6 The Agreement Among the States to Elect the President by National Popular Vote

This chapter

- summarizes the motivation for the authors' proposal to employ an interstate compact to change the system for electing the President and Vice President of the United States (section 6.1),
- presents the text of the authors' proposal, namely the "Agreement Among the States to Elect the President by National Popular Vote" (section 6.2),
- explains the authors' proposed compact (section 6.3),
- mentions federal legislation that might be enacted by Congress in connection with the proposed interstate compact (section 6.4), and
- discusses previous proposals for multi-state electoral legislation (section 6.5).

6.1 MOTIVATION FOR THE PROPOSED INTERSTATE COMPACT

Chapter 1 of this book made the following points:

- Under the winner-take-all rule that is in nearly universal use in the United States, all of a state's electoral votes are controlled by a statewide plurality of the popular votes. Under this rule, a person's vote is nearly worthless unless the voter happens to live in a closely divided battleground state.
- Because only about 18 states are competitive in presidential elections, voters in two-thirds of the states are ignored in presidential elections.
- The existing winner-take-all system divides the nation's 122,000,000 popular votes into 51 separate pools, thereby

regularly manufacturing artificial electoral crises even when the nationwide popular vote is not particularly close. In the past six decades, there have been six presidential elections in which a shift of a small number of votes in one or two states would have elected (and in 2000, did elect) a presidential candidate who lost the popular vote nationwide.

- In about one election in 14, the existing system elects a candidate to the Presidency who did not win the nationwide popular vote.
- The statewide winner-take-all system is the reason why presidential voting does not matter in two thirds of the states, artificial crises are regularly manufactured, and second-place candidates are sometimes elected to the Presidency.

Chapter 2 established the following facts:

- The statewide winner-take-all system is established by state law—not the U.S. Constitution or federal law.
- The U.S. Constitution gives each state the exclusive power to choose the manner of choosing its presidential electors. Unlike the states' power to choose the manner of electing U.S. Representatives and Senators, the states' power to choose the manner of allocating its electoral votes is not subject to Congressional oversight.
- The Founding Fathers did not design or advocate the current system of electing the President. Instead, the current system evolved over a period of decades as a result of political considerations. The statewide winner-take-all rule was used by only three states in the nation's first presidential election (1789). Because each state realized that it diminished its voice by dividing its electoral votes, the statewide winner-take-all rule for the popular election of presidential electors became the norm in the first five decades after the Constitution's ratification.
- Because the power to allocate electoral votes is exclusively a state power and the statewide winner-take-all rule is contained only in state statutes, a federal constitutional

amendment is not necessary to change the existing state laws specifying use of the statewide winner-take-all system. The states have the constitutional power to change the current system.

Chapter 3 analyzed the three most prominent approaches to presidential election reform that have been proposed in the form of a federal constitutional amendment, namely the fractional proportional allocation of electoral votes, allocation of electoral votes by congressional district, and direct nationwide popular election. Each of these three approaches is analyzed in terms of three criteria:

- **Accuracy:** Would it ensure the election to the Presidency of the candidate with the most popular votes nationwide?
- **Competitiveness:** Would it improve upon the current situation in which voters in two-thirds of the states are ignored because they live in presidentially non-competitive states?
- **Equality:** Would every vote be equal?

Chapter 4 analyzed the two most prominent approaches to presidential election reform that can be unilaterally enacted without a federal constitutional amendment and without action by Congress, namely the whole-number proportional approach and the congressional-district approach.

Chapters 3 and 4 reached the conclusion that nationwide popular election of the President is the only approach that satisfies the criteria of accuracy, competitiveness, and equality.

Chapter 5 provided background on interstate compacts and made the following points:

- Interstate compacts are specifically authorized by the U.S. Constitution as a means by which the states may act in concert to address a problem.
- There are several hundred interstate compacts in existence, covering a wide variety of topics.
- An interstate compact is enacted in the same manner as a state law—that is, by a legislative bill receiving gubernatorial approval (or sufficient legislative support to override a gubernatorial veto) or by the citizen-initiative process (in states having this process).

- Interstate compacts typically address problems that cannot be solved unilaterally, but that can be solved by coordinated action. Accordingly, a compact almost always takes effect on a contingent basis—that is, the compact does not take effect until it is enacted by a specified number or combination of states that are sufficient to achieve the compact's goals.
- There are no constitutional restrictions on the subject matter of interstate compacts (other than the implicit limitation that the compact's subject matter must be among the powers that the states are permitted to exercise).
- An interstate compact has the force and effect of statutory law in the states belonging to the compact. The provisions of an interstate compact bind all state officials with the same force as all other state laws. The provisions of a compact are enforceable in court in the same way that any other state law is enforceable—that is, a court may compel a state official to execute the provisions of a compact (by mandamus), and a court may enjoin a state official from violating a compact's provisions (by injunction).
- An interstate compact is a binding contractual arrangement among states involved. The U.S. Constitution prohibits states from impairing the obligations of any contract, including interstate compacts. Thus, each state belonging to an interstate compact is assured that its sister states will perform their obligations under the compact.
- Because a compact is a contract, the provisions of an interstate compact take precedence over any conflicting law of any state belonging to the compact. As long as a state remains a party to a compact, it may not enact a law in conflict with its obligations under the compact. That is, the provisions of an interstate compact take precedence over a conflicting law—even if the conflicting law is enacted after the state enters into the compact.
- A state may withdraw from an interstate compact in accordance with the provisions for withdrawal contained in the compact.

The authors' proposal, namely an interstate compact entitled the "Agreement Among the States to Elect the President by National Popular Vote," would not become effective in any state until it is enacted by states collectively possessing a majority of the electoral votes (that is, 270 of the 538 electoral votes).

The proposed compact does not change a state's internal procedures for operating a presidential election. After the 50 states and the District of Columbia certify their popular vote counts for President in the usual way, a grand total of popular votes would be calculated by adding up the popular vote count from all 51 jurisdictions.

The Electoral College would remain intact under the proposed compact. The compact would simply change the Electoral College from an institution that reflects the voters' state-by-state choices (or, in the case of Maine and Nebraska, district-wide choices) into a body that reflects the voters' nationwide choice. Specifically, the proposed compact would require that each member state award its electoral votes to the presidential candidate who received the largest number of popular votes in all 50 states and the District of Columbia. Because the compact would become effective only when it encompasses states collectively possessing a majority of the electoral votes, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would be guaranteed enough electoral votes in the Electoral College to be elected to the Presidency.

Note that every state's popular vote is included in the nationwide total regardless of whether it is a member of the compact. Membership in the compact is not required for the popular votes of a state to count.

Note also that the political complexion of the particular states belonging to the compact does not affect the outcome—that is, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia is assured sufficient electoral votes to be elected to the Presidency.

6.2 TEXT OF THE PROPOSED COMPACT

This section presents the entire text (888 words) of the proposed "Agreement Among the States to Elect the President by National Popular Vote."

	ARTICLE I—MEMBERSHIP
I-1	Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.
	ARTICLE II—RIGHT OF THE PEOPLE IN MEMBER STATES TO VOTE FOR PRESIDENT AND VICE PRESIDENT
II-1	Each member state shall conduct a statewide popular election for President and Vice President of the United States.
	ARTICLE III—MANNER OF APPOINTING PRESIDENTIAL ELECTORS IN MEMBER STATES
III-1	Prior to the time set by law for the meeting and voting by the presidential electors, 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.
III-2	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."
III-3	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.
III-4	At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.
III-5	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.
III-6	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.
III-7	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.
III-8	The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.

III-9	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.
	ARTICLE IV—OTHER PROVISIONS
IV-1	This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.
IV-2	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.
IV-3	The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.
IV-4	This agreement shall terminate if the electoral college is abolished.
IV-5	If any provision of this agreement is held invalid, the remaining provisions shall not be affected.
	ARTICLE V—DEFINITIONS
V-1	For purposes of this agreement, "chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;
V-2	"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;
V-3	"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;
V-4	"presidential elector" shall mean an elector for President and Vice President of the United States;
V-5	"presidential elector certifying official" shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;
V-6	"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;
V-7	"state" shall mean a State of the United States and the District of Columbia; and
V-8	"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.

6.3 EXPLANATION OF THE PROPOSED COMPACT

6.3.1 Explanation of Article I—Membership

Article I of the compact identifies the compact's prospective parties, namely the 51 jurisdictions that are currently entitled to appoint presidential electors under the U.S. Constitution. These 51 jurisdictions include the 50 states and the District of Columbia (which acquired the right to appoint presidential electors under terms of the 23rd Amendment). Elsewhere in the compact, the uncapitalized word "state" (defined in article V of the compact) refers to any of these 51 jurisdictions. The term "member state" refers to a jurisdiction where the compact has been enacted into law and is in effect.

6.3.2 Explanation of Article II—Right of the People in Member States to Vote for President and Vice President

Article II of the compact mandates 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."

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."

From the perspective of the operation of the compact, this clause establishes an essential precondition for a nationwide popular vote for President and Vice President, namely that there will be popular votes to count. As discussed in detail in section 2.2, the people of the United States have no federal constitutional right to vote for President and Vice President. The people have acquired the privilege to vote for President and Vice President as a consequence of legislative action by their respective states. Moreover, except in Colorado, the people have no state constitutional right to vote for President and Vice President, and the existing privilege may be withdrawn at any time merely by passage of a state law. Indeed, state legislatures chose the presidential electors in a majority of the states participating in the nation's first presidential election (1789). Moreover, state legislatures have changed the rules for voting for President for purely political reasons. For example, just prior to the 1800

presidential election, the Federalist-controlled legislatures of Massachusetts and New Hampshire—fearing Jeffersonian victories in the popular votes in their states—repealed existing state statutes allowing the people to vote for presidential electors and vested that power in themselves. Article II of the compact precludes the state legislature of a member state from doing this.

Because an interstate compact is a contractual obligation among the member states, the provisions of a compact take precedence over any conflicting law of any member state. This principle applies regardless of when the conflicting law may have been enacted.[1] Thus, once a state enters into an interstate compact and the compact takes effect, the state is bound by the terms of the compact as long as the state remains in the compact. Because a compact is a contract, a state must remain in an interstate compact until the state withdraws from the compact in accordance with the compact's terms for withdrawal. Thus, in reading each provision of a compact, the reader may find it useful to imagine that every section of the compact is preceded by the words

> "Notwithstanding any other provision of law in the member state, whether enacted before or after the effective date of this compact, … ."

Thus, as long as a state remains in the compact, article II of the compact establishes the right of the people in each member state to vote for President and Vice President.

Article II of the compact also requires continued use by member states of another feature of presidential voting that is an essential precondition for a nationwide popular vote for President and Vice President (and that is currently in universal use by the states). Specifically, article II of the compact requires that member states continue to use the short presidential ballot (section 2.2.6) in which the voter is presented with a choice among "presidential slates" containing a specifically named presidential nominee and a vice-presidential nominee.[2] The term "presidential

[1] Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

[2] This clause does not prevent a presidential candidate from running with more than one vice-presidential nominee. In 2004, for example, Ralph Nader appeared on the ballot in New York as the presidential nominee of the Independence Party with Jan D. Pierce as his vice-presidential nominee. He simultaneously appeared on the New York ballot as the presidential nominee of the Peace and Justice Party with Peter Miguel Camejo as his

slate" is defined in article V of the compact as

> "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 …."

The continued use of the short presidential ballot is an essential precondition for a nationwide popular vote because it permits the aggregation, from state to state, of the popular votes that have been cast for various presidential slates. If, for example, the voters in a particular state cast separate votes for individual presidential electors (say, in the manner shown in the 1964 Vermont ballot shown in figure 2.1 and discussed in section 2.2.6 or the 1960 Alabama ballot shown in figure 2.13 and discussed in section 2.11), the winning presidential electors from that state would each inevitably have a different vote count. Thus, there would not be any single number available to add into the nationwide tally being accumulated by the presidential slates running in the remainder of the country.

6.3.3 Explanation of Article III—Manner of Appointing Presidential Electors in Member States

Article III of the compact prescribes the manner by which each state would appoint its presidential electors under the compact. Article III establishes the mechanics for a nationwide popular election. The first three clauses of article III are the main clauses for implementing nationwide popular election of the President and Vice President.

The first clause of article III of the compact provides:

> "Prior to the time set by law for the meeting and voting by the presidential electors, 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

vice-presidential nominee. There were, necessarily, two different lists of 31 nominees for presidential elector associated with each of the two Nader "presidential slates" in New York in 2004. Existing New York law treated and counted Nader's Independence Party votes separately from Nader's Peace and Justice Party votes. That is, there were two different Nader "presidential slates" in New York in 2004.

> to produce a 'national popular vote total' for each presidential slate."

The phrase "the time set by law for the meeting and voting by the presidential electors" refers to the federal law (title 3, chapter 1, section 7 of the United States Code) providing:

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

In 2004, the federally designated day for the meeting of the Electoral College was Monday, December 13.

The term "chief election official" used throughout the compact is defined in article V of the compact as

> "the state official or board that is authorized to certify the total number of popular votes cast for each presidential slate."

In most states, the "chief election official" is the Secretary of State or the state canvassing board.

The first clause of article III of the compact requires that the chief election official obtain statements showing the number of popular votes cast for each presidential slate in each state. Then, this clause requires that the popular votes for each presidential slate from all the states be added together to yield a "national popular vote total" for each presidential slate.

Because the purpose of the compact is to achieve a nationwide popular vote for President and Vice President, the popular vote counts from all 50 states and the District of Columbia are included in the "national popular vote total" regardless of whether the jurisdiction is a member of the compact. That is, the compact counts the popular votes from member states on an equal footing with those from non-member states.

Popular votes can, however, only be counted from non-member states if there are popular votes available to count. As already mentioned, Article II of the compact guarantees that each member state will produce a popular vote count because it requires member states to allow their voters to vote for President and Vice President in a "statewide popular

election." Even though all states currently permit their voters to vote for presidential electors in a "statewide popular election," non-member states are, of course, not bound by the compact. In the unlikely event that a non-member state were to take the presidential vote away from its own people (as Massachusetts and New Hampshire did, for partisan political reasons, prior to the 1800 presidential election), there would be no popular vote count available from such a state.

Similarly, in the unlikely event that a non-member state were to remove the names of the presidential nominees and vice-presidential nominees from the ballot and present the voters only with names of unpledged candidates for presidential elector (such as the 1960 Alabama ballot shown in figure 2.13 and discussed in section 2.11), there would be no way to associate the vote counts of the various unpledged presidential electors with the nationwide tally being accumulated by any regular "presidential slate" running in the rest of the country.

The compact addresses the above two unlikely possibilities by specifying that the popular votes that are to be aggregated to produce 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]

The purpose of the second clause of article III of the compact is to identify the winner of the presidential election:

> "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.' "

The third clause of article III of the compact guarantees that the "national popular vote winner" will end up with a majority of the electoral votes in the Electoral College.

> "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 third clause of article III of the compact refers to the "presidential elector certifying official" rather than the "chief election official"

because these two officials are not the same in every state. For example, in some states, the "presidential elector certifying official" is an official or entity that is not otherwise involved in the administration of elections (e.g., the Governor or the Superior Court). The term "presidential elector certifying official" is defined in article V of the compact.

For purposes of illustration, suppose that the compact was in effect in 2004, and that Colorado was a member of the compact in 2004, and that the Republican presidential slate received the most popular votes in all 50 States and the District of Columbia (as was the case in the 2004 presidential election). In that event, the Colorado Secretary of State would declare the nine presidential electors who had been nominated by the Colorado Republican Party to be elected as Colorado's members of the Electoral College.

Because the purpose of the compact is to implement a nationwide popular election of the President and Vice President, it is the *national* vote total—not each state's separate statewide vote count—that would determine the national winner. Under the compact, the Electoral College would reflect the *nationwide* will of the voters—not the voters' separate statewide wills. Thus, the presidential electors nominated by the Republican Party in *all* states belonging to the compact would have won election as members of the Electoral College in their states. If Colorado voters had favored the Kerry-Edwards slate in 2004, the presidential electors nominated by the Republican Party in Colorado, for example, still would have won election as members of the Electoral College in Colorado in 2004 because the specific purpose of the compact is to award enough electoral votes to win the Presidency to the presidential candidate with the most votes nationwide.

Because the compact becomes effective only when it encompasses states collectively possessing a majority of the electoral votes (i.e., 270 or more of the 538 electoral votes), the presidential slate receiving the most popular votes in all 50 States and the District of Columbia is guaranteed at least 270 electoral votes when the Electoral College meets in mid-December. Given the fact that the Bush-Cheney presidential slate received about 3,500,000 more popular votes in the 50 States and the District of Columbia in 2004 than the Kerry-Edwards slate, the compact would have guaranteed the Bush-Cheney slate a majority of the electoral votes in the Electoral College. Under the compact, the Bush-Cheney slate would have received a majority of the electoral votes even if 59,393 Bush

voters in Ohio had switched to Kerry in 2004 thereby giving Kerry a plurality of the popular votes in Ohio. In contrast, under the present system, if Kerry had carried Ohio, Kerry would have received all of Ohio's 20 electoral votes and Kerry would have been elected to the Presidency with 272 electoral votes (to Bush's 266).

The first three clauses of article III of the compact are the main clauses for implementing nationwide popular election of the President and Vice President. The remaining clauses of article III of the compact deal with administrative matters and technical issues.

The fourth clause of article III of the compact requires the timely issuance by each of the compact's member states of an "official statement" of the state's "final determination" of its presidential vote.

> "At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state."

The particular deadline in this clause corresponds to the deadline contained in the "safe harbor" provision of federal law (section 5 of title 3, chapter 1 of the United States Code). The phrase "final determination" in this clause corresponds to the term used in the "safe harbor" provision. Section 5 provides:

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

The federally established "safe harbor" date for the 2004 presidential election was Monday December 6, 2004.

The fourth clause of article III of the compact, in effect, mandates each member state to comply with the "safe harbor" deadline. As a practical matter, this clause is merely a backstop because the vast majority of states already have specific state statutory deadlines for certifying the results of presidential elections, and these existing statutory deadlines come earlier than the federal "safe harbor" date (appendix T). This clause is a backstop for the additional reason that the U.S. Supreme Court in *Bush v. Gore* effectively treated the "safe harbor" date as a deadline for a state's "final determination" of its presidential election results.[3]

The word "communicated" in the fourth clause of article III of the compact is intended to permit transmission of the "official statement" by secure electronic means that may become available in the future (rather than, say, physical delivery of the official statement by an overnight courier service).

The fifth clause of article III of the compact provides:

> "The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress."

When the joint session of Congress counts the electoral votes on January 6th as provided in title 3, chapter 1, section 15 of the United States Code, each state's own "final determination" of its vote is considered "conclusive" as to the counting of electoral votes by Congress if it was finalized by the date established in the "safe harbor" provision of federal law (title 3, chapter 1, section 5). This section makes each state's (and, in particular, each *non-member* state's) final determination of its popular vote similarly "conclusive" when the chief election officials of the compact's member states add up the national popular vote under the terms of the compact.

The sixth clause of article III of the compact deals with the highly unlikely event of a tie in the national popular vote count:

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

> "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."

The purpose of the seventh clause of article III of the compact is to ensure that the presidential slate receiving the most popular votes nationwide gets what it is entitled to—namely 100% of the electoral votes of each member state.

> "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 seventh clause of article III of the compact addresses six potential situations that might prevent the national popular vote winner from receiving all of the electoral votes from a member state. These situations arise because of gaps and ambiguities in the widely varying language of state election laws concerning presidential elections.

First, the winning presidential slate might not be on the ballot in a particular member state. Presidential candidates (particularly third-party candidates) frequently fail to get on the ballot in a particular state because they did not comply with the state's ballot-access requirements (or perhaps did not even attempt to be on the ballot in a particular state). If a presidential candidate were to win the popular vote nationally without having qualified to be the ballot in a particular state belonging to the compact, there would no official slate of presidential electors "nominated in association with" the "national popular vote winner" in that particular member state. The remedy for this situation (and each of the other situations described below) is to employ the concept behind the current law for choosing presidential electors in Pennsylvania. Under current Pennsylvania law, each presidential nominee directly nominates the presidential electors who will run in association with the nominee's

presidential slate in Pennsylvania.[4] Thus, under the seventh clause of article III of the compact, the unrepresented presidential candidate would have the power to nominate the presidential electors for the state involved. The state's presidential elector certifying official would then certify the appointment of the candidate's choices for presidential elector. Note that the nomination of the presidential electors would, in this situation, come after the November voting (i.e., after the presidential slate involved had won the nationwide popular vote and had been declared to be the "national popular vote winner").

Second, no presidential electors may be "nominated in association with" the winning presidential slate in a particular member state because of some unforeseen situation that might arise under the language of state election codes. The Republican National Committee scheduled the 2004 Republican National Convention somewhat later than usual. In particular, the convention was scheduled to be held after Alabama's statutory deadline for each political party to file the name of its presidential and vice-presidential nominees with state officials. The scheduling of the convention created the possibility that there would be no Republican presidential slate on the Alabama ballot in 2004. The problem was satisfactorily resolved when the Alabama legislature agreed to pass special legislation in early 2004 to change the state law.

Third, a full slate of presidential electors may not be nominated in association with the winning presidential slate in a particular member state. For example, in 2004, Congressman Sherrod Brown was nominated as a Democratic presidential elector in Ohio. Brown was ineligible to be a presidential elector because the U.S. Constitution provides:

> "No Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[5]

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[4] The method of direct appointment of presidential electors by the presidential nominee is regularly used in Pennsylvania. Section 2878 of the Pennsylvania election code 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 office of presidential elector as the State is then entitled to."

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

Although Brown submitted his resignation and the Ohio Democratic Party nominated a replacement, some contended that Ohio's procedure for filling a vacancy among the list of nominees for presidential elector did not permit naming a replacement in this case because there had been no legal nomination for Brown's position in the first place and hence no vacancy to fill. This contention remained unresolved because Kerry did not carry Ohio in 2004.

Fourth, the possibility exists that more presidential electors might be nominated in association with a presidential candidate than the state is entitled to send to the Electoral College. Fusion voting (section 2.10) creates the possibility that two or more competing slates of presidential electors could be nominated in association with the same presidential slate.

At the present time, fusion voting is routinely and widely used in only one state—New York. Because fusion voting is so routinely used in New York, the procedures for handling fusion voting in connection with presidential elector slates are well established. In 2004, for example, voters in New York had the opportunity to vote for the Bush-Cheney presidential slate on either the Republican Party line or the Conservative Party line (as shown by the voting machine face in figure 2.11). The political parties sharing a presidential nominee in New York nominate a common slate of presidential electors. Thus, the Republican and Conservative parties nominated the same slate of 31 presidential electors for the 2004 presidential election. The popular votes cast for Bush-Cheney on the Republican and Conservative lines were added together and treated as votes for all 31 Republican-Conservative candidates for the position of presidential elector. The popular votes cast for Kerry-Edwards on the Democratic Party line and the Working Families Party line were similarly aggregated and attributed to the common Kerry-Edwards slate of presidential electors. In 2004, the Kerry-Edwards presidential slate received the most popular votes in New York and therefore became entitled to all of New York's 31 electoral votes. The common Kerry-Edwards slate of 31 presidential electors was therefore declared to be elected to the Electoral College in New York. New York's 2004 Certificate of Ascertainment (appendix H) shows this aggregation.

Fusion voting is, however, permissible at the present time under the laws of a dozen and a half other states under various circumstances. Moreover, fusion voting proposals are currently under active

consideration in several other states.[6] The laws of states where fusion is not routinely used would almost certainly lead to situations in which two competing elector slates are nominated under the banner of the same presidential slate.

Fifth, there is another way in which more presidential electors might be nominated in association with a particular presidential candidate than the state is entitled to send to the Electoral College. In states permitting presidential write-ins (section 2.8), it is possible for different slates of presidential electors to be written in by the voters in association with the same write-in presidential slate. Thus, a situation akin to fusion might arise in those states in connection with presidential write-ins.

Sixth, in some states permitting presidential write-ins, it is possible that an insufficient number of presidential electors may be nominated in association with a particular presidential slate. For example, the Minnesota election code does not specifically require that a full slate of presidential electors be identified at the time of the advance filing of write-in slates (section 2.8). In fact, it requires advance filing of the name of only one presidential elector even though Minnesota has 10 electoral votes.[7] Moreover, voters in Minnesota may cast write-in votes for President without advance filing.

The eighth clause of article III of the compact enables the public, the press, and political parties to closely monitor the implementation of the compact within each member state:

> "The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained."

The unmodified term "statements" is intended to refer to both "official statements" of a state's "final determination" of its presidential vote (the fourth clause of article III of the compact) and any intermediate statements that the chief election official may obtain or consider at any time during the process of determining a state's presidential vote. The unmodified term "statement" is also intended to encompass the variety of types of documentation that may arise under the various practices and

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[6] There was a statewide ballot proposition in 2002 in Alaska on fusion voting. The proposition was defeated.

[7] Minnesota election law. Section 204B.09, subdivision 3.

procedures of the states for officially recording and reporting their presidential votes. The Certificate of Ascertainment issued by the state in accordance with federal law,[8] for example, would be considered to be a "statement."

Because time is severely limited prior to the constitutionally mandated meeting of the Electoral College in mid-December, the term "immediately" is intended to eliminate any delays that might otherwise apply to the release of information by a public official under general public-disclosure laws.

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."

This "governing" clause operates in conjunction with the first clause of article IV of the compact relating to the date when the compact as a whole first comes into effect:

> "This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state."

The ninth clause of article III—the "governing" clause—employs the date of July 20 of a presidential election year because the six-month period starting on this date contains the following six important events relating to presidential elections:

- the national nominating conventions,[9]
- the fall general election campaign period,
- election day on the Tuesday after the first Monday in November,
- the meeting of the Electoral College on the first Monday after the second Wednesday in December,

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[8] Title 3, chapter 1, section 6 of the United States Code deals with issuance of Certificates of Ascertainment by the states (and is discussed in section 2.4). See appendix A for the provisions of the U.S. Constitution and appendix B for provisions of federal law relating to presidential elections.

[9] All recent national nominating conventions of the major parties have met after July 20.

- the counting of the electoral votes by Congress on January 6, and
- the scheduled inauguration of the President and Vice President for the new term on January 20.

The ninth clause of article III of the compact addresses the question of whether article III governs the conduct of the presidential election in a particular year whereas the first clause of article V specifies when the compact as a whole initially comes into effect. The importance of this distinction is that it is theoretically possible that the compact could come into effect by virtue of enactment by states possessing a majority of the votes in the Electoral College (i.e., 270 or more of the 538 electoral votes), but that, at some future time, the compacting states might no longer possess a majority of the electoral votes. The situation could arise in any of four ways.

First, a future federal census might reduce the number of electoral votes possessed by the compacting states so that they no longer account for a majority of the electoral votes. This could occur if the compacting states happened to lose population relative to the remainder of the country. In that event, the compact provides that the compact as a whole would remain in effect (because the compact would have come into initial effect under the first clause of article IV of the compact); however, article III (the operative article in the compact) would then not "govern" the next presidential election. If additional state(s) subsequently enacted the compact—thereby raising the number of electoral votes possessed by the compacting states above 270 by July 20 of a subsequent presidential election year—article III of the compact would then again govern presidential elections.[10]

As a second example, if one or more states withdrew from the compact and thereby reduced the number of electoral votes possessed by the remaining compacting states below 270 by July 20 of a presidential election year, the compact as a whole would remain in effect, but article III (the operative article in the compact) would not govern the next presidential election.

As a third example, if a new state were admitted to the Union and if the total number of seats in the U.S. House of Representatives (and hence the total number of electoral votes) were permanently or temporarily

[10] As a practical matter, the scenario can only arise if the number of electoral votes possessed by states belonging to the compact hovers close to 270.

adjusted upwards, it is conceivable that the compacting states might no longer possess a majority of the new number of electoral votes. If the newly admitted state and/or some combination of other pre-existing state(s) subsequently enacted the compact—thereby raising the number of electoral votes possessed by the compacting states above a majority of the new number of electoral votes—article III of the compact would again govern.

As a fourth example, if the number of U.S. Representatives (set by federal statute) were changed so that the number of electoral votes possessed by the compacting states no longer accounted for a majority of the new number of electoral votes, article III of the compact would not govern the next presidential election. Proposals to change the number of members of the House are periodically floated for a variety of reasons. For example, Representative Tom Davis (R–Virginia) recently proposed increasing the number of Representatives from 435 to 437 on a temporary basis in connection with his bill to give the District of Columbia voting representation in Congress.[11]

As long as the compacting states possess a majority of the electoral votes on July 20 of a presidential election year, article III of the compact would govern the presidential election. In practice, the question as to whether the compact would govern a particular presidential election would be known long before July 20 of the presidential election year. Changes resulting from the census are no surprise because the census does not affect congressional reapportionment until two years after the census.[12] A new state enters the Union only after a time-consuming congressional process. Moreover, no territories are likely to be admitted as a new state in the near future. Enactment of a state law withdrawing from an interstate compact is a time-consuming, multi-step legislative process

[11] H.R. 2043—The D.C. Fairness in Representation Act. Introduced May 3, 2005. Based on the 2000 census, Utah is the state that would become entitled, under the existing formula for distributing U.S. Representatives among the states, to the second temporary additional congressional seat. As a matter of practical politics, the two additional seats would be expected to divide equally among the Democrats and Republicans. If the Davis bill were to pass in, say, 2006, there would be 540 electoral votes in the 2008 presidential election. The Davis bill provides that the number of seats in the House would revert to 435 after the 2010 census.

[12] For example, the 2000 federal census did not affect the 2000 presidential election. The results of the 2000 census affected the 2002 congressional election and the 2004 presidential election.

involving the introduction of a bill, action on the bill in a committee in each house of the state legislature, debate and voting on the bill on the floor of each house, and presentation of the bill to the state's Governor for approval or disapproval.[13] In addition, new state laws generally do not take immediate effect but, instead, take effect at a particular future time.[14] Moreover, a withdrawal from the proposed compact cannot take effect during the six-month period between July 20 of a presidential election year and the subsequent January 20 inauguration date (as discussed below). Finally, enactment of any federal statutory change in the number of U.S. Representatives is a time-consuming, multi-step legislative process.

6.3.4 Explanation of Article IV—Additional Provisions

The first clause of article IV of the compact (quoted above) specifies the time when the compact initially would take effect. A state is not counted for purposes of this clause until the compact is "in effect" in the state in accordance with the terms of the state's constitution schedule specifying when state laws take effect.

The same version of a compact must, of course, be enacted by each member state. The phrase "substantially the same form" is found in many interstate compacts and is intended to permit minor variations (e.g., differences in punctuation and numbering or inconsequential typographical errors) that sometimes occur when the same law is enacted by various states.

The second clause of article IV of the compact permits a state to withdraw from the compact but provides for a "blackout" period (of approximately six months) restricting withdrawals:

> "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."

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[13] Similarly, the citizen-initiative process is a time-consuming, multi-step process that typically involves an initial filing and review by a designated state official (e.g., the Attorney General), circulation of the petition, and voting in a statewide election (usually a November general election).

[14] State constitutions generally specify when new state laws take effect. A super-majority vote is typically required to give immediate effect to a legislative bill. The details vary from state to state.

The purpose for the delay in the effective date of a withdrawal is to ensure that a withdrawal will not be undertaken—perhaps for partisan political purposes—in the midst of a presidential campaign or in the period between the popular voting in early November and the meeting of the Electoral College in mid-December. This restriction on withdrawals is warranted in light of the subject matter of the proposed interstate compact.[15] The blackout period starts on July 20 of a presidential election year and would normally end on January 20 of the following year (the scheduled inauguration date). Thus, if a statute repealing the compact in a particular state were enacted and came into effect in the midst of the presidential election process, that state's withdrawal from the compact would not take effect until completion of the entire current presidential election cycle. The language used in the compact tracks the wording of the 20th Amendment. The date for the end of the present President's term is fixed by the 20th Amendment as January 20th; however, the 20th Amendment recognizes the possibility that a new President might, under certain circumstances, not have been "qualified" by that date. The blackout period in the compact ends when the entire presidential election cycle is completed under terms of the 20th Amendment.

The third clause of article IV of the compact concerns the process by which each state notifies all the other states of the status of the compact. Notices are required on three occasions—namely when the compact has taken effect in a particular state, when the compact has taken effect generally (that is, when it has been enacted and taken effect in states cumulatively possessing a majority of the electoral votes), and when a state's withdrawal has taken effect.

The fourth clause of article IV provides that the compact would automatically terminate if the Electoral College were to be abolished.

The fifth clause of article IV is a severability clause.

6.3.5 Explanation of Article V—Definitions

Article V of the compact contains definitions.

There are separate definitions for the "chief election official" and the "presidential elector certifying official" because these terms may, in some states, refer to a different official or body.

[15] Delays in the effective date of withdrawals are commonplace in interstate compacts (and, indeed, in contracts in general). See section 5.15.3 for additional discussion on withdrawals from interstate compacts in general and section 8.6 for additional discussion on withdrawals from the proposed compact in particular.

The definition of "presidential slate" in Article V of the compact is important because voters cast votes for a team consisting of a presidential and vice-presidential candidate and because the votes for each distinct team are aggregated separately in the national count under the terms of the compact. "Presidential slate" is defined as

> "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."

The above definition permits the substitution of nominees on a given presidential slate if, for example, a nominee were to die during the presidential election cycle,[16] resign from a slate,[17] or become disqualified.[18]

Because North Dakota's ballot lists only the name of the presidential candidate (figure 2.3), the definition of "presidential slate" in the proposed compact contains a savings clause for North Dakota.

Note that this definition comports with present practice in that it treats a slate as a unit containing two particular candidates in a specified order. As discussed in section 2.10 and shown in figure 2.11, Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of both the Independence Party and the Peace and Justice Party. Nader ran with Jan D. Pierce for Vice President on the Independence Party line in New York in 2004, but with Peter Miguel Camejo for Vice President on the Peace and Justice Party line. Thus, there were two different "Nader" presidential slates in New York in 2004. Each "Nader" slate had a different slate of presidential electors in New York in 2004. The votes for these two distinct "presidential slates" were counted separately (as shown on the sixth page of New York's Certificate of Ascertainment in appendix H). There was no fusion of votes between the Independence Party and the Peace and Justice Party in this situation because there were

[16] Horace Greeley, the (losing) Democratic presidential nominee in 1872, died between the time of the November voting and the counting of the electoral votes.

[17] Senator Thomas F. Eagleton of Missouri resigned from the 1972 Democratic presidential slate.

[18] A presidential candidate must be a natural-born citizen.

two distinct presidential slates and two distinct slates of presidential electors.

The definition of "statewide popular election" in article V is important. At the present time, all states conduct a "statewide popular election" for President and Vice President. However, if a state were to withdraw from its voters the power to vote for President (as Massachusetts and New Hampshire did in the 1800 presidential election, as described in section 2.2.3), there would be no popular votes available to count from that state. If there is no popular vote to count from a particular state, the "national popular vote total" would necessarily not include that state.

6.4 POSSIBLE FEDERAL LEGISLATION

The enactment of the proposed "Agreement Among the States to Elect the President by National Popular Vote" would provide an excellent opportunity for Congress to review existing federal laws concerning presidential elections.

The proposed "Agreement Among the States to Elect the President by National Popular Vote" is intended to be entirely self-executing. To this end, the compact identifies officials in each member state to perform the necessary tasks of obtaining the popular vote counts from all the states, adding up the votes from all the states to yield the "national popular vote total," and designating the "national popular vote winner." These tasks could be simplified by the establishment of an administrative clearinghouse for these functions. Such a clearinghouse might be established by federal law. Alternatively, the officials of the compacting states might themselves establish such a clearinghouse.

Numerous problems have been identified concerning the existing schedule of events involving the November general election, the "safe harbor" date, the timing of the meeting of the Electoral College in mid-December, the counting of the votes by Congress in early January, and the presidential inauguration scheduled for January 20.

Leonard M. Shambon, an assistant to the co-chairman of the Ford-Carter Commission on Election Reform in 2001 and a member of the advisory board to the Carter-Baker Commission in 2005, described some of the problems associated with the current schedule in a 2004 article entitled "Electoral-College Reform Requires Change of Timing."[19] Many of

[19] Shambon, Leonard M. 2004. Electoral-College Reform Requires Change of Timing. *Roll Call.* June 15, 2004.

problems identified in the Shambon article are incorporated in H.R. 1579, introduced by Representative David Price (D–North Carolina) on April 12, 2005.[20] They are discussed further by Suzanne Nelson in an article entitled "Three-Month Period Imperils Presidency."[21]

In addition, Norman Ornstein, a resident scholar at the American Enterprise Institute, described additional potential problems concerning presidential elections in a 2004 article entitled "Want a Scary Scenario for Presidential Chaos? Here Are a Few."[22]

Additional issues have been raised by John C. Fortier, a resident fellow of the American Enterprise Institute and Norman Ornstein in a 2004 article entitled "If Terrorists Attack Our Presidential Elections"[23] and by Jerry H. Goldfeder, an elections law attorney in New York and Adjunct Professor at Fordham University School of Law, in an article entitled "Could Terrorists Derail a Presidential Election?"[24]

6.5 PREVIOUS PROPOSALS FOR MULTI-STATE ELECTORAL LEGISLATION

Several previous proposals contained elements of the proposed "Agreement Among the States to Elect the President by National Popular Vote."[25]

In *Oregon v. Mitchell*, U.S. Supreme Court Justice Potter Stewart pointed out in 1970 that an interstate compact could be employed by the states for electoral purposes. This case concerned congressional legislation establishing uniformity among the states for durational residency requirements for voters in presidential elections. In his opinion (partially concurring and partially dissenting), Justice Potter Stewart observed that if Congress had not enacted federal legislation concerning residency

[20] H.R. 1579—To amend title 3, United States Code, to extend the date provided for the meeting of electors of the President and Vice President in the States and the date provided for the joint session of Congress held for the counting of electoral votes, and for other purposes. Introduced April 12, 2005.

[21] Nelson, Suzanne. Three-Month Period Imperils Presidency. *Roll Call.* November 2, 2004.

[22] Ornstein, Norman. 2004. Want a Scary Scenario for Presidential Chaos? Here Are a Few. *Roll Call.* October 21, 2004

[23] Fortier, John C. and Ornstein, Norman. 2004. If Terrorists Attack Our Presidential Elections. 3 *Election Law Journal* 4. Pages 597–612.

[24] Goldfeder, Jerry H. 2005. Could Terrorists Derail a Presidential Election. 32 *Fordham Urban Law Journal* 3. May 2005. Pages 523–566.

[25] None of the proposals discussed in this section was known to the authors of this book at the time when the authors developed their proposed interstate compact in 2004.

requirements, the states could have adopted an interstate compact to accomplish the same objective.[26]

In the 1990s, Senator Charles Schumer (D–New York) proposed a bi-state compact in which New York and Texas would pool their electoral votes in presidential elections. Both states were then (and still are) non-competitive in presidential politics and receive little attention in presidential campaigns except for fund raising. Schumer observed that the two states have almost the same number of electoral votes (at the time, 33 for New York and 32 for Texas)[27] and the two states regularly produce majorities of approximately the same magnitude in favor of the state's dominant political party. The Democrats typically carry New York by about 60%, and the Republicans typically carry Texas by about 60%. The purpose of the proposed compact was to create a presidentially competitive super-state (slightly larger than California) that would attract the attention of the presidential candidates during presidential campaigns.

After the 2000 election in which George W. Bush was elected to the Presidency without receiving a majority of the popular votes, Robert W. Bennett, Northwestern University Law Professor and former Dean of the Northwestern University School of Law, published a highly creative and innovative idea concerning the Electoral College. At a January 2001 conference and in an April 2001 publication, Bennett observed that 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.[28] Bennett expanded his thoughts in subsequent publications suggesting several variations on his basic idea.[29,30] In December 2001, Akhil Reed Amar and Vikram David

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[26] *Oregon v. Mitchell.* 400 U.S. 112 at 286–287. 1970.

[27] In the 2004 presidential election, New York had 31 electoral votes, and Texas had 34.

[28] 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).

[29] 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.

[30] 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.

Amar, citing Bennett, continued the discussion about the fact that the states could allocate their electoral votes to the nationwide winner of the popular vote.[31,32]

In one variation on these proposals, a single state would enact a law that would award its electoral votes to the nationwide winner without regard to whether any other state enacted similar legislation. In another variation, the state laws would be made contingent on the enactment of identical laws by other states. It was further argued the resulting arrangement would not constitute an interstate compact and therefore would not require congressional consent.[33]

These earlier proposals differ from the authors' proposed "Agreement Among the States to Elect the President by National Popular Vote" in several respects.

First, the earlier proposals were not framed as an interstate compact. Interstate compacts are specifically authorized by the U.S. Constitution as a means by which the states may act in concert to address a problem. An arrangement that takes effect only when a specified combination of states agree to participate, that no state would enact without the offer and assurance of complementary action by other states, and that ultimately involves the states acting in concert would probably be regarded by the courts as a contract and hence an "agreement or compact" as that phrase is used in the U.S. Constitution.[34]

Compacts have the specific advantage of making the states' contemplated joint actions into a legally enforceable contractual obligation on all the participating states. This assurance is particularly salient concerning the provision preventing a state from unilaterally withdrawing from the agreed arrangement for partisan political reasons in the midst of a

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[31] 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. http://writ.news.findlaw.com/amar/20011228.html

[32] Amar, Akhil Reed and Amar, Vikram David Amar. 2001. Rethinking the electoral college debate: The Framers, federalism, and one person, one vote. 114 *Harvard Law Review* 2526 at 2549, n. 112.

[33] The question of whether such an arrangement requires congressional consent is separate from the question of whether the arrangement is an interstate compact. As discussed in section 5.12, many interstate compacts do not require congressional consent.

[34] Article I, section 10, clause 3 of the U.S. Constitution states, "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state. . . ."

presidential election campaign or, even more egregiously, after the election results become known in early November but before the Electoral College meets in mid-December. Enforceability is most relevant in the event that the winner of the nationwide popular vote did not carry states having a majority of the electoral votes (as occurred in 1824, 1876, 1892, and 2000). A state whose legislature and Governor are controlled by a political party whose presidential candidate did not win the nationwide popular vote could, in the absence of an enforceable restriction on withdrawal, abandon its obligations at the precise moment when they would matter. Once a state enters into an interstate compact, it may not unilaterally nullify the compact because the Impairments Clause of the U.S. Constitution provides:

> "No State shall … pass any … Law impairing the Obligation of Contracts…."[35]

Instead, a party to a contract must withdraw from the agreement in accordance with the agreement's provisions for withdrawal. Most interstate compacts contain provisions that delay the effective date of a state's withdrawal by a certain amount of time that is appropriate given the nature of the compact. As described in sections 6.2.3 and discussed in section 8.6, the proposed "Agreement Among the States to Elect the President by National Popular Vote" has a "blackout" period (of approximately six months) starting on July 20 of a presidential election year and continuing until a President or Vice President shall have been qualified to serve the next term (normally on January 20 of the following year).

Second, earlier proposals did not contain a provision making the effective date of the system contingent on the enactment of substantially 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 be likely to alone 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 state a voice in the selection of presidential electors in other states and would not alone guarantee achievement of the goal of nationwide popular election of the President. Moreover, enactment of such a law in a single state would encourage the presidential can-

[35] See appendix C for the full wording of the Impairments Clause.

didates to ignore that state. The effect of such a law in a single state would be to negate the voice of the enacting state in the presidential election, except in the unlikely event that the electoral votes of the other states are so nearly equally divided that the lone enacting state could weigh in on the side of the winner of the nationwide popular vote.

Moreover, the earlier proposals do not work in a even-handed and non-partisan way when the arrangement contains states possessing fewer 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 to award their electoral votes to the nationwide popular vote winner without the electoral-majority threshold. 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 helping to achieve 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 a electoral majority threshold would operate in an even-handed and non-partisan way only in the unlikely that the participating states were equally divided (in terms of electoral votes) among reliably Republican and reliably Democratic states. In contrast, if the states participating in the arrangement possess a majority of the electoral votes, the system operates in an even-handed and non-partisan way without regard to the political complexion of the states that happen to be members of the compact.

If the earlier proposals were altered so that the participating states awarded all of their electoral votes to the popular vote winner calculated only within the group of participating states, then a candidate with a bare majority of the popular votes in that group of states would negate the

popular votes of the losing candidate in that group of states—thereby again permitting the Presidency to be won by a candidate who did not receive a nationwide majority of the popular vote.

Third, the statutory language and the operational details were not specified in the earlier proposals.

The authors submit that the proposed "Agreement Among the States to Elect the President by National Popular Vote" does not have the above-mentioned problems of the earlier proposals.