in 2016, it was not evident that Donald Trump was going to win the Electoral College while losing the national popular vote. That outcome did not become evident until several hours later in the evening.

Thus, in the two elections of the early 2000s when the winner of the electoral vote diverged from the national popular vote, that outcome was not evident days—or even hours—in advance.

Summer polling cannot accurately predict that the electoral vote will diverge from the national popular vote in November.

In an article entitled "Anything Can Change in a Presidential Year," Larry Sabato cited numerous previous inaccurate summer predictions:

> "In June 2004, Kerry led Bush outside the margin of error at 49 percent to 43 percent. Instead, Bush grabbed his second term with 51 percent in November."

> "John McCain actually led Barack Obama by a whisker in Gallup's daily tracking at the beginning of June 2008, 46 percent to 45 percent. It wasn't close in the fall, with Obama winning 53 percent."[977]

In July 1988, Michael Dukakis led George H.W. Bush by 17% in a national Gallup poll and even led Bush by 10% in Bush's home state of Texas.[978] However, the general-election

---

[975] 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

[976] Cohn, Nate. 2012. No, we don't have evidence of an Obama advantage in the Electoral College. *The New Republic*. June 27, 2012.

[977] Sabato, Larry. 2012. Anything Can Change in a Presidential Year. *New York Times*. July 23, 2012. https://www.nytimes.com/roomfordebate/2012/01/17/what-the-polls-cant-tell-us/anything-can-change-in-a-presidential-year

[978] Dukakis Lead Widens, According to New Poll. *New York Times*. July 26, 1988. https://www.nytimes.com/1988/07/26/us/dukakis-lead-widens-according-to-new-poll.html?auth=login-email&login=email

campaign had not even started in July, and Bush won in November with an 8% national lead.

In June 2016, an ABC News-*Washington Post* poll of registered voters nationwide showed Hillary Clinton with a 12-point lead over Trump.[979]

In June 2020, a *New York Times*-Siena College poll showed Biden leading Trump by 14 points.[980]

Similarly, Timothy Stanley reminded us that:

> "In March 1980, President Jimmy Carter led Ronald Reagan by 25 percent in some polls. Reagan went onto win the November election by 51 to 41 percent."[981]

The *New York Times* reported that a nationwide Gallup poll taken on June 4–8, 1992, showed Bill Clinton in *third* place. The results were:

- Ross Perot—39%
- Incumbent President George H.W. Bush—31%
- Bill Clinton—25% support.[982]

Despite this June 1992 poll, Bill Clinton took the lead immediately after the Democratic convention and retained it all the way to Election Day.

Table 9.53 shows a compilation by Nathaniel Rakich of the FiveThirtyEight national polling average 84 days before 12 recent elections (that is, mid-August).[983]

More importantly, presidential elections in which one candidate wins the popular vote while losing the electoral vote are necessarily *close elections*.

Tilden's 3.0% margin in 1876 was the largest difference in the national popular vote among the nation's "wrong winner" elections (table 1.1).

In 2000, the difference in the national popular vote between the two candidates was 0.5% (about a half million votes nationwide).

An article on July 24, 2012, by Nate Silver in the *New York Times*, entitled "State and National Polls Tell Different Tales About State of Campaign,"[984] reinforces the point.

Silver pointed out that the *Real Clear Politics* average of national polls gave President Obama a nationwide lead of 1.3% on July 24, 2012. However, at the same moment, Obama led by a mean of 3.5% in the *Real Clear Politics* averages for 10 battleground states (Ohio,

---

[979] Bolton, Alexander. 2020. GOP skeptical of polling on Trump. *The Hill*. June 30, 2020. https://thehill.com/homenews/senate/505151-gop-skeptical-of-polling-on-trump

[980] Cohn, Nate. 2020. In Poll, Trump Falls Far Behind Biden in Six Key Battleground States. *New York Times*. June 25, 2020. https://www.nytimes.com/2020/06/25/upshot/poll-2020-biden-battlegrounds.html

[981] Stanley, Timothy. Why Romney is stronger than he seems. *CNN*. April 10, 2012. https://www.cnn.com/2012/04/10/opinion/stanley-romney-prospects

[982] On the Trail: Poll gives Perot a clear lead. *New York Times*. June 11, 1992. https://www.nytimes.com/1992/06/11/us/the-1992-campaign-on-the-trail-poll-gives-perot-a-clear-lead.html The same article reported that, in a previous Gallup poll in late May, Bush and Perot were tied at 35 percent each, with Clinton at 25 percent.

[983] Rakich, Nathaniel. Twitter. August 11, 2020. https://twitter.com/baseballot/status/1293214167231594496?ref_src=twsrc%5Etfw

[984] Silver, Nate. State and national polls tell different tales about state of campaign. FiveThirtyEight column in *New York Times*. July 24, 2012. https://archive.nytimes.com/fivethirtyeight.blogs.nytimes.com/2012/07/24/state-and-national-polls-tell-different-tales-about-state-of-campaign/?searchResultPosition=3

Table 9.53 Mid-August national polling averages 1976–2020

Year	August leading candidate	Lead of August leading candidate in the national popular vote	Did August leading candidate still lead in the national popular vote on Election Day?	Actual lead of August leading candidate on Election Day	Absolute value of difference
2020	Biden	+8.3%	Yes	+4.0%	4.3%
2016	H. Clinton	+6.6%	Yes	+2.0%	4.6%
2012	Obama	+0.5%	Yes	+3.9%	3.4%
2008	Obama	+2.6%	Yes	+7.2%	4.6%
2004	Kerry	+2.5%	No	–2.4%	.4,9%
2000	G.W. Bush	+10.0%	No	–0.5%	10.5%
1996	B. Clinton	+11.3%	Yes	+8.5%	2.8%
1992	B. Clinton	+20.1%	Yes	+5.6%	14.5%
1988	Dukakis	+5.6%	No	–7.8%	13.4%
1984	Reagan	+16.0%	Yes	+18.2%	–2.2%
1980	Reagan	+22.1%	Yes	+9.7%	12.4%
1976	Carter	+26.6%	Yes	+2.1%	24.5%
	Average				**5.5%**

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. Both the 1.3% margin and the 3.5% margin cited in Silver's article were *inside* the margin of error for most political polling taken during campaigns.

In any case, a poll is not a prediction. Even if a given political poll had *no* margin of error (e.g., if every voter in the country were polled), it would merely be a snapshot of public opinion as of the particular moment when taken.

State constitutional provisions and state legislative procedures provide numerous tools by which the minority party in a state legislature can frustrate a politically motivated last-minute change in state law.

As a practical matter of state legislative scheduling, a decision to "pop in or out of" the National Popular Vote Compact would have to be made considerably earlier than July 20 of a presidential election year in most states.

For one thing, a large majority of state legislatures are not even in session in mid-July. Thus, a change in a state's method of awarding electoral votes would, in practice, have to be enacted earlier in the year in most states.

Moreover, some state legislatures (including the Texas legislature specifically discussed by Gringer) only meet in regular session at the beginning of each *odd-numbered* year—that is, about a year and a half before the presidential election.

In every state, winning approval of any new state law is a multi-step process that can be derailed at many points.

Moreover, the date of approval of a new state law should not be confused with the date on which the new law *takes effect*.

The National Popular Vote Compact is based on state laws that are *in effect on July 20*. Specifically, 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 that is passed by the legislature and signed by the Governor can be "in effect" by July 20 only in accordance with the state's constitution schedule specifying when new state laws take effect.

Procedures exist in every state legislature to allow a newly enacted law to take effect immediately. However, in many states, these procedures can be invoked only by a super-majority.

Given that the premise of Gringer's hypothetical scenario is that the majority party in Texas (the Republicans) wants to enact the National Popular Vote Compact for a "pernicious" partisan advantage, the Democrats in the legislature would vigorously employ every available dilatory tactic at their disposal to block the bill.

Texas is one of four states with a two-thirds quorum in the legislature. Texas Republicans have never had a two-thirds super-majority in both houses of the legislature.

In 2003, the Democrats pulled the quorum when the Republicans attempted to pass a politically motivated mid-decade redrawing of the state's congressional districts (section 9.25.1). They did so again in 2021 concerning an abortion bill.[985] They would surely do so in the situation envisioned by Grainger.

Moreover, many state constitutions provide for a significant delay between the time a Governor signs a new law and its effective date. Delays of 60, 90, or 120 days are typical (as shown in table 9.40 and discussed in section 9.25.1).

Looking at Texas in particular, new state laws take effect 90 days after enactment. This 90-day delay can only be waived by a two-thirds vote of both houses of the legislature. Texas Republicans have not had a two-thirds super-majority in both houses of the state legislature at any time in the 21st century. Thus, the National Popular Vote Compact would have to be signed into law, at the minimum, by April 20 of a presidential election year in order to be in effect by July 20.

There is an additional reason why Gringer's hypothetical scenario could not be successfully executed by April 20 of the presidential election year.

The Texas legislature is one of a number of state legislatures that meet only for a few months in *odd-numbered* years. Thus, Gringer's hypothetical scenario would have to be executed in Texas during the short biannual session that takes place in the early part of an odd-numbered year—that is, 18 months before a presidential election.

Of course, it is theoretically possible to pass a bill in a special session of a state legislature. However, in Texas, a special session would not be an option for a highly partisan bill. If a special session were called for the purpose of passing an elections bill that is perceived to be of partisan advantage to the Republicans, Texas Democrats will simply prevent the formation of a quorum for the special session. In states with filibusters, the minority opposing the legislation would employ that tactic.

---

[985] Eltohamy, Farah. 2021. What it means to break quorum and what you need to know about the Texas House Democrats' dramatic departure. *The Texas Tribune*. July 14, 2021. https://www.texastribune.org/2021/07/14/texas-democrats-walkout-quorum/

A state legislature's dominant party can usually overcome dilatory tactics such as quorum-pulling and filibustering in the longer regular legislative session when there are numerous "must pass" bills. However, in a short special session when only one bill is on the agenda, quorum-pulling and filibustering are generally highly effective.

Section 9.25.1 provides additional details on the difficulties associated with trying to pass legislation over the determined opposition of a legislature's minority.

In short, Tara Ross' assertion that "States will be able to pop in and out" of the Compact is a parlor game that does not reflect real-world state legislative operations.

After the Compact is used in one presidential election, additional states are likely to adopt it.

Under the current state-by-state winner-take-all method of awarding electoral votes, general-election campaigns ignore three-quarters or more of the states (as detailed in section 1.2).

In the first national popular vote for President under the National Popular Vote Compact, presidential candidates will necessarily have to solicit votes from all Americans (chapter 8).

Thus, once a national popular vote for President is conducted, many states that did not belong to the Compact in that first election would likely enact the Compact in order to ensure that they would continue to receive attention in the future.

Thus, the Compact is likely to be law in states with considerably more than 270 electoral votes as its second presidential election approaches. Thus, a considerable number of states would have to want to repeal the Compact in order to return to the old system.

Having said that, the nature of democracy is that laws can be repealed. If the Compact does not have sufficient public support, it would simply not govern future presidential elections.

The Compact's July 20 deadline makes it less vulnerable than the current system to politically motivated last-minute changes by states.

Current federal law (the Electoral Count Reform Act of 2022) provides (in section 1):

> "The electors of President and Vice President shall be appointed, in each State, on election day, **in accordance with the laws of the State enacted prior to election day**." [Emphasis added]

In other words, in the time up to and including *the Monday before Election Day*, a state may switch to, or from, the congressional-district method of awarding electoral votes (such as used in Maine and Nebraska), the winner-take-all method, legislative appointment of presidential electors, the whole-number proportional method, or any other method.

In contrast, the National Popular Vote Compact only governs a presidential election if it is in effect in states possessing a majority of the electoral votes on July 20 of a presidential election year.

If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the fact is that the Compact is distinctly superior to the current system in this respect.

The events in Nebraska in 2024 illustrate the difference between the current system and the Compact.

The Republican presidential nominee has won the statewide vote in Nebraska in every election since 1968.

In 1992, Nebraska switched from the statewide winner-take-all method for awarding electoral votes to the congressional-district system.

In 2008 and 2020, the Democratic presidential nominee won one electoral vote from Nebraska's 2nd congressional district (the Omaha area). Meanwhile, the Republican presidential nominee won the state's other four electoral votes.

The Nebraska legislature has considered proposals to repeal the congressional-district method in every year since 2008.

As the 2024 presidential election approached, Nebraska's Republican Governor Jim Pillen, Donald Trump, and others recognized that there was a politically plausible combination of states that might enable the 2nd district's electoral vote to determine the national outcome of the 2024 presidential election. That combination of states (shown by the map in figure 1.22 section 1.6.4) would produce a 269–269 tie in the Electoral College and throw the presidential election into the U.S. House.

When a presidential election is thrown into the House, each state has one vote. Based on the likely composition of the state delegations on January 6, 2025 (discussed in section 1.6.4), the Republican presidential nominee would be chosen President in the event of a 269–269 tie in the Electoral College.

On the other hand, if the 2nd district were to vote for the Democratic presidential nominee in November 2024, and if Nebraska were to retain its current congressional-district method of awarding electoral votes, the Democratic presidential nominee would win the Electoral College by a 270–268 margin.

In the spring of 2024, Pillen, Trump, and others urged the Nebraska legislature to repeal the state's 1992 law establishing the congressional-district method and replace it with the winner-take-all method of awarding electoral votes.

In reaction to a possible change in Nebraska's law, Democratic legislative leaders in Maine (the only other state using the congressional-district method of awarding electoral votes) threatened to switch Maine to the winner-take-all method.[986] That countermove by Maine would negate the partisan advantage that would be created by the proposed legislation in Nebraska.

The winner-take-all bill was blocked by a filibuster in the Nebraska legislature. Shortly thereafter, the regular sessions of both the Nebraska and Maine legislatures adjourned.[987]

The Nebraska Governor has the power to call a special session of the legislature at any

---

[986] Stein, Sam. 2024. Maine Dems say they'll consider cutting off Trump's path, if Nebraska moves to hurt Biden. *Politico*. April 26, 2024. https://www.politico.com/news/2024/04/26/maine-nebraska-electoral-votes-trump-00154645

[987] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

time. In fact, the Governor called a special session of the legislature starting on July 25, 2024, to consider a limited list of topics largely focused on property taxes.[988]

Although legislation to change Nebraska's method of awarding electoral votes was not on the agenda of the July 2024 special session, the Governor indicated that he was willing to call a special session before Election Day on that topic if there were enough votes in the legislature to overcome the filibuster, pass the bill, and give the bill immediate effect.[989] Both actions would require a two-thirds vote in the legislature.

Immediate effect would be critical in order to impact the November 2024 presidential election, because newly passed legislation in Nebraska ordinarily takes effect after a 90-day delay.

In Maine, there is a similar 90-day delay before new laws take effect. As in Nebraska, new laws in Maine can be given immediate effect by a two-thirds vote in the legislature. However, because the Democrats do not have two-thirds of the Maine legislature, any attempt by Maine to counter a potential change in Nebraska would have to be enacted by early August.

On August 10, 2024, the *Nebraska Examiner* reported:

> "Nebraska Republican Party Chairman Eric Underwood confirmed what state senators have told the *Examiner* privately, **that the issue is not dead for 2024**, and Pillen and legislative Republicans are **waiting for the right moment to bring it forward**."
>
> "State lawmakers, including the senator who shepherded the idea last session, State Sen. Loren Lippincott of Central City, have said Pillen would call another special session if he can show the governor he has 33 votes to overcome a promised filibuster."[990] [Emphasis added]

As of the time of this writing, it is not known whether Nebraska law will be changed in time to impact the November 2024 presidential election.

In summary, a state can change its method of awarding electoral votes right up to the day before Election Day under the current system, whereas under the National Popular Vote Compact, a change in method would have to be enacted and take effect by July 20.

If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the Compact's July 20 deadline is superior to the current system's deadline.

The myth that states could "pop in and out of" the National Popular Vote Compact is one of many examples in this book of a criticism aimed at the Compact where the Compact is superior to the current system.

---

[988] Nebraska Legislature. Introduced Legislation for July 25th, 2024. https://www.nebraskalegislature.gov/calendar/legislation.php?day=2024-07-25

[989] Sanderford, Aaron. 2024. Nebraska push for winner-take-all will wait in line after property tax relief. *Nebraska Examiner*. July 22, 2024. https://nebraskaexaminer.com/2024/07/22/nebraska-push-for-winner-take-all-will-wait-in-line-after-property-tax-relief

[990] Sanderford, Aaron. 2024. Nebraska's 2nd District steps back into presidential spotlight after crazy month. *Nebraska Examiner*. August 10, 2024. https://nebraskaexaminer.com/2024/08/10/nebraskas-2nd-district-steps-back-into-presidential-spotlight-after-crazy-month/

9.36. MYTHS ABOUT A SYSTEMATIC REPUBLICAN OR DEMOCRATIC ADVANTAGE IN THE ELECTORAL COLLEGE

9.36.1. MYTH: Population growth in Sunbelt states gives the Republicans an ongoing advantage in the Electoral College.

QUICK ANSWER:

- Each state's number of votes in the Electoral College is readjusted every 10 years to reflect the result of the federal census.
- Republican-leaning states gained a total of 18 electoral votes as a result of the 2020 and 2010 census—largely because of rapid population growth in Sunbelt states.
- This gain of 18 electoral votes was illusory, because newcomers with political views different from a state's existing voters often destabilize the state's political equilibrium. In particular, there are eight states (comprising 107 electoral votes) that were solidly Republican for decades, but where fast growth did not benefit the Republican cause. Rapidly growing states such as Virginia, Colorado, and New Mexico were solidly red in presidential elections during the last part of the 20th century. However, they transitioned to being battleground states (for a few elections), and they are now solidly blue. Moreover, fast-growing Arizona, Florida, Georgia, Nevada, and North Carolina have shifted from being solidly red during the last part of the 20th century to being battleground states in the 21st century.

MORE DETAILED ANSWER:

As a result of each recent census, many states that were solidly Republican for decades (mainly in the South and West) have grown rapidly.

These states have consistently gained electoral votes at the expense of other states (mainly in the North) that have usually voted Democratic.

Some have argued that this long-term shift of electoral votes should be interpreted as favoring the Republican Party.

However, rapid population growth is not necessarily advantageous to a state's currently dominant political party.

People move into a state, leave a state, and stay in a state because of various economic, demographic, cultural, and psychological factors.

Because the political outlook of newcomers often differs significantly from that of continuing residents and leavers, rapid population growth often alters a state's political complexion.

The 2010 and 2020 census gave Republicans an additional 18 electoral votes, but destabilized 77 other electoral votes.

Republican-leaning states gained six electoral votes as a result of the 2020 census and 12 electoral votes, thanks to the 2010 census.

The Republican Party would have received six more electoral votes in the 2020 presi-

dential election if the allocation of electoral votes based on the 2020 census had applied to the 2020 election. Specifically:

- Five states that voted Democratic in the 2020 presidential election lost electoral votes as a result of the 2020 census, namely California (–1), Illinois (–1), Michigan (–1), New York (–1), and Pennsylvania (–1). However, two states that voted Democratic in 2020 gained electoral votes, namely Colorado (+1) and Oregon (+1). The result was a net gain of three electoral votes for the Republicans.
- Four states that voted Republican in the 2020 presidential election gained electoral vote(s) as a result of the 2020 census, namely Florida (+1), Montana (+1), North Carolina (+1), and Texas (+2). However, two states that voted Republican in 2020 lost electoral votes, namely Ohio (–1) and West Virginia (–1). The result was a net gain of three electoral votes for the Republicans.

The 2010 census had a similar effect, as indicated by the results of the 2008 and 2012 elections.[991]

- Eight states that voted Democratic in the 2008 and 2012 presidential elections 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). However, three states that voted Democratic in 2008 and 2012 gained electoral votes, namely Florida (+2), Nevada (+1), and Washington (+1). The result was a net gain of six electoral votes for the Republicans.
- Five states that voted Republican in the 2008 and 2012 presidential elections gained electoral vote(s) as a result of the 2010 census, namely Arizona (+1), Georgia (+1), South Carolina (+1), Utah (+1), and Texas (+4). However, two states that voted Republican in 2008 and 2012 lost electoral votes, namely Louisiana (–1) and Missouri (–1). The result was a net gain of six electoral votes for the Republicans.

This Republican gain of 12 electoral votes as a result of the 2010 census and the additional gain of six electoral votes as a result of the 2020 census might seem, at first glance, to be helpful to the Republicans.

However, this combined gain of 18 electoral votes was illusory, because it was accompanied by a destabilization of eight states with 107 electoral votes that had been solidly Republican during the last part of the 20th century and the early 2000s.

These eight formerly solidly Republican states are listed below along with their numbers of electoral votes in the 2024 and 2028 elections.

- Virginia (13), Colorado (10), and New Mexico (5) were solidly red for most of the last part of the 20th century. All three voted Republican for President in 2004. However, they transitioned to being solidly blue in presidential elections in 2008, 2012, 2016, and 2020. All three are considered blue states in 2024. These states together have 28 electoral votes.
- North Carolina (16), Arizona (11), Georgia (16), and Nevada (6) were solidly red for most of the last part of the 20th century. All four voted Republican for

[991] See table 3.1 for the distribution of electoral votes in various decades.

President in 2000 and 2004. However, they have transitioned to being closely divided battleground states in recent years. These states together have 49 electoral votes.

- Florida (30) was solidly red for most of the last part of the 20th century. However, it was a closely divided battleground state in 1996 (and, in fact, went Democratic that year) and in 2000 (when it went Republican by a mere 537 popular votes). It went Democratic in 2008 and 2012 and then went Republican in 2016 and 2020 (when Trump won 52% of the two-party vote).

Rapid population growth upset the previously prevailing political equilibrium in each of these eight states and then, more tangibly, increased the payoff to the Democrats when they won those states.

Moreover, rapid population growth in Texas creates the possibility of the nation's second-largest state (with 40 electoral votes in the 2024 and 2028 elections) becoming a battleground state in the future.[992,993]

Figure 9.28 shows that the Republican presidential nominee's percentage of the two-party vote was:

- 62% in 2004 (when Texas had 34 electoral votes)
- 56% in 2008
- 58% in 2012 (when Texas had 38 electoral votes)
- 55% in 2016
- 53% in 2020.

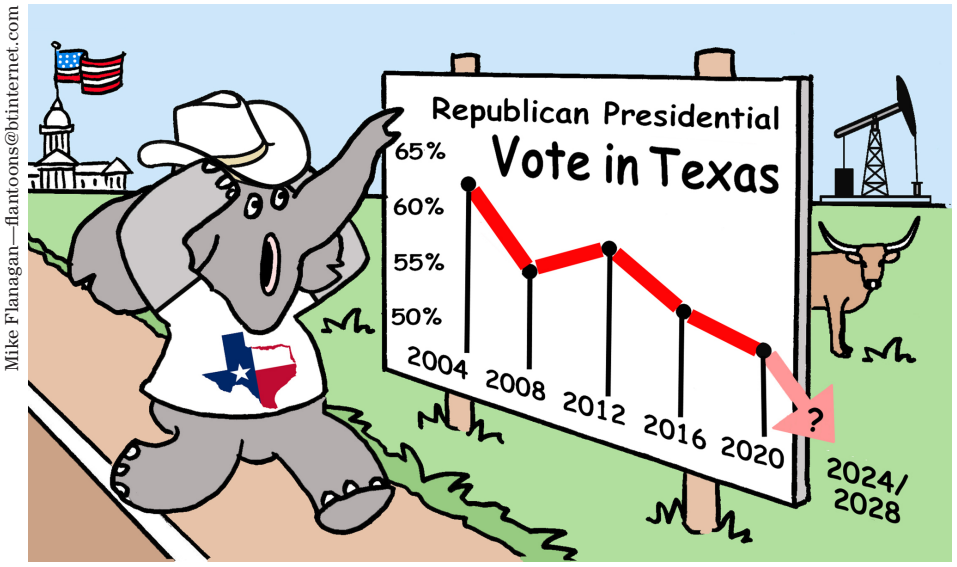


Figure 9.28 Republican presidential vote 2004–2020

[992] Mahtesian, Charles. Obama's Texas battleground prediction. *Politico*. July 18, 2012.

[993] 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."

9.36.2. MYTH: The 2000 election illustrates the Republican Party's structural advantage under the current system.

QUICK ANSWER:

- The Republicans won the 2000 presidential election because of George W. Bush's 537 popular-vote margin in Florida out of over five million votes cast there. That razor-thin statewide margin was the composite result of numerous extraordinarily small events that occurred during that campaign—not because of any Republican structural advantage conferred by the state-by-state winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

It is sometimes argued that the Republican victory in the 2000 election is evidence that the Republican Party has a *structural* advantage under the current state-by-state winner-take-all system.

In 2000, George W. Bush won Florida by a margin of 537 popular votes out of 5,963,110 votes cast there.

Indeed, 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.

As detailed in section 1.3.9, at least four extraordinarily small random events decided the outcome of the presidential race in Florida in 2000:

- the decision by one county official to use the butterfly ballot;
- rain in part of the state on Election Day;
- the use of punch card voting and the resulting hanging chads; and
- the choice of size for the U.S. House of Representatives made in 1911.

There is no way to say whether Al Gore would have become President had the 2000 campaign been conducted on the basis of the national popular vote.

What can be said with certainty is that the patterns of candidate travel and advertising in 2000 would have been entirely different under a national popular vote, because candidates would have solicited votes in every state. Candidates would not have concentrated their efforts so heavily on Florida or any other single state in a nationwide campaign. Almost all (92%) of the general-election campaign events (405 of 439) occurred in 20 states where the Republican percentage of the two-party vote was in the narrow nine-percentage-point range between 44% and 53%, as shown in table 1.19. In a nationwide campaign, the issues discussed would have been different because the candidates would have had to appeal to more than just the voters living in the closely divided states.

9.36.3. MYTH: The Republican Party would find it difficult to win the most votes nationwide.

QUICK ANSWER:

- Over a period of time, the United States has been an evenly divided country. The cumulative nationwide presidential vote in the 31 presidential elections between 1900 and 2020 was virtually tied—50.17% of the two-party vote going to the Republicans and 49.83% going to the Democrats.

MORE DETAILED ANSWER:

Table 9.54 shows the national popular vote for President between 1900 and 2020 and the difference between the Republican and Democratic vote.[994]

Table 9.54 The national popular vote for President 1900–2020

Election	Republican	Democrat	R margin	D margin	R–D margin
1900	7,219,193	6,357,698	861,495		861,495
1904	7,625,599	5,083,501	2,542,098		2,542,098
1908	7,676,598	6,406,874	1,269,724		1,269,724
1912	4,120,207	6,294,326		2,174,119	–2,174,119
1916	8,547,039	9,126,063		579,024	–579,024
1920	16,151,916	9,134,074	7,017,842		7,017,842
1924	15,724,310	8,386,532	7,337,778		7,337,778
1928	21,432,823	15,004,336	6,428,487		6,428,487
1932	15,760,426	22,818,740		7,058,314	–7,058,314
1936	16,679,683	27,750,866		11,071,183	–11,071,183
1940	22,334,940	27,343,218		5,008,278	–5,008,278
1944	22,021,053	25,612,610		3,591,557	–3,591,557
1948	21,970,064	24,105,810		2,135,746	–2,135,746
1952	33,777,945	27,314,992	6,462,953		6,462,953
1956	35,590,472	26,022,752	9,567,720		9,567,720
1960	34,108,157	34,226,731		118,574	–118,574
1964	27,178,188	43,129,566		15,951,378	–15,951,378
1968	31,785,480	31,275,166	510,314		510,314
1972	47,169,911	29,170,383	17,999,528		17,999,528
1976	39,147,793	40,830,763		1,682,970	–1,682,970
1980	43,904,153	35,483,883	8,420,270		8,420,270
1984	54,455,075	37,577,185	16,877,890		16,877,890
1988	48,886,097	41,809,074	7,077,023		7,077,023
1992	39,103,882	44,909,326		5,805,444	–5,805,444
1996	39,198,755	47,402,357		8,203,602	–8,203,602
2000	50,460,110	51,003,926		543,816	–543,816
2004	62,040,611	59,028,432	3,012,179		3,012,179
2008	59,934,814	69,456,898		9,522,084	–9,522,084
2012	60,930,782	65,897,727		4,966,945	–4,966,945
2016	62,985,134	65,853,652		2,868,518	–2,868,518
2020	74,215,875	81,268,586		7,052,711	–7,052,711
Total	**1,032,137,085**	**1,025,086,047**			**227,453**

[994] In 1912, the Republican Party was badly split. The official Republican nominee (incumbent President William Howard Taft) came in third place nationally in both the popular and electoral votes—behind former Republican President Theodore Roosevelt, who ran as the nominee of the Progressive (Bull Moose) Party. Accordingly, this table shows Theodore Roosevelt's vote in the Republican column for 1912, instead of Taft's (smaller) vote.

As can be seen from the table, the United States has been an evenly divided country over the course of time. The cumulative two-party national popular vote in the 31 presidential elections between 1900 and 2020 was:

- 50.17% for the Republicans votes and
- 49.83% for the Democrats.

The results were similarly close for other periods.

If the Roosevelt-Hoover race is viewed as the start of the modern political era, the cumulative national popular vote for the two major parties between 1932 and 2020 was:

- 943,639,400 total Republicans votes—49.59%
- 959,292,643 total Democratic votes—50.41%.

If the 1960 Kennedy-Nixon race is viewed as the start of the modern political era, the cumulative national popular vote for the two major parties between 1960 and 2020 was:

- 775,504,817 total Republicans votes—49.91%
- 778,323,655 total Democratic votes—50.09%.

Between 1988 and 2020, the United States has been in an era of non-landslide presidential elections—that is, elections in which the popular vote difference between the two leading candidates was less than 10%. The cumulative national popular vote for the two major parties between 1988 and 2020 was:

- 497,756,060 total Republicans votes—48.59%
- 526,629,978 total Democratic votes—51.41%.

9.36.4. MYTH: There is a systemic Republican or Democratic advantage in the Electoral College

QUICK ANSWER:

- Because the Republicans won five of the six presidential elections between 1968 and 1988 and numerous states had repeatedly voted for the Republican presidential nominee in that period, an argument (attributed to Horace Busby) became prevalent during the 1980s that the there was a "Republican Electoral College lock" on the presidency.
- Because numerous states had repeatedly voted for the Democratic presidential nominee between 1992 and 2012, an argument (attributed to Ronald Brownstein) became prevalent that the there was a durable Democratic "blue wall" in the Electoral College.
- The conventional wisdom prior to the 2016 election was that the Electoral College favored the Democrats.
- After Donald Trump was elected President in 2016 while losing the national popular vote, the conventional wisdom changed overnight and became that the Electoral College favored the Republicans.

MORE DETAILED ANSWER:

The "Republican Electoral College lock" theory of the 1980s

The Republicans won five of the six presidential elections between 1968 and 1988.

The Republican percentage lead in the national popular vote was substantial in four of these elections—23 percentage points in 1972, 10 in 1980, 18 in 1984, and eight in 1988.

In 1988, a *New York Times* editorial referred to the Republican's "Electoral College lock."

> "This year's fashionable formula goes something like this: … The Republicans have a virtual 'lock' on the Electoral College."
>
> "The political analyst credited with the 'lock' theory is Horace Busby. … Busby concluded that 'the Electoral College … is a Republican institution.' He argued that the addition of important Sunbelt states like Florida and Texas to traditional Republican power bases elsewhere provided a recipe for long-term G.O.P. rule."
>
> "Recent history seems to confirm a Republican tilt. In the last 5 elections, 23 states with 202 electoral votes have voted Republican every time. Thirteen more have voted Republican four times. In 1988, these 36 states would produce 354 electoral votes, far more than the 270 required for a majority."[995]

A 1992 article in the *New York Times* described the Republican "Electoral College lock" as follows:

> "From … observations of what was happening in 1980, Busby postulated a theory that Republicans have an electoral vote 'lock' that gives them an automatic advantage in presidential elections."[996]
>
> "The 'lock,' according to Busby, consists of 29 states with 289 electoral votes—270 are needed to elect a president—that have gone Republican at least 75 percent of the time in the last 32 years."
>
> "Dominance of the Sun Belt, where more and more of the votes and the people are, gave the [Republican] Party an enormous edge in winning the White House—what many analysts described as a lock on the Electoral College."[997]

Shortly after the term "Republican Electoral College lock" came into widespread use in the 1980s, Bill Clinton was elected President in 1992.

The Democratic "blue wall" theory emerged in 2009.

Ronald Brownstein described the "durable" Democratic "blue wall" in 2009:

> "Democrats since 1992 have methodically constructed the party's **largest and most durable Electoral College base in more than half a century. Call it the 'blue wall**.'"

---

[995] *New York Times* editorial. 1988. Opinion: The Electoral College's Cold Calculus. *New York Times*. July 8, 1988. https://www.nytimes.com/1988/07/08/opinion/the-electoral-college-s-cold-calculus.html

[996] Sawislak, Arnold. 1982. Horace Busby; NEWLN:Electoral locks and political music. *United Press International*. December 29, 1982. https://www.upi.com/Archives/1982/12/29/Horace-BusbyNEWLNElectoral-locks-and-political-music/6858409986000/

[997] Toner, Robin. 1992. Republicans' 'Electoral Lock' Is Looking Much Less Secure. *New York Times*. August 3, 1992. https://www.nytimes.com/1992/08/03/us/1992-campaign-political-memo-republicans-electoral-lock-looking-much-less-secure.html

> "**18 states and the District of Columbia have now voted for the Democratic nominee** in at least the past five presidential elections."
>
> "[These] strong-holds … are worth a combined 248 Electoral College votes. That's more than 90 percent of the 270 votes required to win the presidency."
>
> **"GOP nominee John McCain did not finish within 10 percentage points of Obama in any of the 18 states (or Washington, D.C.)."**
>
> "The Democrats' grip on such a large electoral bloc forced McCain into the situation that Democrats typically confronted while the Republicans won five of the six presidential elections between 1968 and 1988. Through those years, so many states solidly favored the GOP that analysts in both parties spoke of a Republican 'lock' on the Electoral College."
>
> "The Democrats' current electoral vote stronghold is larger than the Republican base was during the heyday of the GOP lock on the Electoral College."[998]

The 2012 election results seemed to solidify the notion of the Democratic blue wall.

The 2012 election appeared to validate Brownstein's "blue wall."

Chris Cillizza wrote in December 2012:

> "For months leading up to the 2012 election, we wrote about the clear electoral college advantage that President Obama enjoyed."
>
> "The 332 electoral votes that Obama won on Nov. 6 not only affirmed that edge but also raised the question of whether Democrats were in the midst of the sort of electoral college stranglehold that Republicans enjoyed during the 1980s."
>
> "If the 2016 Democratic nominee carried only the states that President Obama won by 4.5 points or more, he/she would end up with 272 electoral votes and a victory."
>
> "**The electoral college math looks decidedly daunting for Republicans as they begin to prepare for 2016 and beyond**."[999] [Emphasis added]

In 2012, Jonathan Bernstein wrote in *Salon*:

> "The Electoral College now favors the Democrats."[1000]

---

[998] Brownstein, Ronald. 2009. Dems find electoral safety behind a wall of blue. *National Journal Magazine*. January 17, 2009.

[999] Cillizza, Chris. 2012. Democrats' electoral college edge—in 1 amazing chart. *Washington Post*. December 10, 2012. http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/10/democrats-electoral-college-edge-in-1-amazing-chart/

[1000] Bernstein, Jonathan. 2012. Do Democrats have a permanent Electoral College advantage? Nominate Jeb Bush or Bobby Jindal. It doesn't matter: The Electoral College now favors the Democrats. *Salon*. December 1, 2012. http://www.salon.com/2012/12/01/do_democrats_have_a_permanent_electoral_college_advantage/

In 2015, Chris Cillizza confidently asserted in the *Washington Post*:

> "No matter whom Republicans nominate to face Hillary Rodham Clinton in November 2016, that candidate will start at a disadvantage. It's not polling, Clinton's deep résumé or the improving state of the economy. **It's the electoral college.**
>
> "Yes, the somewhat arcane—yet remarkably durable—way in which presidential elections are decided **tilts toward Democrats** in 2016, as documented by nonpartisan political handicapper Nathan Gonzales in a recent edition of the *Rothenberg & Gonzales Political Report*."
>
> "Gonzales's analysis … reaffirms one of the most important—and undercovered—story lines in presidential politics in the past decade: the **increasing Democratic dominance in the electoral college**."[1001,1002] [Emphasis added]

In June 2016, Shane Goldmacher and Annie Karni wrote in *Politico*:

> "Hillary Clinton's super PAC has begun spending $145 million on ads in eight states through November—and there's a realistic path for her to win the White House even if she carries only one of them. It's a sign of **how strongly tilted the Electoral College map is in Clinton's favor**."[1003] [Emphasis added]

The two-percentage-point Democratic advantage in the Electoral College in 2012 seemed to support the "blue wall" theory.

In 2012, Governor Mitt Romney received 60,930,782 popular votes nationally, compared to 65,897,727 popular votes for Barack Obama (as shown in the actual 2012 election returns found in table 1.10).

That is, Romney received about 48% of the two-party national popular vote—about two percentage points short.

Table 9.55 shows the results of applying a tie-producing uniform shift to actual 2012 election returns. This table will show that 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 have won the Electoral College by 285–253.

- Column 2 shows Romney's popular vote in each state after applying a uniform *upward* adjustment of 1.9581343% to his actual popular vote in the state. These upward adjustments add 2,483,472 votes to Romney's nationwide total, giving him 63,414,254 votes.

[1001] Cillizza, Chris. 2015. In 2016 race, an electoral college edge for Democrats. *Washington Post*. March 15, 2015. https://www.washingtonpost.com/politics/in-2016-race-an-electoral-college-edge-for-democrats/2015/03/15/855f2792-cb3c-11e4-a2a7-9517a3a70506_story.html

[1002] Cillizza, Chris. 2012. Democrats' electoral college edge—in 1 amazing chart. *Washington Post*. December 10, 2012. https://www.washingtonpost.com/news/the-fix/wp/2012/12/10/democrats-electoral-college-edge-in-1-amazing-chart

[1003] Goldmacher, Shane and Karni, Annie. 2016. Hillary Clinton's path to victory. *Politico*. June 19, 2016. https://www.politico.com/story/2016/06/hillary-clinton-path-victory-224228#ixzz4C1kM5TAf

- Column 3 shows Obama's popular vote in each state after applying a uniform *downward* adjustment of 1.9581343% to his actual popular vote in the state. These downward adjustments subtract 2,483,472 votes from Obama's nationwide total, giving him 63,414,255 votes. The result of these adjustments to the two candidates is to produce a near-tie in the national popular vote (that is, 63,414,254 to 63,414,255).
- Column 4 shows Romney's percentage of the two-party vote in each state after his upward adjustment. That is, Romney has 50.00% of the nationwide vote after the adjustments. Note that Obama's percentage of the two-party vote in each state (not shown in the table) is simply 100% minus Romney's percentage in each state.
- Column 5 shows the Republican nominee's popular vote margin in each state after his upward adjustment (if he is leading in the state).
- Column 6 shows the Democratic nominee's popular vote margin in each state after his downward adjustment (if he is leading in the state).
- Columns 7 and 8 show the Republican and Democratic electoral votes, respectively, based on their adjusted number of popular votes.

The table is sorted according to Romney's percentage in each state (column 4).

The result of the tie-producing uniform adjustment shown in table 9.55 is that President Obama would lose Florida (29 electoral votes) and Ohio (18 electoral votes). However, even after losing these two states, Obama would have ended 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, Obama would still have ended up with a lead of 28 electoral votes.[1004]

The 2016 election revived the belief that the Electoral College favors the Republican Party.

Since the 2016 election, the conventional wisdom has been that the Electoral College favors the Republicans.

A week before the June 27, 2024, debate between President Joe Biden and former President Donald Trump, Jason Willick wrote in the *Washington Post*:

> "The Trump-Biden rematch is too close (40.8 percent to 40.3 percent in the FiveThirtyEight polling average on Wednesday) to handicap with confidence, and too frozen (Trump's barely statistically significant lead has held for months) to deliver much horse-race drama."
>
> "Some unexpected things could happen after the polls close in November."
>
> "The first is the possibility that **Trump ekes out the most votes—and loses the presidency**. Yes, it's unlikely. … But **the winner-take-all electoral col-**

[1004] Note that the table shows that Obama's lead in Virginia (13 electoral votes) shrinks to a razor-thin 701 votes (1,897,522 to 1,896,820). However, even if Romney had won Virginia, Obama would have had a 272–266 lead in the Electoral College.

Table 9.55 Tie-producing uniform adjustment of 2012 election data

State	Romney	Obama	R-percent	R-Margin	D-Margin	R-EV	D-EV
DC	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**	**50.00%**			**253**	**285**

lege is a fickle institution. It tilted toward Democrats in 2012, only to deliver the presidency to Trump in 2016, despite Hillary Clinton's popular-vote plurality."[1005] [Emphasis added]

9.37. MYTH ABOUT STATE IDENTITY

9.37.1. MYTH: The Compact disenfranchises voters, because the electoral votes of a member state would sometimes go to a candidate who did not receive the most popular votes in that state.

QUICK ANSWER:

- The primary purpose of a presidential election is to elect a President to serve as the entire country's chief executive for four years—not to choose the small group of presidential electors who meet briefly in mid-December for the ceremonial purpose of casting electoral votes.
- The policy choice presented by the National Popular Vote proposal is whether it is more important that the President be the candidate who received the most popular votes in the entire country, or for the candidate who received the most popular votes in a particular state to get that state's electoral votes.
- The current state-by-state winner-take-all method of awarding electoral votes cancels the vote of every voter whose personal choice differs from the predominant sentiment in their state. Under the National Popular Vote Compact, every voter's vote will be added directly to the national count for that individual's choice for President. It is the current system—not the National Popular Vote system—that disenfranchises voters.
- The National Popular Vote Compact represents the "voice of the state" better than the current winner-take-all system. The most accurate "voice of the state" is how *all* of a state's voters voted—not just how a plurality voted. For example, there were 1,717,077 votes for Biden and 1,484,065 votes for Trump in Minnesota in 2020. The current system created the illusion that Minnesota voters were unanimous for Biden by awarding all 10 of Minnesota's electoral votes to Biden. In the last 12 presidential elections in Minnesota, there were 15,129,587 popular votes cast for the Democratic nominee for President and 13,061,178 popular votes cast for the Republican nominee during that period. However, the Democrats received 120 electoral votes, while the Republicans received none.
- Voters care more about who wins the presidency than which presidential electors get to cast the state's electoral votes in December. When a voter's preferred candidate loses the White House, it is no consolation that the voter's candidate won a plurality in the voter's own state. On Election Night in 2020, Donald Trump's supporters in Texas were not celebrating because the 38

[1005] Willick, Jason. 2024. Three potential wild cards for a razor-close Biden-Trump election. *Washington Post*. June 20, 2024.

Republican Party candidates for presidential elector would be meeting in Austin in December to cast the state's electoral votes for Trump.

- The National Popular Vote Compact would award all the electoral votes of all the member states to the presidential candidate who received the most popular votes from all 50 states and the District of Columbia. Therefore, the national-popular-vote winner could sometimes not be the candidate who received the most votes inside a particular member state. The precise purpose of the Compact is to guarantee the presidency to the candidate who received the most popular votes in all 50 states and the District of Columbia.
- Voters will not be surprised when the nationwide winner becomes President under the National Popular Vote Compact, because the entire presidential campaign will have been run on that basis.
- Official presidential election returns will continue to be published for each state (as well as every county, parish, city, town, and precinct), so that everyone will know the political identity of each state.
- Public opinion polls since the 1940s have shown that voters do not favor the current state-by-state winner-take-all method of electing the President. In fact, most people would be happy if it were gone. This strong support for a national popular vote for President decreases only slightly when people are pointedly asked a push question as to 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 President is the candidate who receives the most popular votes in all 50 states and the District of Columbia.
- The concern that a state's electoral votes might be cast, in some elections, for a presidential candidate who did not receive the most popular votes in a particular state is, at the end of the day, a matter of form over substance.

MORE DETAILED ANSWER:

Under the National Popular Vote Compact, all the electoral votes from all the states belonging to the Compact will be awarded to the presidential candidate who receives the most popular votes in all 50 states (and the District of Columbia). The Compact will take effect when enacted by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538).

The policy choice presented by the National Popular Vote Compact is whether it is more important that the President be the candidate who received the most popular votes in the entire country or for the candidate who received the most popular votes in a particular state to get that state's electoral votes.

It is the current system—not the National Popular Vote system—that disenfranchises voters.

In debating the National Popular Vote Compact in Connecticut in 2018, State Representative Laura Devlin said:

> "[If] Connecticut votes for presidential candidate A, but the majority of the rest of the United States chose presidential candidate B, Connecticut would have to put its electoral votes to presidential candidate B, which **totally disenfranchises the popular vote in the State of Connecticut."**[1006] [Emphasis added]

Representative Daniel J. Fox responded by pointing out that no voter in Connecticut would be disenfranchised by the National Popular Vote Compact:

> "**Connecticut's current winner-take-all law creates the illusion that Connecticut's voice was 100 percent for Hillary Clinton** in the 2016 election, when, in fact, it wasn't, because it awards 100 percent of Connecticut's electoral votes to the candidate receiving the most votes in Connecticut. However, Connecticut's true voice was about 900,000 votes for Hillary Clinton and almost 700,000 votes for Donald Trump."[1007] [Emphasis added]

A state's political "identity" is based on how *all* its citizens voted—not just how a plurality voted.

The National Popular Vote Compact would give voice to every voter in every state.

It is the current state-by-state winner-take-all method of awarding electoral votes that effectively disenfranchises voters—not the National Popular Vote Compact. The current system treats voters who supported a candidate who did not win the most popular votes in the state as if they did not exist.

Under the National Popular Vote Compact, every voter's vote is directly added to the national total for his or her candidate.

Voters care more about who wins the presidency than who carried their state.

When voters watch presidential election returns, they are primarily interested in finding out which candidate won the presidency. The question of whether their preferred candidate won their state, congressional district, county, city, or precinct is of secondary concern.

When a voter's preferred candidate loses the White House, it is no consolation that the candidate won a plurality in the voter's own state. On Election Night in 2020, Donald Trump's supporters in Texas were not celebrating because the Republican Party's 38 nominees for presidential electors would be meeting in Austin in December to cast the state's electoral votes for Trump.

The primary purpose of a presidential election is to choose the President—not presidential electors.

The primary purpose of a presidential election is to elect someone to serve for four years as the nation's chief executive—not to choose the group of largely unknown party activists who meet briefly in the state Capitol in mid-December for the ceremonial purpose of casting electoral votes.

The average voter does not derive any satisfaction from knowing that some little-known activist associated with his or her political party won the ceremonial position of

---

[1006] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 7.

[1007] *Ibid.* Page 8.

presidential elector. Indeed, it is the rare voter who even knows the name of any presidential elector.

Voters do not favor the current state-by-state winner-take-all method of electing the President, and most people would be happy if it were gone.

Both state and national polls conducted by numerous polling organizations show that voters do not favor the current method of electing the President, as shown by the numerous polls discussed in section 9.22.

We discuss below three polls in which voters were asked a push question that specifically highlighted the fact that the state's electoral votes would be awarded to the winner of the national popular vote under the National Popular Vote Compact—rather than the winner of the statewide popular vote.

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 did drop after this push question was asked, 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.[1008]

Similarly, a survey of 800 Connecticut voters conducted on May 14–15, 2009, showed 74% overall support for a national popular vote for President. The results for the first question, by political affiliation, were 80% support among Democrats, 67% among Republicans, and 71% among others.

[1008] The 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 3.5%. See https://www.nationalpopularvote.com/polls

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 after this push question was asked, 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.

Moreover, 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.

Concern that voters will be dismayed when they discover that their state's electoral votes were awarded to a candidate who did not carry their state.

In Nebraska in 2008, Barack Obama won the most popular votes in the state's 2nd congressional district (the Omaha area) and thereby received one electoral vote in the Electoral College. Obama received one of Nebraska's electoral votes despite the fact that John McCain received the most votes in Nebraska as a whole.

Similarly, Joe Biden received one electoral vote from Nebraska in 2020—despite the fact that Donald Trump received the most votes in Nebraska as a whole.

Nebraska's congressional-district method of awarding electoral votes was the choice of the people's elected representatives in the state's legislature. The public, candidates, and media all knew in advance that it was the law that would govern the awarding of the state's electoral votes. In both 2008 and 2020, Nebraska's law (passed in 1992) operated exactly as advertised, namely it delivered one of the state's five electoral votes to the winner of the 2nd congressional district—despite the fact that a different candidate won the statewide popular vote.

Nebraska's legislature has had ample opportunity to repeal Nebraska's congressional-district method of awarding electoral votes and replace it with the winner-take-all method of awarding electoral votes. Indeed, repeal bills have been introduced in the legislature almost every year to repeal the current law.

Moreover, the party (namely the Republican Party) that lost one electoral vote in 2008 and 2020 has controlled the state legislature by roughly a two-to-one margin in recent years.[1009]

[1009] The Nebraska legislature is officially non-partisan; however, two-thirds of the legislators are known Republicans.

In 2021[1010] and 2023,[1011,1012] bills to change Nebraska's district method of awarding electoral votes were again introduced in the Nebraska legislature. Those bills did not pass.

In 2024, despite the strong backing of Governor Jim Pillen and former President Donald Trump, the Nebraska legislature again rejected the bill.[1013] See section 9.35.1.

Similarly, in Maine in 2016 and 2020, Donald Trump won the most popular votes in the state's 2nd congressional district (the northern part of the state) and thereby received one electoral vote in the Electoral College—despite the fact that the Democratic presidential nominee had received the most votes in Maine as a whole. As in Nebraska, the party that lost one electoral vote in 2020 currently controls both houses of the legislature and the Governor's office.

Moreover, the voters in both Nebraska and Maine have had access to the citizen-initiative process, which enables them to pass legislation that their legislature does not.

Concern that voters will be shocked when the national popular vote winner becomes President

Voters will not be shocked when the National Popular Vote Compact operates exactly as advertised and results in the winner of the national popular vote becoming President.

The reason is that the following events will have occurred before Election Day:

- The state legislatures and Governors of states possessing at least a majority of the electoral votes (270 of 538) will have responded to the wishes of their constituents and enacted the National Popular Vote Compact in their state (thus giving the National Popular Vote Compact sufficient support to take effect).
- 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 will become President.
- The public will have noticed that presidential candidates will have, for the first time, paid attention to voters in every state instead of just the voters in a handful of closely divided battleground states.
- The focus of polling during the campaign will have been on polls of the popular vote from the entire United States—not state-level polls in a handful of states. In fact, the concept of a battleground state would be obsolete under the National Popular Vote Compact.

[1010] Mayerson, Brett. 2021. Nebraska state senator brings bill to the floor proposing electoral vote system change. January 8, 2021. KTIV TV. https://ktiv.com/2021/01/08/nebraska-state-senator-brings-bill-to-the-floor-proposing-electoral-vote-system-change/

[1011] Bamer, Erin. 2023. Nebraska again considers change to winner-take-all system for presidential races. *Omaha World-Herald*. March 15, 2023.

[1012] The 2023 bill to repeal Nebraska's district method of awarding electoral votes was LB776. https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=4996

[1013] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

Then, the National Popular Vote Compact will operate exactly as advertised and will deliver 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.

A state's political identity would remain known under National Popular Vote.
For those who are concerned about state identity, information as to how many votes each presidential candidate received in a particular state (as well as every county, parish, city, town, district, or precinct) would be known to all—just as is the case today.

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 purpose of the National Popular Vote Compact is to replace the state-by-state method of awarding electoral votes with a system based on the national popular vote. Current winner-take-all laws enable a second-place candidate to win the presidency, make voters unequal, and make three out of four states and three out of four Americans politically irrelevant in presidential elections.

A thought experiment involving a hypothetical two-state interstate compact
One way to understand how the National Popular Vote Compact would operate is to consider it from the perspective of two states from opposite ends of the political spectrum—say, North Dakota 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. North Dakota is reliably Republican, and Vermont is reliably Democratic in presidential elections. They generate almost identical popular-vote margins for their favored presidential candidate. In 2020, North Dakota generated a 120,693-vote margin for the Republican presidential nominee, and Vermont generated a 130,116-vote margin for the Democratic nominee.

Under the current state-by-state winner-take-all method of awarding electoral votes, presidential candidates do not solicit the support of voters in North Dakota and Vermont, because neither party has anything to gain by paying any attention to them. These two states are not ignored because they are small. They are ignored because neither candidate has anything to win or lose by soliciting votes there. The Democratic presidential nominee is not going to carry North Dakota, and the Republican nominee is not going to carry Vermont.

Consider, for the sake of argument, a hypothetical two-state interstate compact in which both states enact a law agreeing to award their electoral votes to the winner of the combined popular vote in the two states. Such a compact would create a closely divided battleground "super-state" with six electoral votes.

Note that this hypothetical two-state compact operates differently from the National Popular Vote Compact in that North Dakota and Vermont would award their six electoral votes based on the *combined* popular vote from just 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 this hypothetical two-state compact, voters in both states would suddenly mat-

ter in presidential campaigns. We can confidently make that statement, because presidential candidates pay considerable attention to closely divided states with six electoral votes. For example, the closely divided state of Nevada (which has six electoral votes) received 11 of the nation's 212 general-election events in 2020 (section 1.2.1). The six electoral votes available from the two-state compact would be just as winnable and just as valuable as the six electoral votes available from Nevada.

The *benefit* to both North Dakota and Vermont of this hypothetical two-state compact would be that the issues and concerns of their voters would suddenly become relevant in the presidential campaign. Consequently, the candidates would start soliciting votes in those states. When presidential candidates need to solicit votes, they start thinking about the issues that are politically important to the voters involved.

The *price* to both North Dakota and Vermont of this hypothetical compact would be that North Dakota's three presidential electors would not always be Republican, and Vermont's three presidential electors would not always be Democratic. Under the hypothetical two-state compact, the presidential electors who meet in December in Bismarck and Montpelier would reflect the outcome of the combined popular vote in the two states—not just the vote in North Dakota and not just the vote in Vermont.

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. Under the National Popular Vote Compact, *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.

9.37.2. MYTH: The Compact could result in out-of-state presidential electors.

QUICK ANSWER:

- The hypothetical scenario of out-of-staters serving as presidential electors is based on the unlikely scenario that a minor-party or independent presidential candidate wins the most popular votes nationwide, that this candidate did not get onto the ballot in a particular state belonging to the National Popular Vote Compact, and that this candidate (who just won the national popular vote and was in the process of trying to unify the country) would gratuitously offend people in the state involved by appointing out-of-state presidential electors.
- Residency requirements for presidential electors already exist in a number of states. If anyone considers this hypothetical scenario to be a significant problem, the U.S. Supreme Court's *Chiafalo* decision in 2020 affirms that states have ample authority to establish residency requirements for their presidential electors.
- Even if the hypothetical scenario were to happen, the National Popular Vote Compact would have delivered precisely its advertised outcome, 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, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, discussed a hypothetical minor-party candidacy of Texas Congressman Ron Paul when the Vermont legislature was debating the National Popular Vote Compact in 2011:

> "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**."[1014] [Emphasis added]

Second, although Ross asserts that it is likely that Ron Paul would appoint Texans as Vermont's presidential electors, historical evidence from the real-world shows that politicians would not behave in this manner.

Under the existing 1937 law in Pennsylvania, *every* presidential candidate, in *every* election, personally chooses *every* presidential elector in Pennsylvania.[1015]

Needless to say, no presidential candidate of either major political party has chosen an out-of-state presidential elector to be a member of Pennsylvania's Electoral College in the many presidential elections since 1937. Indeed, it would be politically preposterous for a presidential candidate to gratuitously insult the voters of any state by selecting out-of-staters to the ceremonial position of presidential elector. It would be even more preposterous for someone who had just won the national popular vote (and was facing the task of unifying the country) to gratuitously insult the voters of any state.

Third, it would be unlikely that a minor-party presidential candidate would be strong enough to win the most popular votes nationwide, while being incapable of collecting the 1,000 signatures necessary to qualify for the ballot in Vermont. In fact, history shows that presidential candidates who have significant national support generally qualify for the ballot in every state as discussed in section 9.30.16.

Fourth, it would be extraordinary that a candidate who had just won the most popular votes in a nationwide election with perhaps 158 million votes could not find three supporters in Vermont.

Fifth, if anyone believes that Ross' hypothetical scenario is politically plausible or potentially harmful, a remedy is readily available. Every state already has the power to adopt residency qualifications for presidential electors, and many have done so. As the U.S. Supreme Court said in *Chiafalo v. Washington* in 2020:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. … **A State**

[1014] Written testimony submitted by Tara Ross to the Vermont Committee on Government Operations. February 9, 2011.

[1015] Section 2878 of Pennsylvania election law enacted on June 1, 1937.

> **can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period**."[1016] [Emphasis added]

Sixth, the sole role of a presidential elector is to attend a single brief meeting in December for the purpose of dutifully casting a vote in the Electoral College. Unlike members of Congress, presidential electors do not cast discretionary votes on hundreds of anticipated and unanticipated issues over a multi-year period. That is, presidential electors have no ongoing role in setting public policy.

Even if a third-party presidential candidate were to perform the feat of winning the national popular vote, even if that candidate were unable to collect 1,000 signatures to get onto the ballot in Vermont, and even if that candidate were foolish enough to gratuitously insult Vermont by appointing three Texans to vote at the Electoral College meeting in Montpelier in December, the National Popular Vote Compact would nevertheless deliver its advertised result, namely the election to the presidency of the candidate who received the most popular votes nationwide.

9.38. MYTH ABOUT HAMILTON FAVORING THE CURRENT SYSTEM

9.38.1. MYTH: Alexander Hamilton considered our 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 other Founding Fathers) would have favored our *current* system of electing the President. In fact, Hamilton's statement does not refer to the currently prevailing winner-take-all method of awarding electoral votes but, instead, to the Founders' never-achieved vision of a "deliberative" and "judicious" Electoral College composed of independently acting presidential electors.
- 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—that is, before the Constitution went into effect and long before Hamilton or anyone else could see how the Electoral College would actually operate. In fact, during Hamilton's lifetime, the winner-take-all method of awarding electoral votes was used by only three states in the nation's first presidential election in 1789, and all three states repealed it before 1800. Hamilton died in the summer of 1804—about a quarter of a century before the winner-take-all rule started being used by a majority of the states.
- There is no record of Hamilton ever endorsing the winner-take-all system in which states award 100% of their electoral votes to the candidate who receives the most popular votes in a state. In fact, at the time of the 1787 Constitutional

---

[1016] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> Convention and the writing of the *Federalist Papers*, Hamilton favored having the state legislature appoint all of the state's presidential electors—that is, not allowing the people to vote for the presidential electors at all.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, 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, Executive Director of Save Our States, has written:

> "**An 'excellent' system** Alexander Hamilton wrote in *The Federalist* that, if the Electoral College is not perfect, 'it is at least excellent.'"[1017] [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 since the winner-take-all method of awarding electoral votes became prevalent in the 1830s.

Instead, Hamilton made clear in *Federalist No. 68* (a few sentences after the above out-of-context quotations) that 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 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]

The practice of presidential electors acting as rubber stamps started at the time of the nation's first contested election in 1796, when political parties started making national nominations for President and Vice President. Once that happened, a party's obvious and necessary path to victory required the nomination of presidential electors who could be relied upon to vote in lockstep in the Electoral College for the party's nominees (section 2.5).

Moreover, Hamilton's statement in *Federalist No. 68* that the Electoral College is "ex-

---

[1017] England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

cellent" was made during the debate on ratification of the U.S. Constitution in 1788—that is, *before* Hamilton or anyone else could see how the Electoral College would operate after the Constitution took effect.

In particular, Hamilton's statement came four decades before the winner-take-all method started being used by a majority of the states.

There is no record of Hamilton ever endorsing the 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.

In fact, at the time of the 1787 Constitutional Convention and the writing of the *Federalist Papers*, Hamilton favored having the state legislature appoint all of the state's presidential electors—that is, he was not in favor of allowing the people to vote for the presidential electors at all.

Alexander Hamilton died in 1804.

Hamilton's home state of New York did not let the people vote for presidential electors until 1828 (when it used a congressional-district method). It was not until 1832—28 years after Hamilton's death—that New York adopted a law calling for presidential electors to be elected on a statewide winner-take-all basis.

In any case, Alexander Hamilton, the other Founding Fathers, and almost all[1018] the rest of the Founding Generation had been dead for decades before the state-by-state winner-take-all rule became the predominant method for awarding electoral votes.[1019]

Madison opposed the winner-take-all method

James Madison (often regarded as the "father of the Constitution") did not favor the winner-take-all method of selecting presidential electors.

As the U.S. Supreme Court noted in its 1892 decision in *McPherson v. Blacker*,

> "**The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution**, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."[1020] [Emphasis added]

In fact, Madison was a critic of the winner-take-all method of choosing presidential electors that evolved in the early 1800s. In a letter to George Hay on August 23, 1823, Madison wrote:

> "I have recd. your letter of the 11th. with the Newspapers containing your remarks on the present mode of electing a President, and your proposed remedy for its defects.

[1018] James Madison died in 1836. He was the last member of the Constitutional Convention to die.

[1019] 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.

[1020] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

> "The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Govt. such as that of the U.S. was deeply felt by the Convention; and as the final arrangement of it took place in the latter stage of the Session, it was not exempt from **a degree of the hurrying influence produced by fatigue & impatience in all such bodies**."[1021] [Emphasis added]

Far from praising the winner-take-all method of awarding electoral votes, Madison continued:

> "I agree entirely with you in thinking that the election of Presidential Electors by districts, is an amendment very proper to be brought forward at the same time with that relating to the eventual choice of President by the H. of Reps. **The district mode was mostly, if not exclusively in view when the Constitution was framed & adopted**; and was exchanged for the general ticket [i.e., winner-take-all] & the Legislative election, as the only expedient for baffling the policy of the particular States which had set the example. A constitutional establishment of that mode will doubtless aid in reconciling the smaller States to the other change which they will regard as a concession on their part. And it may not be without a value in another important respect.
>
> "The States when voting for President by general tickets or by their Legislatures, are a string of beeds: When they make their elections by districts, some of these differing in sentiment from others, and sympathizing with that of districts in other States, they are so knit together as to break the force of those Geographical & other noxious parties which might render the repulsive too strong for the cohesive tendencies within the political System."[1022] [Emphasis added] [Spelling as per original]

FairVote's article entitled "Why James Madison Wanted to Change the Way We Vote for President" discusses this letter in greater detail.[1023]

9.39. MYTH ABOUT STATES GAMING THE COMPACT

9.39.1. MYTH: The Compact can be gamed by giving parents one extra vote for each of their minor children.

QUICK ANSWER:

- Opponents of the National Popular Vote Compact claim that the Compact can be "easily gamed" by giving parents one extra vote for each of their minor children, thereby giving the Republican Party a partisan advantage.

[1021] Letter from James Madison to George Hay. August 23, 1823. https://founders.archives.gov/documents/Madison/04-03-02-0109

[1022] *Ibid.*

[1023] FairVote. June 18, 2012. https://fairvote.org/why-james-madison-wanted-to-change-the-way-we-vote-for-president/

- This myth is one of many examples in this book of a criticism aimed at the Compact that—even if legally permissible or politically plausible—would be equally possible under the current system. In fact, given the outsized impact of the very small number of battleground states, the current system is more susceptible to the effects of politically motivated state-level laws than a nationwide vote for President.
- A state law that would give parents one extra vote for each of their minor children would violate the Equal Protection Clause of the 14th Amendment, raise issues of religious discrimination and religious favoritism, and present daunting operational problems.
- There is no shortage of far-fetched state-level schemes for manipulating the electorate for partisan advantage. For example, extra votes could be given to better-educated voters—perhaps one extra vote for each year of college.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "**The Compact can be easily gamed** or manipulated. One fairly simple way for a state to increase its influence in the final outcome would be … **allowing parents to cast votes on behalf of their minor children**."[1024] [Emphasis added]

The partisan impact of child voting is freely acknowledged by its proponents. For example, Professor Joshua Kleinfeld of the Antonin Scalia Law School and Professor Stephen E. Sachs, the Antonin Scalia Professor of Law at Harvard Law School, have said that there is a:

> "two-percentage-point increase in the Republican advantage as between non-parents and parents of children under 18."[1025]

The two-percentage-point advantage cited in their article entitled "Let Parents Vote" was based on a 2022 CNN exit poll that asked: "Have any children under 18?"[1026]

Senator J.D. Vance has also advocated child voting.[1027]

There is, of course, no shortage of state-level schemes for manipulating the electorate for partisan advantage.

[1024] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 6. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[1025] Kleinfeld, Joshua and Sachs, Stephen E. 2024. Give Parents the Vote. *Notre Dame Law Review*. Page 62. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4723276

[1026] CNN. 2022. Exit Polls. https://www.cnn.com/election/2022/exit-polls/nationalresults/

[1027] Marley, Patrick. 2024. Vance once advocated that children get votes that parents could cast. *Washington Post*. July 25, 2024. https://www.washingtonpost.com/politics/2024/07/24/jd-vance-parents-kids-voting/

Giving extra votes to better-educated voters would skew politics in favor of left-of-center policies.

The 2024 Texas Republican Party's platform advocates settling statewide elections based on the number of counties that a candidate won[1028] even though the U.S. Supreme Court ruled in *Gray v. Sanders* in 1963 that the "country unit rule" system was unconstitutional.[1029]

The current winner-take-all system is more susceptible to state-level manipulation than a national popular vote for President.

Given the outsized impact of the very small number of battleground states, the current system is arguably more susceptible to the effects of politically motivated state-level laws than a nationwide vote for President.

In fact, there is nothing new about attempts to skew the outcome of presidential elections under the current system.

As a result of the 2010 elections, Republicans controlled both houses of the legislature and the Governor's office in Pennsylvania and several other closely divided states that were likely to decide the outcome of the 2012 presidential election.

In June 2012, Pennsylvania state House Republican Leader Mike Turzai told a Republican State Committee meeting:

> "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."**[1030] [Emphasis added]

Voter ID laws have been enacted in other presidential battleground states, such as Ohio, Wisconsin, Michigan, North Carolina, Florida, and Georgia.

Problems with the child-voting proposal

There are several problems with Parnell's claim that child-voting provides a way by which the National Popular Vote Compact can be "easily gamed."

A state law that gives certain voters extra votes based on their number of underage children would violate the Equal Protection Clause of the 14th Amendment.

Plaintiffs in a lawsuit challenging child-voting would include:

- married couples with no children (and particularly infertile couples);
- married couples with only one child (who would be less influential than those with two or more children);

[1028] Downen, Robert and Downey, Renzo. 2024. Proposed Texas GOP platform calls for the Bible in schools, electoral changes that would lock Democrats out of statewide office. *Texas Tribune*. May 25, 2024. https://www.texastribune.org/2024/05/25/texas-republican-party-convention-platform/

[1029] *Gray v. Sanders*. 372 U.S. 368. 1963.

[1030] Weinger, Mackenzie. 2012. Pa. pol: Voter ID helps GOP win state. *Politico*. June 25, 2012. https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811

- married couples with only two children (who would be less influential than those with three children), and so forth;
- single parents (whose children would be less influential than children in households with two parents);
- divorcees who do not have child custody;
- single persons; and
- members of the United Society of Believers in Christ's Second Appearing (commonly known as Shakers), who believe in celibacy and would therefore add religious discrimination to the proposal's constitutional vulnerability.

Religious favoritism would be argued in addition to religious discrimination, because of the greater voting advantage that would be conferred upon adherents of religions that oppose birth control.

In addition, the child-voting proposal presents numerous operational difficulties, such as verifying the current accuracy of the number of additional votes that a particular adult is to receive.

Federalism ameliorates the effect of partisan manipulation.
As just mentioned, the courts can provide some protection against some politically motivated state laws.

For the sake of argument, suppose it were constitutional to give extra votes to parents with minor children (advantaging Republicans) or extra votes to better-educated adults (advantaging Democrats).

In that case, our nation's federal system would reduce the *net national political impact* of such partisan manipulation, because no one political party is ever in control of every state government. For example, as of July 2024, there were 23 states in which the Republicans control both houses of the legislature and Governor's office (a so-called "trifecta") and 17 such Democratic states.[1031]

Admittedly, federalism cannot guarantee a perfect balance between competing political parties. However, it can reduce the net national impact of state-level partisanship.

After each census, congressional districts are typically gerrymandered in states where one party controls the legislature and Governor's office. Although one party usually controls more state governments at any particular moment then the other, federalism reduces the net national impact of state-level partisanship.

[1031] *Ballotpedia*. 2024. Trifecta vulnerability in the 2024 elections. Accessed July 27, 2024. https://ballotpedia.org/Trifecta_vulnerability_in_the_2024_elections

9.40. MYTHS ABOUT SLAVERY

9.40.1. MYTH: There would have been no Emancipation Proclamation without the Electoral College.

QUICK ANSWER:

- Lincoln's election in 1860 and 1864 did not depend on the state-by-state winner-take-all method of awarding electoral votes. He won both the Electoral College and the national popular vote in both elections.

MORE DETAILED ANSWER:

Save Our States, the leading group that lobbies against the National Popular Vote Compact, is a project of the Oklahoma Council on Public Affairs (OCPA).

Jonathan Small, President of OCPA, tweeted in 2023:

> "There is no Emancipation Proclamation without the Electoral College."[1032]

[1032] Save Our States. March 31, 2023. *Twitter*. https://twitter.com/SaveOurStates/status/1641798951744438272?s=20

Charlie Kirk, the founder and president of Turning Point USA, made a similar claim about the Electoral College:

> "One of its minor accomplishments over a couple of centuries was that of making possible the election of Abraham Lincoln."[1033]

President Lincoln issued the Emancipation Proclamation as an executive order on January 1, 1863.

In the four-way race of 1860, Lincoln won both the Electoral College and the national popular vote. Lincoln led his nearest competitor (Stephen A. Douglas) by a significant margin in the popular vote—more than 10% (485,706 out of 4,680,727), as shown in table 1.5.

Similarly, Lincoln won both the Electoral College and the national popular vote in 1864. Lincoln again led his nearest competitor (George B. McClellan) by a significant margin in the popular vote—more than 10% (411,401 out of 4,030,291), as shown in table 9.56.

Table 9.56 1864 election results

Candidate	Party	Popular votes	Electoral votes
Abraham Lincoln	Republican	2,220,846	212
George B. McClellan	Democratic	1,809,445	21
Total		**4,030,291**	**233**

9.40.2. MYTH: The Electoral College prevented a pro-slavery candidate from being elected in one case.

QUICK ANSWER:

- If the Electoral College is to be credited with success in preventing Andrew Jackson from winning the presidency in 1824, it should also be criticized for electing him in 1828 and 1832. This myth is based on selective presentation of data.

MORE DETAILED ANSWER:

Save Our States—the leading group opposed to the National Popular Vote Compact—credits the Electoral College for preventing the election of at least one pro-slavery candidate, namely Andrew Jackson in 1824.

In a memo entitled "The Three-Fifths Compromise and the Electoral College," Save Our States wrote:

> "In one clear case, the Electoral College prevented a pro-slavery candidate from winning."

[1033] Kirk, Charlie. 2019. Beware Democrat Efforts to Abolish the Electoral College. January 14, 2019. https://www.breitbart.com/politics/2019/01/14/charlie-kirk-beware-democrat-efforts-to-abolish-the-electoral-college/

> "In 1824 the Electoral College prevented the election of pro-slavery candidate Andrew Jackson."[1034]

Save Our States selectively credits the Electoral College with success in preventing Jackson from winning the presidency in 1824 but fails to criticize it for electing this same slaveholder in 1828 and 1832.

In fact, Save Our States also turns a blind eye to the fact that eight of the first 12 Presidents owned slaves while in office, namely George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James K. Polk, and Zachary Taylor.

Moreover, two additional Presidents from among the first 12 owned slaves at some point during their lives, namely Martin Van Buren and William Henry Harrison.

Two additional pre-Civil-War Presidents (Franklin Pierce and James Buchanan) were considered to be "dough-faced" on the issue of slavery in the sense that they were northerners with southern principles.

The historical reality is that the Three-Fifths Clause of the Constitution amplified the political power of southern slave states in both the U.S. House of Representatives and the Electoral College in the period before the Civil War.

9.41. MYTHS ABOUT THE VOTING RIGHTS ACT

9.41.1. MYTH: The Compact violates the Voting Rights Act.

QUICK ANSWER:

- The National Popular Vote Compact received preclearance under section 5 of the Voting Rights Act from the Department of Justice in 2012.
- The National Popular Vote Compact would not deny or abridge the right to vote—of minorities or anyone else. On the contrary, it would make every person's vote equal—consistent with the goal of the Voting Rights Act.

MORE DETAILED ANSWER:

Professor Robert M. Hardaway of the Sturm College of Law at the University of Denver and five other opponents of the National Popular Vote Compact issued a written statement at a Colorado legislative committee hearing in 2007, arguing that the Compact would:

> "diminish the political influence of racial and ethnic minorities in the United States in presidential elections."[1035]

In 2008, David Gringer argued that the National Popular Vote Compact would:

> "run afoul of sections 2 and 5 of the Voting Rights Act—as either minority vote

---

[1034] Save Our States. 2021. The Three-Fifths Compromise and the Electoral College. https://saveourstates.com/uploads/The-Three-Fifths-Compromise-and-the-Electoral-College.pdf Accessed May 22, 2021.

[1035] The statement was signed by Robert M. Hardaway, Robert D. Loevy, Danial Clayton, Edward Roche, Jim L. Riley, and Dennis Steele.

> dilution or retrogression in the ability of minority voters to elect the candidate of their choice."[1036]

In his 2016 book, Mark Weston warned:

> "Lawsuits claiming that the National Popular Vote system violates the 1965 Voting Rights Act would also be likely. In California, for example, about 30% of the voters are Latino."[1037]

In 2024, the Maine Policy Institute (a conservative think tank) claimed:

> "The National Popular Vote Compact could potentially be a civil rights violation. The Voting Rights Act of 1965's second section has been interpreted by the Supreme Court to mean that states cannot create an electoral system that reduces the electoral impact of the state's minority voters (*Shaw v. Reno*)."[1038]

The National Popular Vote Compact would not deny or abridge the right to vote—of minorities or anyone else.

On the contrary, it would make every person's vote equal—consistent with the goal of the Voting Rights Act.

The National Popular Vote Compact received pre-clearance from the U.S. Department of Justice under section 5 of the Voting Rights Act on January 13, 2012. The pre-clearance was issued while the California legislature was considering the Compact.[1039]

The National Popular Vote Compact has been sponsored by hundreds of minority state legislators and endorsed by organizations such as:

- the National Black Caucus of State Legislators in 2006[1040]
- the National Latino Congreso in 2006[1041]
- the NAACP in 2008[1042]
- Mi Familia Vota in 2020.[1043]

[1036] Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. *Columbia Law Review*. Volume 108. January 2008. Pages 182–230.

[1037] Weston, Mark. 2016. *The Runner-Up Presidency: The Elections That Defied American's Popular Will (and How Our Democracy Remains in Danger)*. Guilford, CT: Lyons Press. Page 131.

[1038] Van Pate, Harris. 2024. Five Legal Problems with the National Popular Vote bill. *Pine Tree Beat*. April 8, 2024. https://mainepolicy.org/five-legal-problems-with-the-national-popular-vote-bill/

[1039] 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 U.S. Department of Justice to Robbie Anderson, Senior Elections Counsel of the state of California.

[1040] The National Black Caucus of State Legislators adopted a resolution (https://fairvote.app.box.com/v/NBCSL-NPV-resolution) at its 2006 annual meeting in Jackson, Mississippi.

[1041] The National Latino Congreso passed a resolution (https://fairvote.app.box.com/v/NLC-NPV-resolution) at its September 2006 conference.

[1042] At its 2008 annual convention in Cincinnati, Ohio, the NAACP adopted a resolution (https://fairvote.app.box.com/v/NAACP-NPV-resolution) in support of the proposition of a national popular vote for president in general, and the National Popular Vote Compact in particular. It won final approval of the NAACP board on October 17, 2008. See https://fairvote.app.box.com/v/NAACP-NPV-resolution

[1043] Mi Familia Vota endorsed a "yes" vote in the November 2020 statewide referendum in Colorado (Proposition 113) on the National Popular Vote law that was passed in 2019 by the Colorado legislature and signed by the Governor. https://progressivevotersguide.com/colorado/2020/general/about/vota

In endorsing the National Popular Vote Compact, the NAACP cited the fact that it supported "the ideal of one person, one vote."

The purpose of the Voting Rights Act is to guarantee voting equality (particularly in relation to racial minorities who historically suffered discrimination in certain states or parts of states).

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 would 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).

Opponents of the National Popular Vote Compact, such as Gringer, often quote from various court cases involving disputed changes in voting methods for *multi-member* legislative bodies, such as city councils and county governing boards.[1044] However, these cases do not bear on elections to fill a *single office* such as the presidency.

In *Butts v. City of New York Dept. of Housing Preservation and Development*, the U.S. Court of Appeals for the Second Circuit considered 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**."[1045] [Emphasis added]

The court also stated:

> "**There is no such thing as a 'share' of a single member office**." [Emphasis added]

It then added:

> "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 considered whether the at-large, elected chair 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:

[1044] 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.

[1045] *Butts v. City of New York Dept. of Housing Preservation and Development*, 779 F.2d 141 at 148 (1985).

> "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."[1046]

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*,[1047] 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 circuit court or judicial court. Preclearance was required when more than one judge was to be elected, but not when only one judge was to be elected.

Although the National Popular Vote Compact received preclearance from the U.S. Department of Justice in 2012 under section 5 of the Voting Rights Act, the requirement that states obtain preclearance was significantly modified by the decision of the U.S. Supreme Court in 2013 in *Shelby County v. Holder*.[1048]

The U.S. Department of Justice described the effect of the Court's decision in this case as follows:

> "The United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the Shelby County decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act."[1049]

9.42. MYTH ABOUT THE WORLD SERIES

9.42.1. MYTH: The World Series teaches us something about how presidential elections should be run.

QUICK ANSWER:

- Inequality in the value of a vote requires substantially more justification than an analogy with the way a particular sport conducts its national championship.

[1046] *Dillard v. Crenshaw County*, 831 F.2d 246 at 253 (11th Cir. 1987).

[1047] *Southern Leadership Conference v. Siegelman*, 714 F. Supp. 511 at 518 (M.D. Ala. 1989).

[1048] *Shelby County v. Holder*. 570 U.S. 529. (2013).

[1049] U.S. Department of Justice. 2013. The *Shelby County* Decision. https://www.justice.gov/crt/about-section-5-voting-rights-act

MORE DETAILED ANSWER:

Opponents of the National Popular Vote Compact often use an analogy to the World Series to justify the current method of electing the President.

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has written:

> "**The Series teaches us something about our Constitution**."
>
> "**The team that scores the most runs can still lose the World Series**. As any baseball fan knows, that's simply how it works. Teams earn the championship by winning the most games during the Series, not by scoring the most runs over the course of several games. Rules could be established to change this situation, but such rules would not **accomplish the stated objective of the games: Awarding the championship to the best overall team**."[1050] [Emphasis added]

Michael C. Maibach, a Distinguished Fellow of Save Our States wrote:

> "Those who disfavor the Electoral College say that the majority should always rule. … **The sports world can teach us something**. … The winner of the Series—the rules tell us—is the team that wins four out of seven games."[1051] [Emphasis added]

There is indeed a similarity between the state-by-state winner-take-all method for awarding electoral votes and the fact that the team that wins four games in the World Series is deemed to be the national champion—regardless of which team scores more runs during the Series.

In 1960, the Pittsburgh Pirates scored 27 runs, while the New York Yankees scored 55 runs. However, the World Series' scoring procedure awarded the championship to the Pirates.

One would think that a team that scored 55 runs, compared to the opponent's 27, would, by any rational standard, be considered, to use Ross' words, "the best overall team."

Can anyone say that less sports prowess is demonstrated by a run simply because it was scored on a day when many other runs were scored?[1052]

If particular runs are to be devalued merely because they occur in proximity to other runs, would it not be equally appropriate to base the outcome of each individual baseball game (throughout the season) on the number of innings in which a team scored more runs?

While inequality in the value of a run in the World Series may be a harmless oddity

---

[1050] Ross, Tara. 2021. The World Series imitates the Electoral College. October 13, 2021. https://www.taraross.com/post/tdih-world-series-electoral-college?utm_campaign=67ea345b-959b-476d-a73b-f1eddf1a6b33&utm_source=so&utm_medium=mail&cid=bc1b93af-da39-4787-92de-a4acf7547077

[1051] Maibach, Michael C. 2022. How the World Series can explain the Electoral College. November 28, 2022. https://saveourstates.com/blog/how-the-world-series-can-help-explain-the-electoral-college

[1052] The World Series' scoring procedure similarly awarded the championship in 2022, when the Anaheim Angels scored 41 runs, while the San Francisco Giants scored 44 runs. Similarly, in 1997, the Florida Marlins scored 37 runs, while the Cleveland Indians scored 44 runs. In 1992, the Minnesota Twins scored 24 runs, while the Atlanta Braves scored 29 runs.

from the world of sports entertainment, inequality in the value of a person's vote requires more justification than it is simply what "the [current] rules tell us."

9.43. MYTH ABOUT ORIGINS OF THE NATIONAL POPULAR VOTE CAMPAIGN

9.43.1. MYTH: The National Popular Vote effort is funded by left-wingers.

QUICK ANSWER:

- Over 80% of the contributions supporting the National Popular Vote effort over the years have come from a pro-life, anti-Buffett-rule, registered Republican businessman and a pro-choice, pro-Buffett-rule, registered Democratic businessman.
- The National Popular Vote effort has also been supported by thousands of additional contributors.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation 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."[1053] [Emphasis added]

The facts are that over 80% of the contributions supporting the National Popular Vote effort over the years have come—in about equal total amounts—from

- Tom Golisano (a pro-life, anti-Buffett-rule, registered Republican businessman currently residing in Florida) and
- John R. Koza (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").

9.43.2. MYTH: The Compact originated with three law professors.

QUICK ANSWER:

- The ideas underlying the National Popular Vote Compact go back to Dale Read's 105-page research paper at Duke University in 1971 and his 1976 article in the *Washington Law Review*.

[1053] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

- Charles Schumer discussed the idea of a two-state interstate compact for presidential elections involving New York and Texas in the 1990s.
- Key ideas were posted on the internet in December 2000 by Brent White of Seattle and Tony Anderson Solgard of Minneapolis.
- Subsequently, in January 2001, Law Professor Robert W. Bennett discussed some of the ideas about which Read, White, and Solgard had previously written.
- In December 2001, Law Professors Akhil Reed Amar and Vikram David Amar subsequently made comments about Professor Bennett's writings.

MORE DETAILED ANSWER:

Save Our States (the leading group that lobbies against the National Popular Vote Compact) claims:

> "The idea behind National Popular Vote was developed by three law professors."[1054]

The facts show otherwise.

In 1971, Dale Read Jr., then a student at Duke University Law School and later a practicing attorney in the Seattle area, wrote the first known written discussion of the ideas underlying the National Popular Vote Compact.

Read's work was contained in a 105-page research paper entitled "Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment."[1055]

In 1976, Read published a shortened version of his 1971 paper in the *Washington Law Review*.[1056] Read said:

> "The states, without federal action, possess the capability of implementing the direct popular election of the President."

Read's 1976 article in the *Washington Law Review* described what he called "The National Vote Plan" as follows:

> "The states possess the power to institute direct popular vote and they can do so more readily than the Constitution can be amended. Reform can be accomplished if the states change their election laws to require electors to support the national popular-vote winner, rather than the individual state winners."
>
> "This National Vote Plan would eliminate the winner-take-all system and its resulting inequities just as effectively as would a constitutional amendment implementing direct popular vote. Technically, an indirect electoral system would

---

[1054] Save Our States. 2024. Who came up with the idea for a National Popular Vote. Flyer distributed at the National Conference of State Legislatures in Louisville, Kentucky on August 5–7, 2024.

[1055] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1056] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

> remain, but the faults presently attributable to such a system would be substantially eliminated, because the electors would vote for the national winner."[1057]

Read's proposal envisioned states separately passing similar laws—what we today call the "single-state" approach (discussed in section 9.44.1 in connection with a different proposal made in 2019). Read estimated that the plan would work if adopted by states possessing perhaps 108–135 electoral votes:

> "The plan can work even if fewer than one-half of the electoral votes are committed to the national winner, because the winner will undoubtedly receive electoral votes from states that retain the existing system. Indeed, states that hold 20-25 percent of the total electoral college votes (108–135 electoral votes) can effectively implement the system."[1058]

In the 1990s, Congressman (and later U.S. Senator) Charles Schumer of New York proposed a bi-state compact in which New York and Texas would pool their electoral votes in presidential elections. Both states were, at the time, noncompetitive in presidential politics and therefore received little attention in presidential campaigns except for as a source of donations. Schumer observed that the two states had almost the same number of electoral votes (at the time, 33 for New York and 32 for Texas)[1059] and that the two states regularly produced majorities of approximately the same magnitude in favor of each state's dominant political party (at the time, about 60% for the Democrats in New York, and about 60% for the Republicans in Texas). The purpose of Schumer's proposed bi-state compact was to create a presidentially competitive super-state (which would have had more electoral votes than California had at the time) that would attract the attention of the presidential candidates during presidential campaigns. Schumer attempted to interest Texas Republicans in the proposal, but no action ever occurred.

The 2000 election stimulated discussion by a number of people of ideas about how direct election of the President might be achieved by state-level action.

On December 30, 2000, Brent White of Seattle wrote the following on the "Full Representation" mail server entitled "Direct Prez Election W/O Amendment."

> "**If the goal is to eventually have the president elected directly, then there is a straighter path to get there—one that does not require an amendment to the US Constitution.**
>
> "Article II of the Constitution grants each state legislature the power to determine how that state's presidential electors will be allotted. **A state legislature could, if it so chose, award that state's electors to the winner of the national popular vote.**
>
> "If even one state gives its electoral votes to the national popular winner, the voters of every other noncompetitive state would be instantly re-enfranchised, causing an immediate bump in the presidential turnout."

[1057] *Ibid.* Page 333.

[1058] *Ibid.* Page 336.

[1059] In the 2004 presidential election, New York had 31 electoral votes, and Texas had 34.

> "If several Democratic-leaning and several Republican-leaning states give their electoral votes to the national popular winner, they would form a block that virtually assures victory to the popular winner.
>
> "**If states carrying a majority of the Electoral College do this, they will make the popular winner the automatic electoral winner**."[1060] [Emphasis added]

On December 31, 2000, Tony Anderson Solgard of Minneapolis commented on White's web posting and wrote:

> "Brent's proposal … would provide a result consistent with the national popular vote. And that is precisely the point: the presidency is a single-winner office without a need for proportionality in an electoral college.
>
> "The political problem would be the criticism that it gives away the decision of each state's voters to the nation as a whole. And unless all the other states went along with it, you couldn't convince one state to disenfranchise its voters.
>
> "To get around this, **a variation on Brent's idea would be to put a multi-state compact clause into the proposal: when X number of states agree to adopt the same allocation plan, then the law goes into effect**."[1061] [Emphasis added]

At a January 11–12, 2001, conference and in an April 19, 2001, web posting, Professor Robert W. Bennett, former Dean of the Northwestern University School of Law, observed that a federal constitutional amendment was not necessary to achieve the goal of nationwide popular election of the President, because the states could use their power under Article II of the U.S. Constitution to allocate their electoral votes based on the nationwide popular vote.[1062,1063]

[1060] This December 30, 2000, posting by Brent White was at the (now expired) link of http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702433464&sort=d&start=800 The list was the "full-representation@igc.topica.com" list. The authors are grateful to Steve Chessin, President of Californians for Electoral Reform, who remembered and located White's December 30, 2000, web posting after the first edition of this book was published on February 23, 2006.

[1061] The authors of the National Popular Vote Compact became aware (thanks to the research efforts of Steve Chessin, President of Californians for Electoral Reform) of the December 31, 2000, web publications by Tony Anderson Solgard of Minneapolis after the compact was written and after the first edition of this book was released on February 23, 2006. Chessin notes that the Solgard posting was made using the e-mail address of Tony Solgard's wife (Karen L. Solgard). This posting was made on the (now expired) link of http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702436082&sort=d&start=800

[1062] Bennett, Robert W. 2001. Popular election of the president without a constitutional amendment. 4 *Green Bag*. Spring 2001. Posted on April 19, 2001. The January 11–12, 2001, presentation was contained in *Conference Report*, *Election 2000: The Role of the Courts*, *The Role of the Media; The Roll of the Dice* (Northwestern University).

[1063] The authors became aware of the 2001 web publications of Professor Bennett in early 2001 and the Amar brothers in December 2001 after the National Popular Vote Compact was written but just before the first edition of this book in 2006 went to the printer. Accordingly, the first edition of this book in 2006 referenced and discussed only these 2001 web publications but did not mention the earlier December 2000 web

In June 2001, the *Harvard Law Review* published an article on the Electoral College.[1064]

In December 2001, law Professors Akhil Reed Amar and Vikram David Amar cited Professor Bennett's earlier 2001 posting and continued the discussion about the fact that the states could allocate their electoral votes to the national winner of the popular vote.[1065]

One variation of the proposals made by Professors Robert W. Bennett, Akhil Reed Amar, and Vikram David Amar was based on the politically implausible premise (discussed in section 9.44.1) that single states would unilaterally enact laws awarding their electoral votes to the nationwide winner without regard to whether other states had enacted similar legislation.

Another variation was based on the impractical assumption (discussed in section 9.44.1) that carefully selected pairs of states of equal size and opposite political leanings could be found to enact the proposal.

Initially, these writers argued the resulting multi-state arrangement would not constitute an interstate compact, and, as a result, the proposed arrangement would not require congressional consent.[1066] Later, the use of an interstate compact was suggested.

In 2002, Bennett expanded his thoughts in subsequent publications suggesting several variations on his basic idea.[1067, 1068]

In September 2004, the authors of this book started developing the National Popular Vote Compact.

National Popular Vote held its initial press conference in Washington, D.C., and released its book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*. The press conference featured former Congressmen John Anderson

---

publications by Brent White of Seattle and Tony Anderson Solgard of Minneapolis. John Koza and Barry Fadem had discussed the possibility of state legislation being used to award a state's electoral votes to the national popular vote winner at the time of the 1992 Perot candidacy; however, they had not, at that time, combined that general idea with either the mechanism of an interstate compact or the concept of a compact taking effect when enacted by states possessing a majority of the Electoral College. The authors became aware of Dale Read's pioneering earlier papers after publication of the 4th edition of this book in 2013.

[1064] Rethinking the electoral college debate: The Framers, federalism, and one person, one vote. *Harvard Law Review*. June 2001. Volume 114. Number 8. Pages 2526–2549. See note 112 on page 2549. https://www.jstor.org/stable/1342519?origin=crossref

[1065] Amar, Akhil Reed, and Amar, Vikram David. 2001. How to achieve direct national election of the president without amending the constitution: Part three of a three-part series on the 2000 election and the electoral college. *Findlaw's Writ*. December 28, 2001. https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html

[1066] The question of whether a given arrangement is an interstate compact is separate from the question of whether the arrangement requires congressional consent. As discussed in section 9.23.3, many interstate compacts do not require congressional consent. A multi-state arrangement (1) that takes effect in response to an "offer" made by one or more states, (2) that does not take effect without assurance of complementary action by other states (through acceptance of the offer), and (3) that then commits the states to act in concert would almost certainly be regarded by the courts as a contract, and hence an "agreement or compact" as that phrase is used in the U.S. Constitution.

[1067] Bennett, Robert W. 2002. Popular election of the president without a constitutional amendment. In Jacobson, Arthur J., and Rosenfeld, Michel (editors). *The Longest Night: Polemics and Perspectives on Election 2000*. Berkeley, CA: University of California Press. Pages 391–396.

[1068] Bennett, Robert W. 2002. Popular election of the president II: State coordination in popular election of the president without a constitutional amendment. *Green Bag*. Winter 2002.

(R–Illinois and Independent presidential candidate) and John Buchanan (R–Alabama), former Senator Birch Bayh (D–Indiana), Common Cause President Chellie Pingree, FairVote Executive Director Rob Richie, National Popular Vote President Barry Fadem, and Dr. John R. Koza, originator of the plan.

Later in 2006, Jennings "Jay" Wilson analyzed the numerous variations proposed by Professors Robert W. Bennett, Akhil Reed Amar, and Vikram David Amar in 2001 and 2002. Wilson's analysis points out the political impracticality of the various proposals made in 2001 and 2002.[1069]

These earlier proposals differ from the authors' proposed "Agreement Among the States to Elect the President by National Popular Vote" in several respects.

None of the earlier proposals contained a provision making the effective date of the system contingent on the enactment of identical laws in states that collectively possess a majority of the electoral votes (i.e., 270 of the 538 electoral votes). No single state would ever be likely to unilaterally enact a law awarding its electoral votes to the nationwide winner. For one thing, such an action would give the voters of all the other states a voice in the selection of the state's own presidential electors, while not giving the enacting state the benefit of a voice in the selection of presidential electors in other states. Moreover, enactment of such a law in a single state would encourage the presidential candidates to ignore the enacting state. Such unilateral action would not guarantee achievement of the goal of nationwide popular election of the President. These issues are discussed in detail in section 9.44.1 in connection with a different 2019 proposal.

Moreover, the earlier proposals do not work in an even-handed and non-partisan way if enacted by states possessing less than a majority of the electoral votes. Suppose, for example, that a group of states that consistently voted Democratic in presidential elections were to participate in an arrangement—without the electoral-majority threshold—to award their electoral votes to the nationwide popular vote winner. Then, if the Republican presidential candidate won the most popular votes nationwide (but did not carry states with a majority of the electoral votes), the participating (Democratic) states would award their electoral votes to the Republican candidate—thereby achieving the desired result of electing the presidential candidate with the most popular votes nationwide. On the other hand, if the Democratic presidential candidate won the most popular votes nationwide (but did not carry states with a majority of the electoral votes), the similarly situated Democratic presidential candidate would not receive a symmetric benefit. Instead, the Republican candidate would be elected, because the Democratic candidate could not receive any additional electoral votes from the group of states involved, because the Democratic candidate would already be getting all of the electoral votes from that group of states. In short, a Republican presidential nominee would be the only beneficiary if only Democratic states participated in such an arrangement, and vice versa. In fact, an arrangement without an electoral majority threshold would operate in an even-handed and non-partisan way only in the unlikely event that the participating states were equally divided (in terms of electoral votes) among reliably Republican and reliably Democratic states. In contrast,

---

[1069] 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.

if the states participating in the arrangement possess a majority of the electoral votes, the system operates in an even-handed and nonpartisan way without regard to the political complexion of the enacting states. With an electoral majority threshold, the political complexion of the enacting states becomes irrelevant.

In his 2006 article, Wilson proposed his own "bloc voting" variation (in which only the popular votes of *only* the enacting states would decide which candidate received the electoral votes of the enacting states).[1070] The obvious flaw of this variation is illustrated if one considers a scenario in which one or more Republican-leaning states were to enact the "bloc voting" proposal. If, subsequently, a group of Democratic-leaning states that together generated a larger popular-vote margin than the existing Republican group were to enact Wilson's "bloc voting" proposal, all the electoral votes of the less-muscular Republican group would be go to the Democrats. In other words, the Democratic group of states would have commandeered the electoral votes of the Republican states. More important, this would occur irrespective of whether the Democratic presidential candidate received the most popular votes nationwide.

The authors submit that the proposed "Agreement Among the States to Elect the President by National Popular Vote" does not have the above problems of any of the other variations that have been previously discussed.

In any event, specific legislative language was never created for any of the other proposals, and none of the other proposals has ever been introduced in any state legislature. Soon after National Popular Vote's initial press conference on February 23, 2006, the National Popular Vote Compact had been introduced in all 50 state legislatures.

9.44. MYTHS ABOUT PROPOSALS THAT ARE ENACTED BY A SINGLE STATE OR ONLY A FEW STATES

9.44.1. MYTH: The benefits of a national popular vote can be achieved if one state or only a few states adopt the Voter Choice Ballot.

QUICK ANSWER:

- The Voter Choice Ballot (VCB) is proposed state legislation by which a state would award its electoral votes to the national popular vote winner—without the requirement (contained in the National Popular Vote Compact) that states possessing a majority of the electoral votes (270 of 538) have agreed to award their electoral votes in that manner.
- Enactment of the single-state version of the Voter Choice Ballot in any state that usually votes Republican in presidential elections would be politically preposterous (and vice versa for Democratic states).

[1070] *Ibid.*

MORE DETAILED ANSWER:

Starting with Dale Read's 1971 research paper at Duke University[1071] and his 1976 law review article entitled "Direct election of the president without a constitutional amendment,"[1072] there have been repeated suggestions that the benefits of a nationwide vote for President can be achieved through the action of a bloc of states possessing considerably less than a majority of the electoral votes.

This idea achieved a brief second life after the 2000 presidential election in the writings of several law professors (section 9.43.2).

A version of this idea resurfaced in 2019 under the name "Voter Choice Ballot" from an organization called "Making Every Vote Count" (MEVC).

Description of the Voter Choice Ballot

The Voter Choice Ballot (VCB) is proposed state legislation in which a state would award its electoral votes to the national popular vote winner—without the requirement (contained in the National Popular Vote Compact) that states possessing a majority of the electoral votes (270 of 538) must have agreed to award their electoral votes to the national popular vote winner.

Making Every Vote Count has proposed two distinct versions of the Voter Choice Ballot:

- **Single state version**: The Voter Choice Ballot legislation takes effect immediately after enactment by a single state.
- **Paired state version**: The Voter Choice Ballot legislation takes effect only after being enacted by two states with an equal number of electoral votes and with equal, but opposite, political orientation.

In both versions, voters would first vote for President in the usual way, and then vote on the following question:

> "Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES."

The effect of voting "Yes" would be printed on each ballot:

> "The state will count the votes for all those who filled in the YES oval as cast for the winner of the national popular vote for the purpose of appointing electors as otherwise provided by this state's law."

Figure 9.29 shows the Voter Choice Ballot.

In other words, if a voter were to vote "Yes," then the vote that the voter just cast for President would—for purposes of awarding the state's electoral votes—be transferred

---

[1071] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1072] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

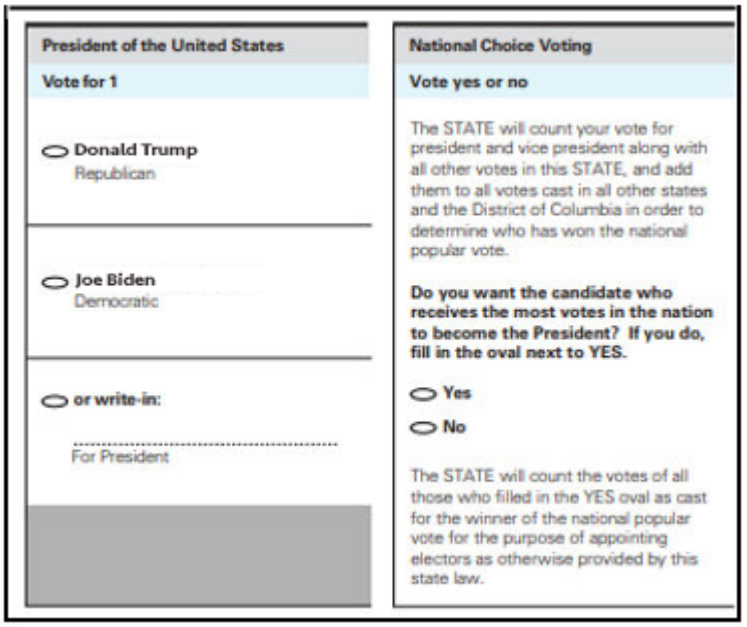


Figure 9.29 The Voter Choice Ballot

from the voter's preferred presidential candidate and added to the tally of the candidate who won the national popular vote. Then, after those transfers, the presidential candidate who has the most popular votes in the state would win all of the state's electoral votes.

As an example, consider Michigan in 2020 when Democrat Joe Biden got 2,804,040 (51%) of the state's popular votes, and the Republican Donald Trump got 2,649,852 (49%).

For the sake of argument, suppose that Trump had won the national popular vote and that 77,095 of Michigan's 2,804,040 Biden voters (1.4% of the state's voters) voted "Yes" on the Yes-No question.

Under the assumption that Trump won the national popular vote, 77,095 Democratic votes would then be subtracted from Biden—leaving Biden with only 2,726,945. Those 77,095 Biden votes would then be added to Trump's tally—thus putting Trump in the lead in Michigan with 2,726,946 votes. The result would be that Trump (the assumed national popular vote winner) would receive all of Michigan's electoral votes.

The Yes-No question on the Voter Choice Ballot is unusual in that it will appear to many voters to be a typical referendum question that requires a statewide majority of "Yes" votes in order to take effect. However, this is not the case. Instead, a voter may express support for the concept of a national popular vote for President *only* if the voter is willing to have the vote he or she just cast for President to be transferred from the voter's preferred candidate to the national popular vote winner.

No ordinary referendum question requires a voter to surrender his or her vote for their chosen candidate in order to cast a vote on the referendum question.

In other words, a "Yes" vote is an authorization by an individual voter to transfer their vote from one candidate to another under the specified circumstances (specifically, that a certain candidate won the national popular vote).

Thus, a very modest percentage of a state's voters (1.4% in the example above) would be sufficient to trigger the shift of a state's electoral votes from one presidential candidate to another.

Speaking in favor of VCB at an August 13, 2020, conference, Mark Bohnhorst (a director of Making Every Vote Count at the time) said:

> "The percentage of the 'Yes' votes that you would need in order to assure that one of the major-party candidates that won the national popular vote will win the state's electors … **are not particularly high, and in some cases, they are vanishingly small**."[1073] [Emphasis added]

Table 9.57 shows the percentage of voters voting "Yes" on VCB's Yes-No question that would have been required in 2020 to shift a state's electoral votes from one candidate to another:

- Columns 2 through 4 of this table show the 2020 presidential vote for each state.
- Column 6 shows the number of voters voting "Yes" on the Yes-No question that would have been needed in 2020 to switch the state's electoral votes to the national popular vote winner.
- Column 7 expresses the number of voters in column 6 as a percentage of the state's total popular vote for President. The table is sorted by the percentages in column 7.

As can be seen from the table, less than 10% of the voters in two-thirds of the states would be sufficient to trigger the shift of the state's electoral votes from one presidential candidate to another.

Less than 2% of the voters in eight states would be sufficient to trigger the shift of the state's electoral votes from one presidential candidate to another.

The two versions of the Voter Choice Ballot have very different characteristics.

A considerable amount of confusion can arise when justifications that support one version of a proposal are used to justify the other version.

In an article entitled "Ten Advantages of the Voter Choice Ballot Proposal to Achieve Urgently Needed Presidential Election Reform," Making Every Vote Count intermixes the justifications for the two versions of VCB.

The "Ten Advantages" article states that one key advantage of VCB is:

> "The reform can **go into effect immediately without any other state taking action.**"[1074] [Emphasis added]

This feature is particularly appealing to supporters of VCB, because the National Pop-

---

[1073] Bohnhorst, Mark. 2020 Presidential Election Reform 2020 & Beyond Conference. August 13, 2020. Slide 2 at timestamp 2:07 of video. https://www.crowdcast.io/e/electoralcollegereform2020

[1074] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal to Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

Table 9.57 Percentage of voters needed to switch a state's electoral votes under VCB in 2020

State	Biden	Trump	Others	Total Vote	"Yes" votes needed to switch the state's electoral votes	Percent of voters needed to switch the state's electoral votes
Georgia	2,473,633	2,461,854	62,229	4,997,716	5,890	0.1%
Arizona	1,672,143	1,661,686	53,497	3,387,326	5,229	0.2%
Wisconsin	1,630,866	1,610,184	56,991	3,298,041	10,342	0.3%
Pennsylvania	3,458,229	3,377,674	79,380	6,915,283	40,278	0.6%
North Carolina	2,684,292	2,758,775	68,422	5,511,489	37,242	0.7%
Nevada	703,486	669,890	17,921	1,391,297	16,799	1.2%
Michigan	2,804,040	2,649,852	85,392	5,539,284	77,095	1.4%
Florida	5,297,045	5,668,731	101,680	11,067,456	185,844	1.7%
Texas	5,259,126	5,890,347	165,583	11,315,056	315,611	2.8%
Minnesota	1,717,077	1,484,065	67,308	3,268,450	116,507	3.6%
New Hampshire	424,937	365,660	13,236	803,833	29,639	3.7%
Ohio	2,679,165	3,154,834	88,203	5,922,202	237,835	4.0%
Iowa	759,061	897,672	29,801	1,686,534	69,306	4.1%
Maine	435,072	360,737	23,565	819,374	37,168	4.5%
Alaska	153,778	189,951	13,840	357,569	18,087	5.1%
Virginia	2,413,568	1,962,430	64,761	4,440,759	225,570	5.1%
New Mexico	501,614	401,894	20,457	923,965	49,861	5.4%
South Carolina	1,091,541	1,385,103	36,685	2,513,329	146,782	5.8%
Colorado	1,804,352	1,364,607	88,021	3,256,980	219,873	6.8%
Kansas	570,323	771,406	30,574	1,372,303	100,542	7.3%
Missouri	1,253,014	1,718,736	54,212	3,025,962	232,862	7.7%
New Jersey	2,608,335	1,883,274	57,744	4,549,353	362,531	8.0%
Indiana	1,242,413	1,729,516	61,183	3,033,112	243,552	8.0%
Oregon	1,340,383	958,448	58,401	2,357,232	190,968	8.1%
Montana	244,786	343,602	15,252	603,640	49,409	8.2%
Mississippi	539,398	756,764	17,597	1,313,759	108,684	8.3%
Illinois	3,471,915	2,446,891	114,632	6,033,438	512,513	8.5%
Louisiana	856,034	1,255,776	36,252	2,148,062	199,872	9.3%
Delaware	295,933	200,327	7,421	503,681	47,804	9.5%
Nebraska	374,583	556,846	20,283	951,712	91,132	9.6%
Washington	2,369,612	1,584,651	106,116	4,060,379	392,481	9.7%
Connecticut	1,080,831	714,717	28,309	1,823,857	183,058	10.0%
Utah	560,282	865,140	62,867	1,488,289	152,430	10.2%
Rhode Island	307,486	199,922	10,349	517,757	53,783	10.4%
New York	5,230,985	3,244,798	115,574	8,591,357	993,094	11.6%
Tennessee	1,143,711	1,852,475	57,665	3,053,851	354,383	11.6%
Alabama	849,624	1,441,170	32,488	2,323,282	295,774	12.7%
Kentucky	772,474	1,326,646	37,608	2,136,728	277,087	13.0%
South Dakota	150,471	261,043	11,095	422,609	55,287	13.1%
Arkansas	423,932	760,647	34,490	1,219,069	168,358	13.8%
California	11,110,250	6,006,429	384,192	17,500,871	2,551,911	14.6%
Hawaii	366,130	196,864	11,475	574,469	84,634	14.7%
Idaho	287,021	554,119	26,091	867,231	133,550	15.4%
Oklahoma	503,890	1,020,280	36,529	1,560,699	258,196	16.5%
North Dakota	114,902	235,595	11,322	361,819	60,347	16.7%
Maryland	1,985,023	976,414	56,482	3,017,919	504,305	16.7%
Massachusetts	2,382,202	1,167,202	65,671	3,615,075	607,501	16.8%
Vermont	242,820	112,704	11,904	367,428	65,059	17.7%
West Virginia	235,984	545,382	13,365	794,731	154,700	19.5%
Wyoming	73,491	193,559	7,976	275,026	60,035	21.8%
D.C.	317,323	18,586	8,447	344,356	149,369	43.4%
Total	**81,268,586**	**74,215,875**	**2,740,538**	**158,224,999**		

ular Vote Compact does not offer this immediacy. Instead, the Compact will not take effect until states possessing a majority of the electoral votes (270 of 538) agree to award their electoral votes to the national popular vote winner.

Immediacy is an attractive feature for the single-state version of VCB. However, as discussed shortly below, it is politically unsaleable, because enactment of the "single-state" version of VCB by a Democratic state would give the Republican candidate a one-sided partisan advantage, while not giving the Democrat an equivalent benefit (and vice versa for a Republican state). That is, this characteristic of the single-state version of VCB makes it unsaleable in both Democratic and Republican states.

To counter this criticism of the "single-state" version of VCB, the "Ten Advantages" article shifts to discussing the paired-state version:

> "States can also adopt the voter choice ballot in contingent legislation, which would **go into effect when another state that voted for the candidate of a different party in the previous election** adopts reciprocal legislation (the "paired" approach)."[1075] [Emphasis added]

In discussing an "urgently needed presidential election reform," Reed Hundt, the CEO of Making Every Vote Count, predicted in December 2020 that no Republican state would be receptive to the National Popular Vote Compact before 2024.[1076]

This prediction turned out to be accurate.

However, this prediction provides no justification for VCB. If no Republican state was going to be receptive to the concept of a national popular vote for President between 2020 and 2024, no Republican state was going to be available to create the politically balanced pair of states required to enact the paired-state version of VCB before 2024. Indeed, if a state does not favor the concept of a nationwide vote for President, it is certainly not going to favor accelerating its adoption.

In other words, the only version of VCB that could possibly be seriously considered (namely, the paired-state version) could not go into effect by 2024.

Enactment of the single-state version of the Voter Choice Ballot in any state that usually votes Republican in presidential elections would be politically preposterous (and vice versa for Democratic states).

It also would be politically preposterous for Republicans to support the single-state version of VCB in any state that regularly votes Republican in presidential elections.

For example, consider the reliably red state of South Carolina. As shown in table 9.57, if more than 6% of those who voted Republican for President were to vote "Yes" on the Yes-No question in South Carolina, and the Democratic candidate were to win the national popular vote, the Democrat would get all nine of South Carolina's electoral votes. That is,

---

[1075] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

[1076] Hundt, Reed. 2020. Reaction to the Critique of the Voter Choice Ballot. December 5, 2020. https://www.makingeveryvotecount.com/research-whitepapers-library Accessed December 28, 2020.

the Democratic candidate winning the national popular vote would get nine electoral votes worth of protection against losing the Electoral College while winning the nationwide vote.

This would be a desirable and virtuous outcome, provided that the single-state version of VCB were to confer an equivalent benefit on the Republican presidential nominee.

However, it does not.

Instead, the Republican presidential nominee who wins the national popular vote would get zero electoral votes of protection against losing the Electoral College while winning the nationwide vote, because the Republican candidate *was destined to win South Carolina's electoral votes anyway.*

That is, enactment of the single-state version of VCB would boomerang against the party (i.e., the Republican Party) that usually wins presidential elections in South Carolina and that controls both houses of the state legislature and the governorship.

That is, the single-state version of VCB would punish the party that has the power to enact it.

Similarly, unilateral enactment of the single-state version of VCB in any state that usually votes Democratic in presidential elections would put Democratic electoral votes at risk, while putting no Republican electoral votes at risk. It would give the Republican candidate a one-sided partisan advantage while not giving the Democrat an equivalent benefit.

As shown in table 1.28, 36 states voted for the same party in the six presidential elections between 2000 and 2020. An additional nine states voted for the same party in all but one of those elections. Unilateral enactment of VCB makes no sense in any state that reliably votes for the same party in presidential elections.

Note the difference between VCB and the National Popular Vote Compact. An essential feature of the Compact is that it gives both parties *equal* protection against the possibility of losing the presidency if they win the national popular vote.

In other words, the Compact does not punish the party that has the power to enact it.

The National Popular Vote Compact operates in this bipartisan fashion because it contains the vital condition that it will not take effect until it is enacted by states possessing a majority of the electoral votes—that is, 270 out of 538. When the Compact takes effect, it will result in the appointment of at least 270 presidential electors nominated by the party whose presidential candidate won the most popular votes in all 50 states and the District of Columbia. That is, the Compact guarantees the national popular vote winner enough electoral votes to become President. Moreover, the Compact treats both parties equally. Both parties receive equal protection against the possibility of losing the Electoral College if they win the national popular vote.

Enactment of the paired state version of the Voter Choice Ballot would be exquisitely difficult to execute in practice.

In the previous section, we showed that the percentage of voters who would have to vote "Yes" on the Yes-No question in order to switch a state's electoral votes is so small that the Yes-No question is superfluous. That is, enactment of the single-state version of VCB is essentially equivalent to a state just unilaterally awarding its electoral votes to the national popular vote winner.

We also showed above that it would be politically preposterous for Democrats in a state that usually votes Democratic in presidential elections (or for Republicans in a state that usually votes Republican) to unilaterally enact the "single-state" version of VCB, because it would perversely punish the party that enacts it.

Supporters of VCB respond to these valid criticisms of the single state version of VCB by advocating that it be simultaneously enacted by a politically balanced pair of states.

Pairing of states would be exquisitely difficult to execute in practice because of the difficulty of finding appropriate partners, and then finding legislative and gubernatorial support simultaneously in those particular states.

Each of the following five considerations severely reduces the chance of finding suitable pairs of states.

First, pairing only makes sense between states with an *equal* number of electoral votes. For any given number of electoral votes, there are only a few states (and sometimes no states) with the same number of electoral votes. For example, Maryland, Missouri, and Minnesota are the only states with 10 electoral votes. Virginia is also a singleton, because it is the only state with 13 electoral votes.

Second, "pairing" only makes sense between states whose partisanship is opposite. Ignoring the fact that Pennsylvania has 19 electoral votes, while Minnesota has only 10, Making Every Vote Count suggests:

> "If only Minnesota and Pennsylvania, for example, paired up in adopting the ballot, both parties would be forced to campaign to win the national popular vote."[1077]

However, this combination makes no sense, because both states voted Democratic in eight or nine of the nine presidential elections between 1992 and 2020. The net effect of a Minnesota–Pennsylvania partnership would be, in almost all elections, to put 29 Democratic electoral votes at risk, while putting no Republican electoral votes at risk.

Similarly, it would make no sense for Maryland and Minnesota to enter into a "pairing" arrangement, because both regularly vote Democratic in presidential elections. That pairing would put 20 almost certain Democratic electoral votes at risk, while putting no Republican electoral votes at risk.

Third, pairing only makes sense between states whose partisanship is not merely opposite but *of equal intensity.* For example, it would also make no sense for Michigan and Georgia to enter into a "pairing" arrangement (even if they had the same number of electoral votes), because Republicans hold a 7.9% edge in base party strength in Georgia, compared to a Democratic edge of 1.8% in Michigan.[1078]

Fourth, pairing only makes sense between states whose equal and opposite partisan-

---

[1077] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

[1078] Ballenger, Bill. 2021. Georgia is still way more Republican than most states. *The Ballenger Report.* January 20, 2021. https://www.theballengerreport.com/georgia-republicans-never-should-have-lost-those-two-u-s-senate-seats-georgiais-still-way-more-republican-than-most-states/

ship is *stable*. Unless VCB were enacted on a temporary basis for just the immediately upcoming election, it would make no sense for a state with relatively stable demographics and politics (e.g., Michigan) to pair itself with a state with rapidly changing demographics and politics (e.g., Georgia).

Fifth, Making Every Vote Count claims that the character of a presidential campaign would be changed if only one state, or a few states, adopt VCB. However, this could only happen if VCB were adopted by a large number of states together possessing a hefty number of electoral votes.

In 1971, Dale Read (the attorney who originated the idea of states unilaterally passing legislation tying their electoral votes to the national popular vote in his Duke University paper[1079] and in a 1976 *Washington Law Review* article)[1080] estimated that between 108 and 135 electoral votes would be needed to make his idea work.

Northwestern University Law School Dean Robert Bennett made a similar behavioral prediction in his 2006 book:

> "If states with 100 to 125 electoral votes—**more or less evenly balanced in partisan terms**—were to bind themselves initially, the dynamics of campaigning would shift dramatically toward concern with the nationwide vote."[1081,1082,1083] [Emphasis added]

Neither Bennett nor Read provided any justification for their estimates (100, 108, 126, or 135). There is no way to know exactly what number of carefully paired states would be sufficient to change the behavior of presidential candidates.

The important point is that neither Read nor Bennett is talking about one state, or a few states, changing the character of a presidential campaign. They are talking about a substantial bloc of electoral votes.

In 2019, Making Every Vote Count introduced a bill in the Maryland Senate that would have potentially paired Maryland (with 10 electoral votes) to either Minnesota (10) or Missouri (10). This bill did not include VCB.[1084]

Making Every Vote Count's 2019 Maryland bill was nowhere near as complex as VCB.

[1079] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1080] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

[1081] Bennett, Robert W. 2006. Electoral College Reform Is Heating Up and Posing Some Tough Choices. *Northwestern University School of Law Public Law and Legal Theory Papers*. Paper No. 45. Page 15. http://law.bepress.com/nwwps/plltp/art45

[1082] Bennett, Robert W. 2001. Popular election of the president without a constitutional amendment. *Green Bag*. Volume 4. Number 2. Posted on April 19, 2001. Pages 241–245. http://www.greenbag.org/v4n3/v4n3_articles_bennett.pdf

[1083] Bennett, Robert W. 2006. *Taming the Electoral College*. Stanford, CA: Stanford University Press.

[1084] For additional details on Making Every Vote Count's 2019 Maryland bill, see https://www.nationalpopularvote.com/state/md

MEVC first announced VCB in 2020.[1085] However, MEVC has yet to present actual statutory language for VCB. Additional analysis of VCB will remain impossible until MEVC provides actual proposed statutory language.

The Voter Choice Ballot would fizzle in any election (such as 2016 and 2020) in which one candidate adopts a strategy aimed only at winning the Electoral College.

The Voter Choice Ballot is based on the unsupported behavioral prediction that presidential candidates feel compelled to conduct a 50-state campaign because of enactment of VCB by a few states with a modest number of electoral votes.

In 2018, Reed Hundt, the President of Making Every Vote Count, wrote:

> "If even a few states allocated even a few electors to the national winner, then both campaigns would seek national pluralities."[1086]

Hundt also wrote in December 2018:

> "What **our great lawyers and statisticians discovered is that if only a few states enact** laws allocating some or all electors to the winner of the national vote, then **the campaigns would be impelled to seek a national victory. Both parties would send their nominees everywhere, asking everyone for their vote**. Both parties would listen to all Americans when drafting their platform, selecting their nominees down ballot, shaping their agendas. The true center of American opinion would call for the candidates to act in accordance with the wishes of most Americans."[1087,1088][Emphasis added]

To see why Hundt's prediction is too good to be true, let's start by clarifying what VCB actually does, and does not do.

If VCB were enacted in a single state (say, Michigan with 15 electoral votes), it would *not* instantly and automatically create a nationwide popular election for President.

Instead, its immediate political effect would be to replace the state of Michigan (which has 10 million people) with a new "electoral district" with 330 million people and 15 electoral votes.

Winning the 15 electoral votes belonging to this new "electoral district" would be based on the number of votes cast nationwide for President (which was 158,224,999 in 2020).

The presidential campaigns would carefully evaluate the costs and benefits of trying to win these particular 15 electoral votes in comparison to the costs and benefits of winning electoral votes elsewhere.

[1085] Cohen, Thea. 2020. New MEVC Poll: Americans Want the National Choice Ballot. March 6, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmyt-59jcw-zxcc2

[1086] Hundt, Reed. 2018. Making Every Vote Count Blog. December 27, 2018.

[1087] Hundt, Reed. 2018. Making Every Vote Count press release. December 13, 2018.

[1088] There is a substantial amount of additional discussion of the Voter Choice Ballot at https://www.makingeveryvotecount.com/mevc—particularly in 2020.

Specifically, the campaign strategists would compare this new opportunity to their chances of winning the electoral votes of the existing closely divided battleground states.

In 2020, there were 11 battleground states (other than Michigan) with a total of 145 electoral votes in which the presidential candidates campaigned extensively (table 1.6).

In 2020, neither the Trump campaign nor the Biden campaign thought, for a minute, that Trump could win, would win, or was even trying to win, the national popular vote.

Trump conducted his 2020 presidential campaign patterned after the way he had won in 2016—that is, his campaign was aimed only at winning the Electoral College. Polls throughout the year showed Biden leading in the national popular vote (which he eventually won by over seven million votes).

Thus, both campaigns would have quickly concluded that the new "electoral district" created by Michigan's enactment of VCB was just another place in which one candidate (Biden, in this case) was safely ahead, and the other (Trump) was hopelessly behind.

Presidential candidates do not campaign in such places, for the simple reason that they have nothing to gain or lose by doing so. Thus, both campaigns would have ignored the new "electoral district" created by Michigan's enactment of VCB. Biden would have won these 15 electoral votes without bothering to campaign—just like he won New York, California, Illinois, Massachusetts, and numerous other spectator states.

That is, VCB would have totally fizzled in 2020 in terms of motivating candidates to run a 50-state campaign.[1089]

In short, VCB can lead a horse to water, but it can't make him drink.

As will be seen in the next section, even when the national popular vote is closely divided, VCB would not be successful in making the horse drink.

The most efficient way for a candidate to win electoral votes under VCB is to redouble efforts to win *popular* votes in *existing* battleground states—not to campaign nationwide.

VCB is based on the unsupported behavioral prediction that presidential candidates will be compelled to conduct a 50-state campaign merely because of its enactment by one state, or a few states, with a modest number of electoral votes.

The major reason why VCB would not motivate presidential candidates to campaign outside of the usual dozen-or-so battleground states is that it is simply not necessary—or advantageous—to campaign in 38 spectator states (and the District of Columbia) in order to increase a candidate's national popular vote total.

Instead of bothering to campaign in the 38 spectator states (and the District of Columbia), candidates could far more efficiently increase their national popular vote total simply by winning additional popular votes in the dozen-or-so battleground states.

Spending money and campaign time trying to win additional popular votes in the ex-

---

[1089] Trump's 2020 goal of winning a majority in the Electoral College, while losing the national popular vote, almost worked. If 21,847 voters had changed their minds (5,229 in Arizona, 5,890 in Georgia, and 10,342 in Wisconsin), Trump would have won the 37 electoral votes from these states, and there would have been a 269-269 tie in the Electoral College. Trump would have been re-elected, because, when there is a tie in the Electoral College, the newly elected U.S. House of Representatives picks the President on a one-state-one-vote basis, and the Republicans had a majority of the *delegations* in the 2021 House of Representatives.

isting closely divided battleground states would give a candidate a bite at two apples. Winning additional popular votes in a battleground state would count toward winning *both* the battleground state's electoral votes (under that state's existing winner-take-all rule) and would *simultaneously* count toward winning the electoral votes tethered to the national popular vote by VCB.

In contrast, campaigning among the 215,000,000 people in the 38 spectator states (and the District of Columbia) would give a candidate a bite at only one apple, namely the possibility of winning the relatively small number of electoral votes tethered to the national popular vote by VCB.[1090]

In fact, the perverse political effect of VCB would be to increase the already outsized political importance of the dozen-or-so closely divided battleground states. Each battleground state would retain 100% control over its own electoral votes—while acquiring partial control over the electoral votes of the state(s) enacting VCB. This transfer of political power would be a one-way street, because voters in the VCB state(s) would not acquire any compensating influence over the electoral votes of battleground states.

Note the critical difference between VCB and the National Popular Vote Compact. The Compact contains the vital condition that it will only go into effect when enacted by states with a majority of the electoral votes (270 of 538). As a result, the National Popular Vote Compact does not have VCB's undesirable asymmetric transfer of power in favor of the battleground states. Under the Compact, no state is asked to unilaterally become a selfless donor that gets nothing in return.

Even under generous hypothetical assumptions, VCB would not create a meaningful nationwide campaign.

As just explained, VCB would not create any motivation for presidential candidates to expand their campaigns into the spectator states.

However, purely for the sake of argument, let us assume that VCB actually motivated presidential candidates to conduct a 50-state campaign. That is, suppose that presidential candidates were to make the illogical decision to expand their campaign into the spectator states rather than the rational decision to simply redouble efforts to win *popular* votes in the battleground states.

[1090] The argument for ignoring the spectator states is especially clear in the special case of a sitting President seeking re-election (or a retiring President desiring to aid his preferred successor). Sitting Presidents have unique additional tools at their disposal, such as the ability to award vote-getting government contracts, highway improvements, waivers, exemptions, or distribution of medical supplies to particular states. Under VCB, a sitting president would continue to focus this "presidential pork" on battleground states, because every vote gained in those states would help him win their electoral votes and simultaneously help him win the electoral votes tethered to the national popular vote by VCB. Given a choice between awarding a job-creating and vote-getting tank production contract to a factory in Lima, Ohio, versus a factory in a spectator state such as Democratic Illinois or Republican Indiana, then-President Trump awarded the contract to the factory in Ohio (which was then a battleground state). He would have no reason to give that contract to Illinois, because a few additional popular votes in Illinois would not get him the safely Democratic electoral votes of Illinois, and failing to get a few more popular votes in Indiana would not cause him to lose the safely Republican electoral votes of Indiana. Indeed, campaigning in spectator states cannot help any candidate win any additional electoral votes.

Under that assumption, the obvious question would be: *How much effort should a candidate make to win the electoral votes of the new "electoral district" created by VCB?*

For this discussion, let's suppose that Michigan had enacted VCB in time for the 2016 election.[1091]

Table 9.58 shows the 12 battleground states of 2016 (including Michigan), with their combined 153 electoral votes and 95 million people.

- Column 1 shows the Republican percentage of the two-party vote.
- Column 2 shows the number of general-election campaign events.
- Column 10 shows the state's population.

Clearly, candidates are not going to drop everything in order to win the 16 electoral votes that Michigan possessed in 2016.

The opportunity to win the 16 electoral votes from the new nationwide "electoral district" with 310 million people would be evaluated along with the opportunity to win the 137 electoral votes available from the 11 remaining battleground states of 2016.

It is a fact that Michigan received 22 general-election campaign events in 2016 (out of 399 events nationally).

Thus, 22 campaign events (and the customary millions of dollars of accompanying advertising and the customary supporting ground game and other activity) are a reasonable estimate of what it is worth to win the new nationwide "electoral district" created by Michigan's enactment of VCB.

There is plenty of evidence of how presidential candidates conduct their campaigns when they encounter a situation in which every vote is equal, and the candidate receiving the most votes wins. Candidates distribute their campaign events closely in proportion to population (as discussed in detail in chapter 8 and section 9.7).

So, let's see how the presidential candidates would likely distribute these 22 events.

Table 9.58 The 12 battleground states of 2016

Trump %	Events	State	Trump	Clinton	R-Margin	D-Margin	R-EV	D-EV	Population
55%	21	Iowa	800,983	653,669	147,314		6		3,053,787
54%	48	Ohio	2,841,006	2,394,169	446,837		18		11,568,495
52%	55	North Carolina	2,362,631	2,189,316	173,315		15		9,565,781
52%	10	Arizona	1,252,401	1,161,167	91,234		11		6,412,700
51%	71	Florida	4,617,886	4,504,975	112,911		29		18,900,773
50%	14	Wisconsin	1,405,284	1,382,536	22,748		10		5,698,230
50%	54	Pennsylvania	2,970,733	2,926,441	44,292		20		12,734,905
50%	22	Michigan	2,279,543	2,268,839	10,704		16		9,911,626
49.8%	21	New Hampshire	345,790	348,526		2,736		4	1,321,445
49%	17	Nevada	512,058	539,260		27,202		6	2,709,432
47%	19	Colorado	1,202,484	1,338,870		136,386		9	5,044,930
47%	23	Virginia	1,769,443	1,981,473		212,030		13	8,037,736
51%	**375**		**22,360,242**	**21,689,241**			**125**	**32**	**94,959,840**

[1091] In this section concerning the 2016 election, we use data from the applicable 2010 census, namely a nationwide population of 310 million people, and 95 million people living in the 12 battleground states of 2016.

A 22-event campaign distributed among 310,000,000 people means one campaign event for every 14,090,000 people.

Thus, the campaign in the 38 spectator states would look something like the following:

- California (population 37 million) would probably get three of the 22 events.
- Texas (population 25 million) would probably get two events.
- New York (population 19 million) would probably get one event.
- Illinois (population 13 million) would probably get one event.
- Louisiana (population five million), Alabama (population five million) and Mississippi (population three million) might get one event among them.
- The remaining 14 campaign events would be distributed in a similar manner among the remaining spectator states.

In short, the 22-event VCB-induced campaign would be barely noticeable in the context of a general-election campaign involving 399 campaign events.

The 377 events concentrated in the 11 remaining battleground states (with 137-or-so electoral votes) would still constitute the bulk of the campaign.

Thus, the above calculation—as well as common sense—suggests that the real-world effect of a small number of electoral votes on the overall campaign would, well, be small.

VCB is based on magical thinking that asserts that a tiny number of electoral votes will somehow cause presidential candidates to drop everything in pursuit of the tiny number of electoral votes tethered to the nationwide popular vote.

The bottom line is that there is no quick shortcut, involving state(s) with a tiny number of electoral votes that can create a nationwide presidential campaign in which every vote is equal, and in which every voter in every state is politically relevant in every presidential election. Candidates will campaign nationally only if winning the national popular vote actually yields the White House.

If a battleground state enacted VCB, it would be exchanging its current high level of attention for considerably less attention than its population warrants.

MEVC claims that closely divided battleground states will find VCB attractive.

Let's consider Michigan—a state that had 16 electoral votes in 2016.[1092]

What, specifically, would have happen if it had enacted VCB in 2016?

The effect of enacting VCB would be that Michigan would have become a very small part—just 3%—of a new nationwide electoral district with 310,000,000 people and 16 electoral votes.

As previously discussed, we know the value of 16 electoral votes in the 2016 presidential campaign. Michigan received 22 general-election campaign events in 2016 (out of a nationwide total of 399).[1093]

A 22-event campaign in this new virtual nationwide electoral district with 310,000,000 people would mean one campaign event for every 14,090,000 people.

[1092] Michigan was a closely divided battleground state in 2016 and 2020 (although it was almost totally ignored in the 2012 general-election campaign and 2008 campaign).

[1093] In 2020, Michigan received 21 general-election campaign events in the COVID-constrained 2020 campaign (out of a smaller-than-usual total of 212 events).

With 10,000,000 people, Michigan does not have sufficient population to be absolutely guaranteed that it would receive even one campaign event. However, for the sake of argument, let's say that Michigan would receive one.

Thus, if Michigan enacted VCB, it would be exchanging its current outsized amount of attention (22 events) for a very small amount of attention (one event).[1094]

One campaign event out of 399 is far less than the amount of attention that Michigan's population warrants.

In a nationwide campaign in which every vote is equal, 399 events would correspond to one event for every 777,000 people. That means that Michigan would warrant about 13 campaign events in a nationwide campaign in which every voter in the country is treated equally. Thirteen events are almost exactly one event for each of the 14 congressional districts that Michigan had in 2016.

Thus, if Michigan had enacted VCB in 2016, it would have been exchanging more attention than its population warrants (22 events) for considerably less attention than its population warrants (one event).

Therefore, no battleground state is likely to enact VCB.[1095]

VCB would not come close to making every vote equal.

VCB is based on the claim that its enactment by a few states, with a small number of electoral votes, will somehow make every vote equal throughout the country.

The fourth advantage in MEVC's list of "10 Advantages of the Voter Choice Ballot Proposal" is:

> "By becoming effective in only a few states by 2024, **every vote across the country would count and count equally."**[1096] [Emphasis added]

[1094] The calculation that Michigan would receive one campaign event under VCB is overly generous. In practice, candidates would double down on their efforts to win the non-VCB battleground states. Winning popular votes in a non-VCB battleground state would count toward winning both that state's electoral votes and simultaneously count toward winning the electoral votes of states tethered to the national popular vote by VCB. Thus, spending money and campaign time trying to win additional popular votes in a non-VCB battleground state would give a candidate a bite at two apples. Thus, if Michigan had enacted VCB, it would be all but pointless for a presidential candidate to spend any time, money, or effort in Michigan.

[1095] Battleground states admittedly have not been early adopters of changes in the winner-take-all method of awarding electoral votes. However, experience shows that battleground states can be receptive to the idea of National Popular Vote based on the fairness principle and (to be a little more political) because battleground status is fleeting and fickle. The fleeting nature of battleground status is demonstrated by Michigan and Pennsylvania, which were both almost totally ignored in 2012 (when they only received one and five general-election campaign events, respectively). Neither President Obama nor Vice President Biden campaigned there after being nominated in 2012. In contrast, under the National Popular Vote Compact, each state can rely on always getting the attention that its population warrants—regardless of whether candidate support in the state is in the narrow 46%–54% to 47%–53% range that makes a state worthwhile. The National Popular Vote Compact guarantees that every voter in every state will be politically relevant in every presidential election.

[1096] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

This statement is totally misleading.

Enactment of VCB in 2016 in a state (say, Michigan with 16 electoral votes), would make every vote equal in terms of deciding that particular bloc of 16 electoral votes, but it certainly would not make every vote equal in the overall presidential election.

Earlier in this sub-section, we did a hypothetical calculation of the maximum amount of effort that presidential candidates might make to win Michigan's electoral votes if Michigan had enacted VCB, and candidates made the illogical decision to expand their campaign into the spectator states—as opposed to the rational decision to double down on the battleground states. That maximum effort was one general-election campaign event for every 14,090,000 people in the country.

We also previously noted that, under the National Popular Vote Compact, there would be one general-election campaign event for every 777,000 people (chapter 8).

In other words, enactment of VCB would not even come close to achieving one of the most important benefits guaranteed by the National Popular Vote Compact—that every vote throughout the United States would be equally important in presidential elections.

The reason why the National Popular Vote Compact can deliver the benefit of making every vote equal is that it contains the vital condition that it will only go into effect when enacted by states with a majority of the electoral votes (270 of 538). Once candidates know that the national popular vote will determine which candidate becomes President, then every voter throughout the United States becomes equally valuable. The National Popular Vote Compact would make every voter in every state equally valuable in every presidential election. VCB cannot accomplish this.

VCB would not come close to guaranteeing the presidency to the national popular vote winner.

Another example of the flawed thinking on which VCB is based concerns its ability to prevent the election of a President who did not win the national popular vote.

Biden's margin of victory in the Electoral College in 2020 was 74 electoral votes (specifically, 302 to 232).

Trump's margin in 2016 was, by coincidence, 74 electoral votes.

Obama's margin in 2012 was 126 electoral votes.

The average margin of victory in the Electoral College in the nine presidential elections from 1988 to 2020 was 138 electoral votes.

Manifestly, enactment of VCB (say, by Michigan with 16 electoral votes in 2016) would not have come close to accomplishing the goal of protecting against the possibility of electing a President who lost the national popular vote.

This goal can be achieved by the National Popular Vote Compact, because it contains the vital condition that it will not take effect until it is enacted by states possessing a majority of the electoral votes—that is, 270 out of 538.

There simply is no shortcut, involving one state or a few states, that can achieve the goal of guaranteeing the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

The polling supporting VCB was not constructed so as to accurately measure voter sentiment.

"Americans Want the National Choice Ballot" is the title of Making Every Vote Count's description of its poll on VCB.[1097]

However, an examination of the poll indicates that it was not constructed so as to accurately measure what "Americans want."

The key question in Making Every Vote Count's poll was:

> "Some people want the person who wins the **national popular vote** to become president. One way to make that likely is to be able to cast your vote as you normally would and then **choose**, if you select this **option**, to have the **national vote winner** counted as your **choice** for president in your state. Do you want to have that **choice** on the ballot?" [Emphasis added]

As can be seen, this poll question is loaded with:

- three occurrences of the word "choice" or "choose,"
- one occurrence of the word "option," and
- two references to "national popular vote."

Of course, most people are in favor of "choice." Most people are in favor of "options." Most people are in favor of a national popular vote for President.

This question was not the only loaded question that was shown to poll respondents. The following Yes-No question appeared on the Voter Choice Ballot that was shown to poll respondents:

> "Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES."[1098]

The consequences of voting "Yes" on this appealingly worded question are only hinted at by the opaque wording "for the purpose of appointing electors as otherwise provided by this state's law" that appears after the voter has voted on the Yes-No question:

> "The state will count the votes for all those who filled in the YES oval as cast for the winner of the national popular vote **for the purpose of appointing electors as otherwise provided by this state's law**."[1099] [Emphasis added]

It is likely that many participants in the poll failed to realize that if the voter were to

---

[1097] Cohen, Thea. 2020. New MEVC Poll: Americans Want the National Choice Ballot. March 6, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmyt-59jcw-zxcc2

[1098] Making Every Vote Count. *Voter Choice Ballot: Summary And Coordinated Strategy To Achieve National Popular Vote For President Reform*. July 1, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2020/7/1/voter-choice-ballot-summary-and-coordinated-strategy-to-achieve-national-popular-vote-for-president-reform

[1099] Making Every Vote Count's web site. See *Voter Choice Ballot: Summary And Coordinated Strategy To Achieve National Popular Vote For President Reform*. July 1, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2020/7/1/voter-choice-ballot-summary-and-coordinated-strategy-to-achieve-national-popular-vote-for-president-reform

vote "Yes," their vote for President would be subtracted from their preferred presidential candidate and added to the opposing candidate—if (1) the voter's preferred choice for President is ahead in the voter's own state, and (2) the opposing candidate is ahead nationally.

This Yes-No question appears to be a referendum on a general question of public policy that would take effect if it were to receive a majority vote. Thus, it is also likely that many participants in the poll failed to realize that a "Yes" vote could immediately authorize the state to count the vote that they just cast for President in favor of the candidate that individual voter just voted against.

In summary, Making Every Vote Count's poll provided no convincing evidence that "Americans want the National Choice Ballot."

9.44.2. MYTH: The benefits of a national popular vote for President can be achieved by the Constant Two Plan.

QUICK ANSWER:

- The Constant Two Plan is state legislation that would award two of a state's electoral votes to the national popular vote winner. This state legislation would go into effect as soon as a single state enacts it, regardless of whether any other state enacts a similar law.
- Even if all 50 states and the District of Columbia enacted the Constant Two Plan, awarding 102 electoral votes (out of 538) to the national popular vote winner would not guarantee the presidency to the candidate receiving the most popular votes nationwide under various politically plausible scenarios.
- Because 81% of the electoral votes under the Constant Two Plan (that is, 436 of 538) would continue to be awarded on a state-by-state winner-take-all basis, presidential candidates would continue to concentrate on the small number of closely divided battleground states. Moreover, a small number of votes in a small number of states would continue to regularly decide the presidency—thereby fueling post-election controversies that threaten democracy.
- Because the Constant Two Plan retains all existing features of the current Electoral College, all five of the current system's sources of inequality would remain.

MORE DETAILED ANSWER:

Jay Wendland describes a novel system for electing the President in his 2024 book, *The Constant Two Plan: Reforming the Electoral College to Account for the National Popular Vote.*[1100]

The Constant Two Plan is state legislation that would award two of the state's electoral votes to the national popular vote winner. It would not require a federal constitutional amendment. It would go into effect in a state as soon as a state enacts it, regardless of whether any other state enacts a similar law.

[1100] Wendland, Jay 2024. *The Constant Two Plan: Reforming the Electoral College to Account for the National Popular Vote.* Lanham, MD: Lexington Books.

If all 50 states and the District of Columbia were to enact the Constant Two Plan, the national popular vote winner would receive 102 electoral votes (out of 538).

In that respect, the Constant Two Plan bears some similarity to the National Bonus Plan, a proposed federal constitution amendment that would award a bonus of 102 at-large electoral votes to the national popular vote winner (section 4.5).

Even if all 50 states and the District of Columbia enacted the Constant Two Plan, it would:

- not guarantee the presidency to the candidate receiving the most popular votes in all 50 states and the District of Columbia under various politically plausible scenarios (as described in section 4.5.4 in connection with the National Bonus Plan);
- not make every vote equal, because all five of the current system's sources of inequality (section 1.4) would remain with respect to the remaining 436 electoral votes (as described in section 4.5.5 in connection with the National Bonus Plan); and
- not give presidential candidates a reason to campaign in all 50 states (section 1.2), because 81% of the electoral votes under the Constant Two Plan (that is, 436 of 538) would continue to be awarded on a state-by-state winner-take-all basis (as described in section 4.5.5 in connection with the National Bonus Plan).

The Constant Two Plan resembles the single-state version of the Voter Choice Ballot in that it would go into effect as soon as a single state enacts it, regardless of whether any other state enacts a similar law. The discussion in section 9.44.1 shows that it would be very difficult to find a state willing to unilaterally enact it.

9.45. MYTH ABOUT UNINTENDED CONSEQUENCES

9.45.1. MYTH: There could be unintended consequences of a nationwide vote for President.

QUICK ANSWER:

- Change can have unintended or unexpected *desirable* consequences just as easily as it can have undesirable consequences.
- In the case of the current system of electing the President, the consequences of inaction are known and highly *undesirable*.
- 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 unintended undesirable consequence materializes, or some adjustment becomes advisable in the National Popular Vote Compact, state legislation may be amended or repealed more easily than, say, a federal constitutional amendment.

MORE DETAILED ANSWER:

One of the generic arguments against *any* proposed change of *any* kind is that there could possibly be unintended consequences.

The attractiveness of this intellectually lazy argument is that opponents need not identify any specific consequence or engage in thoughtful discussion about whether the possible consequence is either likely or substantial.

Change can have unintended and unexpected *desirable* consequences—just as easily as it can have unintended and unexpected undesirable consequences. Merely saying that change might have unintended and unexpected consequences does not provide enough information to determine whether the consequence is negative or positive—much less whether the consequence is likely or substantial.

There are several generic answers to the generic argument about unintended or unexpected consequences:

(1) No significant unexpected undesirable consequences surfaced when an analogous action was taken in a closely related situation.

(2) Reversing the proposed action would be relatively easy if there were significant unexpected undesirable consequences.

(3) The consequence of inaction is that the known shortcomings of the existing system will not be corrected.

Concerning item (1), 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.[1101] 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 over two centuries, no state has ever decided to eliminate its direct popular election for Governor. Moreover, there is virtually no editorial, academic, legislative, or public criticism of direct election of Governors.

Concerning item (2), 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, say, a federal constitutional amendment.

Concerning item (3), the consequences of inaction are known and undesirable, including the shortcomings of the current system of electing the President that are itemized in chapter 1.

[1101] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Page xx.