National Popular Election of the President

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Materials Submitted by Dr. John R. Koza Answering Objections that are Sometimes Raised in Connection with the National Popular Vote Bill (18-0769)

As chair of National Popular Vote, I would like to submit the following answers to 61 objections that are sometimes raised in connection with the National Popular Vote bill (18-0769). These answers are from chapter 10 of our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*.

In oral testimony, I would be pleased to answer to any of these issues, or other issues, that may be raised about the bill.

Thank you.

10 Responses to Myths about the National Popular Vote Plan

This chapter responds to concerns that have been raised during the debate about the National Popular Vote bill, including:

- **Myths about the U.S. Constitution**
  - MYTH: A federal constitutional amendment is required to change the method of electing the President (section 10.1.1).
  - MYTH: The "traditional," "appropriate," and "normal" way of changing the method of electing the President is by means of a federal constitutional amendment (section 10.1.2).
  - MYTH: The current system of electing the President was created and favored by the Founding Fathers (section 10.1.3).
  - MYTH: Seeking change by means of a federal constitutional amendment shows respect for the Founding Fathers (section 10.1.4).
  - MYTH: A federal constitutional amendment is the most democratic approach for considering a change in the manner of electing the President (section 10.1.5).
  - MYTH: "Eleven colluding states" are trying to impose a national popular vote on the country (section 10.1.6).
  - MYTH: A federal constitutional amendment is the superior way to change the system (section 10.1.7).
  - MYTH: It is inappropriate for state legislatures and governors to consider changing the method of electing the President (section 10.1.8).
  - MYTH: The National Popular Vote bill is unconstitutional (section 10.1.9).
- **Myths about Small States**
  - MYTH: The small states would be disadvantaged by a national popular vote (section 10.2.1).

- MYTH: The small states oppose a national popular vote (section 10.2.2).
- MYTH: The National Popular Vote bill threatens the equal representation of the states in the U.S. Senate (section 10.2.3).
- MYTH: A national popular vote would undermine a partisan advantage in favor of the Republican Party in the small states (section 10.2.4).

- **Myths about Recounts**
  - MYTH: A national popular vote would result in recount chaos (section 10.3.1).
  - MYTH: The current state-by-state winner-take-all system is a firewall that helpfully isolates recounts and disputes to particular states (section 10.3.2).
  - MYTH: Resolution of a presidential election could be prolonged beyond the inauguration date because of recounts (section 10.3.3).
  - MYTH: Conducting a recount would be a logistical impossibility under a national popular vote (section 10.3.4).
  - MYTH: States would be put in the uncomfortable position of judging election returns from other states under a national popular vote (section 10.3.5).
  - MYTH: Political fraud and mischief would be encouraged under a national popular vote (section 10.3.6).
- **Myths about Faithless Electors**
  - MYTH: Faithless presidential electors would be a problem under the National Popular Vote compact (section 10.4.1).
  - MYTH: It might be difficult to coerce presidential electors to vote for the nationwide winner (section 10.4.2).
- **Myth That "Wrong Winner" Elections Are Rare**
  - MYTH: "Wrong winner" elections are rare, and therefore not a problem (section 10.5.1).
- **Myths about Proliferation of Candidates**
  - MYTH: A national popular vote would result in a proliferation of third-party candidates and fragmentation of the vote (section 10.6.1).
  - MYTH: Under a national popular vote, the winner might receive only 20% of the vote (section 10.6.2).

- MYTH: The National Popular Vote bill is defective because it does not require the winner to receive an absolute majority of the popular vote (section 10.6.3).
- MYTH: The National Popular Vote bill is defective because it does not provide for a run-off (section 10.6.4).
- MYTH: A national popular vote would diminish moderation in political discourse (section 10.6.5).

- **Myths about Big States and Big Cities**
  - MYTH: Only the big states would matter under a national popular vote (section 10.7.1).
  - MYTH: Only the big cities, such as Los Angeles, would matter under a national popular vote (section 10.7.2).
  - MYTH: Candidates would "fly over" most of the country under a national popular vote (section 10.7.3).
  - MYTH: Candidates would only campaign in media markets, while ignoring the rest of the country (section 10.7.4).
  - MYTH: Candidates would concentrate on major metropolitan media markets under a national popular vote (section 10.7.5).
- **Myth about the Public's Desire for "State Identity"**
  - MYTH: The public strongly desires to see electoral votes cast on a state-by-state basis because it provides a sense of "state identity" (section 10.8.1).
- **Myths about Post-Election Changes in the Rules**
  - MYTH: A Secretary of State might change a state's method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December (section 10.9.1).
  - MYTH: A state legislature might change a state's method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December (section 10.9.2).
- **Myth about Campaign Spending**
  - MYTH: Campaign spending would skyrocket if candidates had to campaign thoughout the country (section 10.10.1).
- **Myth about Federalism**
  - MYTH: Federalism would be undermined by a national popular vote (section 10.11.1).

- **Myth about "a Republic versus a Democracy"**
  - MYTH: A national popular vote is inconsistent with the concept that the United States is a republic, not a democracy (10.12.1).
- **Myths about "Mob Rule"**
  - MYTH: A national popular vote would be "mob rule" and a "popularity contest" (section 10.13.1).
  - MYTH: The Electoral College acts as a buffer and damper against popular passions (section 10.13.2).
- **Myth about an Incoming President's "Mandate"**
  - MYTH: The current winner-take-all system gives the incoming President a "mandate" in the form of an exaggerated lead in the Electoral College (section 10.14.1).
- **Myths about Interstate Compacts and Congressional Consent**
  - MYTH: Interstate compacts are exotic and "fishy" (section 10.15.1).
  - MYTH: The National Popular Vote compact is defective because Congress did not consent to the compact prior to its consideration by state legislatures (section 10.15.2).
  - MYTH: The National Popular Vote compact is defective because it fails to specifically mention Congress in its text (section 10.15.3).
  - MYTH: The National Popular Vote compact requires congressional consent to become effective (section 10.15.4).
- **Myth about the District of Columbia**
  - MYTH: The National Popular Vote bill would permit the District of Columbia to vote for President, even though it is not a state (section 10.16.1).
- **Myths about the 14th Amendment**
  - MYTH: The Privileges and Immunities Clause of the 14th Amendment precludes the National Popular Vote compact (section 10.17.1).
  - MYTH: Section 2 of the 14th Amendment precludes the National Popular Vote compact (section 10.17.2).
  - MYTH: The Due Process Clause of the 14th Amendment precludes the National Popular Vote compact (section 10.17.3).

- MYTH: The Equal Protection Clause of the 14th Amendment precludes the National Popular Vote compact (section 10.17.4).

- **Myths about the Voting Rights Act**
  - MYTH: Section 2 of the Voting Rights Act precludes the National Popular Vote compact (section 10.18.1).
  - MYTH: Racial minorities would be disadvantaged by a national popular vote (section 10.18.2).
- **Myths about Administrative or Fiscal Impact**
  - MYTH: The National Popular Vote compact would be costly (section 10.19.1).
  - MYTH: The National Popular Vote compact would complicate the work of local election officials (section 10.19.2).
  - MYTH: The National Popular Vote compact would complicate the work of the state's chief election official (section 10.19.3).
- **Myths about the Mechanics of a National Popular Vote**
  - MYTH: There is no official count of the national popular vote (section 10.20.1).
  - MYTH: A single state could frustrate the National Popular Vote compact by making its election returns a state secret (section 10.20.2).
  - MYTH: The Electoral College provides a way to replace a President-Elect who dies, becomes disabled, or is revealed to be manifestly unsuitable after the people vote in November, but before the Electoral College meets in December (section 10.20.3).
- **Myths about Congressional or Proportional Allocation of Electoral Votes**
  - MYTH: It would be better to allocate electoral votes by congressional district (section 10.21.1).
  - MYTH: It would be better to allocate electoral votes proportionally (section 10.21.2).
- **Myth that the Electoral College Produces Good Presidents**
  - MYTH: The Electoral College produces good Presidents (section 10.22.1).

10.1 MYTHS ABOUT THE U.S. CONSTITUTION

10.1.1 MYTH: A federal constitutional amendment is required to change the method of electing the President.

It is important to recognize what the U.S. Constitution says, and does not say, about the method of electing the President. The Founding Fathers never reached a conclusion as to how the President would be elected. Instead, the U.S. Constitution grants the states exclusive and plenary (i.e., complete) control over the manner of awarding their electoral votes.

Article II of the U.S. Constitution says:

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

The winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in each individual state) is not set forth in the U.S. Constitution. It is entirely a matter of state law. When the Founding Fathers returned from the Constitutional Convention to their states to organize the nation's first presidential election in 1789, only three states chose to employ the winner-take-all rule for awarding their electoral votes. So, it is incorrect to say that our current system of electing the President was the choice of the Founding Fathers or that our current system was endorsed by the Founding Fathers.

The winner-take-all rule is a state law that was adopted on a state-by-state basis. It became prevalent with the emergence of strong political parties seeking to maximize regional power in the run-up to the Civil War. More importantly, the winner-take-all rule did not come into widespread use by means of an amendment to the U.S. Constitution. Accordingly, changing the winner-take-all rule does not require an amendment to the U.S. Constitution. The winner-take-all rule may be changed in the same way that it was adopted, namely through the enactment by state legislatures of state laws on a state-by-state basis.

The wording "as the Legislature … may direct" in Article II of the U.S. Constitution is an unqualified grant of plenary and exclusive power to the states. This constitutional provision does not encourage, discourage,

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

require, or prohibit the use of any particular method for awarding the state's electoral votes. This wording certainly does not require the use of the winner-take-all rule. States may exercise this grant of power in any way they see fit, provided only that they do not violate other specific provisions of the U.S. Constitution. As the U.S. Supreme Court stated in the 1893 case of *McPherson v. Blacker:*

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket[2] nor that the majority of those who exercise the elective franchise can alone choose the electors. …
>
> "In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States."[3] [Emphasis added]

The winner-take-all rule has been adopted and repealed by various states at various times. All three of the states that used the winner-take-all rule in the first presidential election in 1789 repealed it by 1800 (and each later re-adopted it).

As recently as 1992, Nebraska switched from the winner-take-all rule to a congressional-district system of awarding electoral votes. Maine did so in 1969.

The North Carolina legislature has exercised its power to change the method of awarding the state's electoral votes on four occasions. In 1792, the legislature chose the presidential electors. The people then voted for electors from presidential-elector districts between 1796 and 1808. Then, the Legislature chose the electors in 1812. In 1816, the legislature changed to the statewide winner-take-all rule.[4]

Massachusetts has exercised its power to change its system of awarding its electoral votes on 10 different occasions. In 1789, the Massachusetts legislature, in effect, chose the state's presidential

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[2] The "winner-take-all" rule is sometimes also called the "general ticket" system or the "unit rule."

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

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

electors. In 1792, the voters were allowed to elect presidential electors in four multi-member regional districts. Then, the voters picked electors by congressional districts (with the legislature choosing the state's remaining two electors). Shortly thereafter, the legislature took back the power to pick all the presidential electors (excluding the voters entirely). Later, the voters picked electors on a statewide basis using the winner-take-all rule. Then, the legislature again decided to pick the electors itself, followed by the voters using districts, followed by another return to legislative choice, followed again by the voters using districts, and, finally, the present-day statewide winner-take-all rule. None of these 10 changes required an amendment to the U.S. Constitution because the Founding Fathers and U.S. Constitution gave Massachusetts (and all the other states) exclusive and plenary power to award their electoral votes.

In short, there is nothing in the U.S. Constitution that needs to be amended in order for states to change from the current system of awarding all of a state's electoral votes to the candidate who receives the most popular votes in each individual state (the winner-take-all rule) to a system in which the states 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 approach). The states already have the power, under the U.S. Constitution, to make this change. As a result, a federal constitutional amendment is not required.

For additional information, see section 1.1 and chapter 2 of this book.

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

Nearly all the major reforms for conducting U.S. presidential elections have been initiated by action at the state level—not by action at the federal level.

Let's start by discussing the most significant change that has ever been made in the way the President of the United States is elected, namely allowing the people to vote for President. There is nothing in the U.S. Constitution that gives the people the right to vote for President. The Founding Fathers gave the states plenary and exclusive power to specify the manner of conducting presidential elections. In the nation's first presidential election in 1789, only five states permitted the people to vote for their state's presidential electors. In the remaining states, the state

legislatures (or, in New Jersey, the governor and his council) appointed the electors. The people acquired the vote for President by the enactment by state legislatures of state laws. The states exercised their role, under the U.S. Constitution, as the "laboratories of democracy."[5]

With the passage of time, more and more states observed that permitting the people to vote for President did not produce any disastrous consequences. By 1824, three-quarters of the states had adopted the idea that the people should be permitted to vote for President. The state-by-state process of empowering the people to vote for President was completed by the time of the 1880 election.

This fundamental change in the manner of electing the President was not accomplished by means of a federal constitutional amendment. Instead, it was accomplished through state-by-state changes in state law. Permitting the people to vote for President was not an "end run" around the U.S. Constitution but, instead, an exercise of a power that the Founding Fathers explicitly assigned to state legislatures in the Constitution. We have not encountered a single person who argues that the state legislatures did anything improper, inappropriate, or unconstitutional when they made this fundamental change in the way the President is elected.

When the U.S. Constitution came into effect in 1789, only wealthy property holders were entitled to vote in most states. At that time, there were only about 100,000 eligible voters in a nation of over 3,000,000 people. By 1800, three states permitted universal white male suffrage. By 1830, this number had increased to 10 (of the 24 states at the time).

Today, there are no property qualifications for voting in any state. The elimination of property qualifications was not accomplished by means of a federal constitutional amendment. This very substantial 10-to-1 expansion of the electorate was an example of the use by state legislatures of a power explicitly granted to them by the U.S. Constitution to decide the manner of conducting elections. Eliminating property qualifications for voting was not improper, inappropriate, or unconstitutional. It was not an "end run" around the U.S. Constitution, but an exercise of power explicitly granted by the Constitution.

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[5] Justice Louis Brandeis said 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."

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, where that right was withdrawn in 1807). Wyoming gave women the right to vote in 1869. By the time (50 years later) the 19th Amendment was passed by Congress, women already had the vote in 30 of the then-48 states.

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 2-to-1 expansion of their electorates. This major change was simply another example of the state legislatures using a power that the U.S. Constitution explicitly granted to the states concerning the conduct of elections. It should be remembered that the only effect of the 19th Amendment was to extend women's suffrage to the minority of states (18) that had not already acted at the state level to permit women to vote. 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. Indeed, the 19th Amendment only passed Congress in 1919 because women already constituted half the electorate in 30 states (and because the members of Congress from the remaining states knew that it was only a matter of time before women would obtain the right to vote in the remaining states, with or without the federal constitutional amendment).

The direct election of U.S. Senators is another example of a major change initiated at the state level. The original U.S. Constitution specified that U.S. Senators were to be elected by state legislatures. Starting with the "Oregon Plan" in 1907, states passed laws establishing "advisory" elections for U.S. Senator. Under the Oregon plan, the people cast their votes for U.S. Senator in a statewide "advisory" election, and the state legislature then dutifully rubberstamped the people's choice. By the time the 17th Amendment passed the U.S. Senate in 1912, the voters were, for all practical purposes, electing U.S. Senators in a majority of the states.

African Americans had the right to vote in New York in the 1820s and in five states by the 1850s. Black suffrage was later extended to all states by the 15th Amendment (ratified in 1870).

Persons under the age of 21 first acquired the right to vote in various states (e.g., Georgia, Kentucky, Alaska, Hawaii, and New Hampshire). Later, the 26th Amendment extended this practice to all states in 1971.

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

Professor Joseph Pika (author of *The Politics of the Presidency*) described the National Popular Vote bill by saying:

> "If successful, this effort would represent **amendment-free constitutional reform, the way that most other changes have been made in the selection process since 1804."**[6] [Emphasis added]

The Founders did something similar, but different, concerning congressional elections. The U.S. Constitution gives the states primary control over the manner of electing Congress. However, in the case of congressional elections, the U.S. Constitution gave Congress the power to review and override state decisions. This override power has been used on only rare and minor occasions. In contrast, state power over the manner of electing the President is plenary (i.e., complete), and Congress does not have the power to override a state's decision.

10.1.3 MYTH: The current system of electing the President was created and favored by the Founding Fathers.

The Founding Fathers did not create or anticipate—much less favor—our current system of electing the President.

In the debates of the Constitutional Convention and the Federalist Papers, there is no mention of the winner-take-all rule (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most votes in an individual state). 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 rule for awarding their electoral votes. Each of the three states that used the win-

[6] Pike, Joseph. Improving on an doubly indirect selection system. *Delaware On-Line.* September 16, 2008. http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20080916/OPINION09/809160318/1004/OPINION.

ner-take-all rule in the first presidential election in 1789 repealed it by 1800 (and later re-adopted it).

The Founding Fathers intended that the Electoral College would consist of "wise men" who would deliberate on the choice of the President and select the best candidate. The Electoral College was patterned after ecclesiastical elections. For example, cardinals of the Roman Catholic Church (with lifetime appointments) deliberated in the College of Cardinals 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, on the death of the king, choose a new king from a pool consisting of designated members of the royal family.

The Founding Fathers did not, however, anticipate the emergence of political parties. In the debates of the Constitutional Convention and the Federalist Papers, there is no mention of a state's presidential electors being mere "rubberstamps" for a pre-announced choice. Nonetheless, when George Washington declined to run for a third term in 1796, political parties immediately emerged. In 1796, both the Federalist and anti-Federalist parties nominated candidates for President and Vice President at a national meeting (a caucus of the party's members of Congress). As soon as there were national nominees, virtually all the candidates for presidential elector made it known that they would be willing "rubberstamps" who would vote for their party's nominee when the Electoral College met. All but one of the presidential electors who participated in the Electoral College for the 1796 election dutifully voted for their party's nominees. The expectation that presidential electors should "act," and not "think," was thus established in the 1796 election[7] and has persisted to this day. Of the 21,915 electoral votes cast for President in the nation's 55 presidential elections, only 11 were cast in an unexpected way.[8]

The delegates to the Constitutional Convention in 1787 debated the method of electing the President on 22 separate days and held 30 votes on the topic. During those debates, the Convention considered election

[7] A Federalist supporter famously complained in the December 15, 1796, issue of *United States Gazette* that Samuel Miles, a Federalist presidential elector, had voted for Thomas Jefferson, instead of John Adams, by saying, "What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, I chufe him to act, not to think."

[8] See section 2.12 of this book.

by state governors, Congress, state legislatures, nationwide popular vote (which lost by one vote), and presidential electors. In the end, the Founding Fathers could not agree on a method for electing the President. The Founding Fathers left the matter to the states.

10.1.4 MYTH: Seeking change by means of a federal constitutional amendment shows respect for the Founding Fathers.

The Founding Fathers did not anticipate, much less favor, our current system of electing the President (as discussed in section 10.1.3 of this book).

In any event, one does not show respect for the Founding Fathers by ignoring the specific method that they built into the U.S. Constitution for changing the method of electing the President, namely state action. Moreover, one does not show respect for the Constitution by unnecessarily amending it. The method that is built into the Constitution should be used first. Amending the Constitution should be the method of last resort.

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 rule) 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 bill). The Founding Fathers gave the states exclusive and plenary control over the manner of awarding their electoral votes. Before contemplating a change in the U.S. Constitution, the states should be given the chance to exercise the power that the Founding Fathers specifically gave to the states in the Constitution.

10.1.5 MYTH: A federal constitutional amendment is the most democratic approach for considering a change in the manner of electing the President.

Tara Ross (author of a book[9] defending the current system of electing the President) characterizes a federal constitutional amendment as being more democratic and as turning the matter over to "the people." However, 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 (i.e., the 13 smallest states).

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

10.1.6 MYTH: "Eleven colluding states" are trying to impose a national popular vote on the country.

Tara Ross (author of a book[10] defending the current system of electing the President) has criticized the National Popular Vote bill on the grounds that "11 colluding states" could, if they acted in concert, impose a national popular vote on the country.

The 11 most populous states contain 56% of the U.S. population and a majority of the electoral votes. In fact, these 11 states could theoretically elect a President in every presidential election under the current system. However, reality is that the 11 largest states have little in common politically with one another and rarely act in concert on any issue. In terms of the 2000 and 2004 presidential elections, five of the 11 largest states (Texas, Florida, Ohio, North Carolina, and Georgia) were Republican, and six of them (California, New York, Illinois, Pennsylvania, Michigan, and New Jersey) were Democratic.

The National Popular Vote bill will become effective when states cumulatively possessing a majority of the electoral votes have enacted it. As of 2008, the National Popular Vote bill has been enacted by four states possessing 50 electoral votes (that is, 19% of the 270 electoral votes needed to elect a President or to bring the compact into effect). The four states are Hawaii (a small state), Maryland (an average-sized state), and New Jersey and Illinois (large states). An extrapolation from these initial numbers suggests that about half of the states (certainly not 11) would be needed to bring the National Popular Vote compact into effect. Such a group of states would represent a majority of the American people.

Ross's argument is apparently based on the belief that support for the National Popular Vote bill is limited to large states. However, the National Popular Vote bill has considerable support in small states. It has been enacted by Hawaii and has passed the Maine Senate and both houses of the Vermont and Rhode Island legislatures. Polls in 2008 showed a high level of support for a nationwide election for President in Vermont (75%), Maine (71%), New Hampshire (69%), and Rhode Island (74%).[11] In fact, public support for a national popular vote is slightly higher than the

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

[11] These polls (and many others) are available on National Popular Vote's web site at http://www.nationalpopularvote.com/pages/polls.php#2007WPKHU.

national average in many of the smallest states. The reason may be that the small states are the most disadvantaged group of states under the current system (as discussed in section 10.2 of this book).

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

State action offers several advantages over a federal constitutional amendment.

First, it is far easier to amend state legislation than to repeal a constitutional amendment if some "unintended consequence" materializes or some adjustment becomes advisable.

Second, the National Popular Vote compact leaves untouched the states' existing power to control presidential elections. Most of the constitutional amendments that have been debated in Congress over the years have taken away state control over presidential elections and given it to Congress. The Founders were suspicious of an over-reaching President who might, in conjunction with a compliant legislative branch, try to alter the method of conducting presidential elections in a politically advantageous manner.[12] As a "check and balance" on the central government, the Founders dispersed the power to control federal elections among the states, knowing that no single "faction" would simultaneously be in power in all the states.

Third, 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). In contrast, state action permits support to bubble up from the people through their state legislatures. The genius of the U.S. Constitution is that it provides a way for both the central government and the state governments to initiate action. There have been only 17 amendments since passage of the Bill of Rights. The last time that Congress successfully launched a federal constitutional amendment (voting by 18-year-olds) was in 1971. Thus, experience indicates that building support locally is more likely to yield success.

Divisive debates over the process to be employed to achieve a particular objective have frequently delayed achievement of that objective. The passage of women's suffrage, for example, was delayed by decades

[12] 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.

as a result of a long-running argument within the women's suffrage movement over whether to pursue changes at the state level versus a federal constitutional amendment. Women's suffrage was first adopted by individual states using the state's power, under the U.S. Constitution, to conduct elections. It was 50 years between the time when the first state permitted women to vote (Wyoming in 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 then-48 states. Indeed, the 19th Amendment was able to get through Congress largely because women already had the vote in 30 states (and because members of Congress from the remaining 18 states knew that women would likely get the right to vote in the remaining states, by state action, in the very near future, with or without the amendment).

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

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

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct,** a Number of Electors…."[13] [Emphasis added]

The Founding Fathers had good reason to give the states the power to control the conduct of presidential elections. They specifically wanted to thwart the possibility that an over-reaching President, in conjunction with a possibly compliant Congress, could manipulate the manner of conducting presidential elections in a politically advantageous way. For similar reasons, the U.S. Constitution gives the states primary power over the manner of conducting congressional elections.[14] Control over elections is a state power under the U.S. Constitution.

For additional information, see section 1.1 and chapter 2 of this book.

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

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

10.1.9 MYTH: The National Popular Vote bill is unconstitutional.

A successful challenge to the National Popular Vote compact on constitutional grounds is unlikely, given the fact that constitutional law concerning interstate compacts is well settled and given the fact that the National Popular Vote compact is based on the exclusive and plenary (i.e., complete) power of the states to award their electoral votes as they see fit.

First, the U.S. Constitution says:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct,** a Number of Electors…."[15] [Emphasis added]

The wording "as the Legislature … may direct" in the Constitution is an unqualified grant of plenary and exclusive power to the states. This constitutional provision does not encourage, discourage, require, or prohibit the use of any particular method for awarding a state's electoral votes. States may exercise this grant of power in any way they see fit, provided only that they do not violate other specific provisions of the Constitution. As the U.S. Supreme Court stated in the 1892 case of *McPherson v. Blacker:*

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and **leaves it to the legislature exclusively to define the method** of effecting the object. 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."**[16] [Emphasis added]

The Court continued:

> "In short, the appointment and mode of appointment of elec-

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

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

> tors belong **exclusively** to the states under the constitution of the United States"[17] [Emphasis added]

In *Bush v. Gore* in 2000, the Court called article II, section 1, clause 2:

> "The source for the statement in *McPherson v. Blacker* … that the State legislature's power to select the manner for appointing electors is **plenary**."[18] [Emphasis added]

In short, the U.S. Supreme Court has repeatedly characterized the authority of the states over the manner of awarding their electoral votes as "plenary" and "exclusive."

Second, there are no restrictions in the U.S. Constitution on the subject matter of interstate compacts, other than the implicit limitation that a compact's subject matter must be among the powers that the states are permitted to exercise. As just mentioned, the states possess the exclusive power to choose the manner of awarding their electoral votes.

Third, we are not aware of any case in which the courts have invalidated an interstate compact.[19] Given the recent tendencies of the courts to accord even greater deference to states' rights and even freer use of interstate compacts by the states, it is unlikely that the courts would invalidate the National Popular Vote compact. The National Popular Vote compact is an example of states' rights in action.

Fourth, there is no argument that the winner-take-all rule is entitled to any special deference based on history or the historical meaning of the words in the U.S. Constitution. The winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in a particular state) is not mentioned in the U.S. Constitution, the debates of the Constitutional Convention, or the Federalist Papers. The actions taken by the Founding Fathers in organizing the nation's first presidential election in 1789 (in particular, the fact that only three states used the winner-take-all rule) make it clear that the Founding Fathers never gave their imprimatur to the winner-take-all rule.

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

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

[19] There are cases where a higher court invalidated a ruling by a lower court invalidating an interstate compact. See, for example, *West Virginia ex rel. Dyer v. Sims.* 341 U.S. 22. 1950.

10.2 MYTHS ABOUT SMALL STATES

10.2.1 MYTH: The small states would be disadvantaged by a national popular vote.

The small states are the most disadvantaged group of states under the current system.

Although the small states theoretically benefit from receiving two extra electoral votes corresponding to their U.S. Senators, this "bonus" does not, in practice, translate into political power. Political power in presidential elections comes from being a closely divided battleground state—not from the two-vote bonus conferred on the small states in the Electoral College.

Under the winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in each state), candidates have no reason to poll, visit, advertise, organize, or pay attention to the concerns of states where they are comfortably ahead or hopelessly behind. Instead, candidates concentrate their attention on a small handful of battleground states. This means that voters in the vast majority of the states are ignored in presidential elections. In 2004, candidates concentrated over two-thirds of their money and campaign visits in five states; over 80% in nine states; and over 99% of their money in 16 states. In 2008, candidates concentrated over two-thirds of their campaign events and ad money in just six states, and 98% in just 15 states.[20]

The reason that the small states are the most disadvantaged group of states under the current system is that almost all of them are one-party states in terms of presidential elections. In the last six presidential elections (1988 through 2008), six of the 13 least populous states (i.e., those with three or four electoral votes) have regularly gone Republican (Alaska, Idaho, Montana, Wyoming, North Dakota, and South Dakota). Six others (Hawaii, Vermont, Maine, Rhode Island, Delaware, and the District of Columbia) have regularly gone Democratic.[21] New Hampshire has been the only battleground state among the 13 smallest states.

The 12 smallest non-competitive states have a combined population of 11.4 million. Because of the bonus of two electoral votes that every

[20] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

[21] Among the six regularly Republican-leaning small states Clinton, carried Montana in 1992 (presumably due to Perot's presence on the ballot). Among the six Democratic-leaning small states, George H. W. Bush carried Delaware, Maine, and Vermont in 1988.

state receives, these 12 small states have 40 electoral votes. Coincidentally, Ohio has 11.4 million people. Ohio has 20 electoral votes. That is, the 11 million people in Ohio have "only" 20 electoral votes, whereas the 11 million people in the 12 smallest non-competitive states have 40 electoral votes. However, political power does not arise from the number of electoral votes that a state possesses, but, instead, from whether the state is a closely divided battleground state. The battleground state of Ohio (with "only" 20 electoral votes) received 62 visits in the 2008 presidential election. However, the 12 non-battleground small states (with their 40 electoral votes) were politically irrelevant. In 2008, the 12 small non-battleground states received virtually no visits, advertising, polling, or policy consideration by presidential candidates because the outcome of the presidential race in those states was generally a foregone conclusion. The winner-take-all rule makes the 11 million people in the closely divided battleground state of Ohio crucial in presidential races, while rendering the 11 million people in the nation's smallest states irrelevant. This is a situation in which 20 is much more than 40. A national popular vote would make every vote equal throughout the United States. A national popular vote would make a vote cast in a small state as important as a vote cast in Ohio.

Most of the states with five or six electoral votes are similarly non-competitive in presidential elections (and therefore similarly disadvantaged). In fact, of the 22 least populous states (i.e. those with between three and six electoral votes), only New Hampshire (four electoral votes), New Mexico (five electoral votes), and Nevada (five electoral votes) have been battleground states in recent elections.

The fact that the small states are disadvantaged by the current system has been recognized by prominent officials from smaller states. In a 1979 Senate speech, 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**."[22] [Emphasis added]

Senator Robert E. Dole of Kansas, the Republican nominee for President in 1996 and Republican nominee for Vice President in 1976, stated:

> "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.[23] [Emphasis added]

Because so few of the least populous states are battleground states in presidential elections, the current system actually shifts power from voters in the small and medium-sized states to voters in a handful of big

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[22] *Congressional Record.* July 10, 1979. Page 17748.

[23] *Congressional Record.* January 14, 1979. Page 309.

states. As early as the spring of 2008, both major political parties acknowledged that there would be at most 14 battleground states (involving only 166 of the 538 electoral votes) in the 2008 presidential election.[24] In other words, two-thirds of the states were regarded as irrelevant under the current system. Among this group of 14 battleground states, Michigan (17 electoral votes), Ohio (20), Pennsylvania (21), and Florida (27) contain over half (85) of the 166 electoral votes. Among the 22 least populous states, only three (i.e., New Hampshire, New Mexico, and Nevada) were among this group of 14 battleground states. These three states contain only 14 of the 166 electoral votes. The net result is that the current system shifts power from voters in the least populous states to voters in a handful of closely divided battleground states (almost all of which are big states).

10.2.2 MYTH: The small states oppose a national popular vote.

The facts speak for themselves. Hawaii was the fourth state to enact the National Popular Vote bill. As of 2008, the bill has been approved by a total of seven state legislative chambers in small states, including one house in Maine and both houses in Hawaii, Rhode Island, and Vermont.

The concept of a national popular vote for President is far from being politically "radioactive" in small states. Indeed, the concept of a national popular vote for President is popular in small states. Polls in 2008 showed a high level of support for a nationwide election for President in small states such as Vermont (75%), Maine (71%), New Hampshire (69%), and Rhode Island (74%).[25] These results are consistent with the fact that more than 70% of the American people have favored a nationwide election for President since the Gallup poll started asking this question in 1944. The *Washington Post*, Kaiser Family Foundation, and Harvard University poll in 2007 showed 72% support for direct nationwide election of the President. This recent national result is similar to recent statewide polls in Arkansas (74%), California (70%), Connecticut (73%), Massachusetts (73%), Michigan (73%), Missouri (70%), and Washington (77%). In short, there is very little difference in the level of political support for a national popular vote in small, medium-sized, and large states.

The small states are the most disadvantaged group of states under the current system (as discussed in section 10.2.1 of this book). The fact

[24] "Already, Obama and McCain Map Fail Strategies." *New York Times*, May 11, 2008.

[25] These polls (and many others) are available on National Popular Vote's web site at http://www.nationalpopularvote.com/pages/polls.php#2007WPKHU.

that the bonus of two electoral votes is an illusory benefit to the small states is not a new revelation. This fact has been widely recognized by the small states for some time. In 1966, Delaware led a group of 12 predominantly low-population states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, and Iowa) in suing New York in the U.S. Supreme Court. These states argued that New York's use of the winner-take-all rule effectively disenfranchised voters in their states.[26] The Court declined to hear the case (presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision). Ironically, the defendant (New York) is no longer an influential battleground state (as it was in the 1960s). Today, New York suffers the very same disenfranchisement as most of the less populous states because it too has become politically non-competitive. Today, a vote in New York is equal to a vote in Wyoming—votes in both are equally irrelevant in presidential elections.

The Electoral College is not the bulwark of influence for the small states in the U.S. Constitution. The 13 smallest states (with 3% of the nation's population) have 25% of the votes in the U.S. Senate—a very significant source of political clout. However, the 13 smallest states (i.e., those with three or four electoral votes) have only 26 extra votes in the Electoral College by virtue of the two-vote bonus—not a large number in relation to the total of 538 electoral votes. Although the 13 smallest states cast 3% of the nation's popular vote while possessing 6% of the electoral votes, the extra 3% is a minor numerical factor in the context of a presidential election. More significantly, this small theoretical advantage is eradicated by the fact that the small states are equally divided between the two major political parties and because the one-party character of the small states makes 12 out of 13 of them irrelevant in presidential elections. In fact, the bulwark of influence for the small states is the equal representation of the states in the U.S. Senate—not the small number of additional electoral votes that they have in the Electoral College.

10.2.3 MYTH: The National Popular Vote bill threatens the equal representation of the states in the U.S. Senate.

Equal representation of the states in the U.S. Senate is explicitly estab-

[26] Information about *State of Delaware v. State of New York* (and links to the pleadings) may be found at http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php.

lished in the U.S. Constitution. This feature of the U.S. Constitution cannot be changed by state law. In fact, it may not even be amended by an ordinary federal constitutional amendment. Instead, this feature of the U.S. Constitution may only be changed by unanimous consent of all 50 states.[27] In contrast, the U.S. Constitution explicitly assigns the power to choose the manner of electing the President to the state legislatures. The adoption by a state legislature of the National Popular Vote bill is an exercise of a legislature's existing powers under the U.S. Constitution. Such action has no impact or bearing on the constitutional provisions concerning representation in the U.S. Senate.

10.2.4 MYTH: A national popular vote would undermine a partisan advantage in favor of the Republican Party in the small states.

The small state issue sometimes serves as a surrogate for the unstated political concern (and misconception) that the small states confer a partisan advantage in favor of the Republican Party. However, this belief does not reflect current political reality. In the last six presidential elections (1988 through 2008), six of the 13 least populous states have regularly gone Republican (Alaska, Idaho, Montana, Wyoming, North Dakota, and South Dakota), while six others (Hawaii, Vermont, Maine, Rhode Island, Delaware, and the District of Columbia) have regularly gone Democratic.[28] New Hampshire has been, in recent years, the one closely divided battleground state among the 13 smallest states (having supported the Democrat in 1992 and 1996, the Republican in 2000, and the Democrat in 2004 and 2008).

Interestingly, the 12 smallest non-competitive states actually confer a slight political advantage on the Democratic presidential candidate. For example, in 2004, John Kerry won 21 electoral votes from his 444,115-vote lead in the six non-competitive Democratic small states, whereas George W. Bush won only 19 electoral votes from his 650,421-vote lead in the six non-competitive Republican small states. The reason that the Democrats enjoy a partisan advantage in presidential elections in the smallest states

[27] Article V of the U.S. Constitution provides: "No State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

[28] Among the six regularly Republican-leaning small states Clinton, carried Montana in 1992 (presumably due to Perot's presence on the ballot). Among the six Democratic-leaning small states, George H. W. Bush carried Delaware, Maine, and Vermont in 1988.

is that the six regularly Republican small states are very heavily Republican (Alaska 64%, Idaho 69%, Montana 61%, Wyoming 70%, North Dakota 64%, and South Dakota 61%). In contrast, the Democrats carried three of their six small states (Delaware, Hawaii, and Maine) with only 54% of the vote. A 54% margin is generally viewed as placing a state safely out of reach for the opposition during a typical presidential campaign;[29] however, 54% is considerably less than the Republican Party's margin in their six small states. In two additional states (Vermont and Rhode Island), the Democrats won with 60% of the vote (again a smaller margin than the Republican Party's margin in their six small states). If the boundaries of the small states had been recently drawn, there would be accusations that the boundaries were a Democratic gerrymander.

10.3 MYTHS ABOUT RECOUNTS

10.3.1 MYTH: A national popular vote would result in recount chaos.

If the President were elected from a single nationwide pool of votes, one would expect a recount once in 332 elections, or once in 1,328 years. The fact is that recounts would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all system (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in each separate state).

Based on a recent study of 7,645 statewide elections in the 26-year period from 1980 through 2006 by FairVote,[30] the probability of a recount is 1 in 332 elections (23 recounts in 7,645 elections). The average change in the margin of victory as a result of a recount was a mere 274 votes. The original outcome remained unchanged in over 90% of the recounts.

Under the current winner-take-all system, there are 51 separate opportunities for recounts in every presidential election. Thus, our nation's 55 presidential elections have really been 2,084 separate state-level elections. There have been five seriously disputed counts in the nation's 55 presidential elections. The current system has repeatedly cre-

[29] Although there is no universally accepted definition of a battleground state, battleground states are, more or less, those in which the spread between the top two candidates is less than 8%.

[30] Fair Vote. 2007. *Survey and Analysis of Statewide Election Recounts 1980-2006* available at http://www.fairvote.org/reports/?page=1786&articlemode=showspecific&showarticle=2736.

ated artificial crises in which the vote has been extremely close in particular states, while not close on a nationwide basis. Note that five seriously disputed counts out of 2,084 is closely in line with the historically observed probability of 1 in 332.

A national popular vote would reduce the probability of a recount from five instances in 55 presidential elections to one instance in 332 elections (that is, once in 1,328 years). In fact, the reduction would be even greater because a close result is less likely to occur as the size of the jurisdiction increases. Indeed, only two of the 23 recounts among the 7,645 statewide elections in the 26-year period from 1980 through 2006 were in big states.

The 2000 presidential election was an artificial crisis created because of Bush's lead of 537 popular votes in Florida. Gore's nationwide lead was 537,179 popular votes (1,000 times larger). Given the miniscule number of votes that are changed by a typical recount (averaging only 274 votes), no one would have requested a recount or disputed the results in 2000 if the national popular vote had controlled the outcome.[31] Indeed, no one (except perhaps almanac writers and trivia buffs) would have cared that one of the candidates happened to have a 537-vote margin in Florida.

There was a recount, a court case, and a reversal of the original outcome in Hawaii in 1960. Kennedy ended up with a 115-vote margin in Hawaii in an election in which his nationwide margin was 118,574.

Samuel Tilden's 3% lead in 1876 was a solid victory in terms of the national popular vote (equal to Bush's solid percentage lead in the 2004 election). However, an artificial crisis was created because of the razor-thin margin of 889 votes in South Carolina, 922 in Florida, and 4,807 in Louisiana. No one would have cared who received more votes in these closely divided states if the President had been elected by a nationwide popular vote.

Critics of a national popular vote have argued that there could be an extremely close nationwide count in the future (and historical data indeed indicate that there would be one such extremely close election every 1,328 years). However, even in that rare situation, there would also be, almost inevitably, one or more states with razor-thin popular vote

[31] Some states, including Florida, conduct "automatic recounts" when the difference between two candidates is smaller than some pre-specified percentage. However, this kind of perfunctory recount would not have overturned Gore's nationwide lead of 537,179 popular votes.

margins. Thus, such an election would also be controversial under the current system.

It is important to note that the question of recounts comes to mind in connection with presidential elections only because the current system so frequently creates artificial crises and unnecessary disputes. No one was sitting at the edge of their chairs nervously awaiting recounts while watching the election returns from the 420 statewide races in November 2006. Consistent with the historically observed 1-in-332 probability, there was one statewide recount in 2006 (a race for state auditor in Vermont). Similarly, there was one statewide recount in 2004 (the governor's race in Washington state) and one statewide recount in 2008 (the U.S. Senate race in Minnesota).

More importantly, the possibility of recounts should not even be a consideration in debating the merits of a national popular vote. No one has ever suggested that the possibility of a recount constitutes a valid reason why state governors or U.S. Senators, for example, should not be elected by a popular vote.

10.3.2 MYTH: The current state-by-state winner-take-all system is a firewall that helpfully isolates recounts and disputes to particular states.

Brendan Loy claims that the current state-by-state winner-take-all rule acts as a helpful firewall that

> "isolate[es] post-election disputes to individual close states."[32]

In fact, the winner-take-all system is not a helpful firewall, but instead the cause of unnecessary fires.

Under the current winner-take-all system, there are 51 separate vote pools in every presidential election.[33] Thus, our nation's 55 presidential elections have really been 2,084 separate state-level elections. These 51 separate pools regularly create artificial crises in elections in which the vote is not at all close on a nationwide basis, but close in particular states.

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[32] Loy, Brendan Loomer, "Count Every Vote-All 538 of Them" *Social Science Research Network*. September 12, 2007. Available at http://ssrn.com/abstract=1014431.

[33] More accurately, every presidential election is really 56 separate elections because presidential electors are elected using vote counts from all 50 states, the District of Columbia, two congressional districts in Maine, and three congressional districts in Nebraska. Maine and Nebraska award two electoral votes on a statewide basis and one electoral vote based on the voting in each of their congressional districts.

This is the reason why there have been five seriously disputed counts in the nation's 55 presidential elections (as discussed in section 10.3.1 of this book).

If anyone is genuinely concerned about minimizing the possibility of recounts, then a single national pool of votes provides a way to drastically reduce the likelihood of recounts and eliminate the artificial crises that are regularly produced by the current state-level winner-take-all system.

10.3.3 MYTH: Resolution of a presidential election could be prolonged beyond the inauguration date because of recounts.

Brendan Loy warns that if we had a national popular vote:

> "Post-election uncertainty could stretch well into January, raising doubt about whether we would have a clear winner by inauguration day." …
>
> "With two centuries of legal precedent tossed aside, courts would have a very difficult time managing it all."[34]

Loy's scenario for a prolonged and unsettled election is based on the incorrect assumption that the existing U.S. Constitution, existing federal statutes, and existing state statutes would somehow be "tossed aside" after the National Popular Vote compact comes into effect. In fact, the National Popular Vote compact was drafted so as to rely on existing constitutional and statutory provisions in the same way that the current system does.

The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election. These existing provisions would apply to elections conducted under the proposed National Popular Vote legislation in the same way that they apply to elections conducted under the current system. No prolongation of a U.S. presidential election until January is possible thanks to these existing constitutional provisions and existing federal and state statutory provisions.

The U.S. Constitution provides:

> "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[35] [Spelling as per original]

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[34] Loy, Brendan Loomer, "Count Every Vote-All 538 of Them" *Social Science Research Network*. September 12, 2007. Available at http://ssrn.com/abstract=1014431.

[35] U.S. Constitution. Article II, section 1, clause 4.

Congress has exercised this constitutional power to set the uniform nationwide date for meeting of the Electoral College.

> "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."[36]

Under both the current system and the National Popular Vote approach, all counting, recounting, and judicial proceedings must be conducted so as to reach a "final determination" prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

The U.S. Supreme Court has made it clear that the states are expected to make their "final determination" six days before the Electoral College meets (the so-called "safe harbor" date established by section 5 of title 3 of the United States Code).

In any event, in almost all states, state statutes already impose independent earlier deadlines for finalizing the count for the presidential election. The U.S. Supreme Court has also ruled that state election officials and the state judiciary must conduct counts and recounts in presidential elections within the confines of existing state election laws.

It may be argued that the schedule established by the U.S. Constitution, existing federal statutes, and existing state statutes may sometimes rush the count (and possibly even create injustice). However, there can be no argument that this schedule exists in the U.S. Constitution, federal statutes, and state statutes and that this existing schedule guarantees "finality" prior to the meeting of the Electoral College in mid-December. The existing constitutional and statutory schedule would govern the National Popular Vote compact in exactly the same way that it governs elections under the current system.

10.3.4 MYTH: Conducting a recount would be a logistical impossibility under a national popular vote.

A recount is not an unimaginable horror or a logistical impossibility. All states routinely make arrangements for a recount in advance of every election. A recount is a recognized contingency that is occasionally

[36] United States Code. Title 3, chapter 1, section 7.

required in the course of conducting elections, and recounts do indeed occur about once in every 332 elections. The personnel and resources necessary to conduct a recount are indigenous to each state. A state's ability to conduct a recount inside its own borders is unrelated to whether a recount is occurring in another state.

10.3.5 MYTH: States would be put in the uncomfortable position of judging election returns from other states under a national popular vote.

Existing federal law specifies that each state's own "final determination" of its presidential election returns is "conclusive" (if done in a timely manner and in accordance with laws in existence prior to Election Day). The National Popular Vote compact is directly patterned after this existing federal law and requires each state to treat as "conclusive" each other state's "final determination" of its vote for President.

The "safe harbor" provision of federal law specifies the conditions under which a state's "final determination" is considered "conclusive."

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."[37]

The fifth clause of article III of the National Popular Vote compact provides:

> "The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by

[37] United States Code. Section 5 of title 3, chapter 1.

> the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress."

In short, no state has any power to judge the presidential election returns of any other state under either the National Popular Vote compact or the current system.

10.3.6 MYTH: Political fraud and mischief would be encouraged under a national popular vote.

The potential for political fraud and mischief is not uniquely associated with either the current system or a national popular vote. In fact, the current state-by-state winner-take-all system magnifies the incentive for fraud and mischief because all of a state's electoral votes are awarded to the candidate who receives a bare plurality of the votes in each state.

Under the current system, the national outcome can be affected by mischief in one of the closely divided battleground states (e.g., by placing insufficient or defective voting equipment into the other party's precincts, by selectively and overzealously purging voter rolls). The accidental use of the butterfly ballot by a Democratic election official in one county in Florida cost Gore an estimated 6,000 votes—far more than the 537 popular votes that he needed to carry Florida and win the White House in 2000. However, an incident involving 6,000 votes would have been a mere footnote if the nationwide count had governed the presidential election (where Gore's margin was 537,179).

Senator Birch Bayh (D–Indiana) summed up the concerns about possible fraud in a 1979 Senate speech by saying:

> "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."[38]

In the 1950s and 1960s, accusations of voter fraud by both political parties were commonplace in Illinois and various other states. In 1960, a switch of 4,430 votes in Illinois and a switch of 4,782 votes in South Carolina would have given Nixon a majority of the electoral votes.

[38] *Congressional Record.* March 14, 1979. Page 5000.

However, 4,430 votes in Illinois were only a focus of controversy in 1960 because of the statewide winner-take-all rule. John F. Kennedy led Richard M. Nixon by 118,574 popular votes nationwide. So, four thousand votes in two states would not have been decisive in 1960 in terms of changing the national popular vote. If Nixon had carried Illinois and South Carolina in 1960, he would have won a majority of the votes in the Electoral College without receiving a majority of the popular votes nationwide.

For more information, see section 9.2 of this book.

10.4 MYTHS ABOUT FAITHLESS ELECTORS

10.4.1 MYTH: Faithless presidential electors would be a problem under the National Popular Vote compact.

There is no practical problem with faithless presidential electors (i.e., presidential electors who cast their vote in the Electoral College for someone other than the official nominee of the political party under whose banner the elector was chosen). However, if anyone thinks that there is a problem, the states already have ample constitutional authority to remedy it. Moreover, the National Popular Vote bill virtually eliminates the possibility of a faithless elector affecting the outcome of a presidential election (for reasons explained below).

First, faithless electors are not a practical problem. Presidential electors are committed party activists who are nominated by their political party to cast a pre-announced vote when the Electoral College meets. Of the 21,915 electoral votes cast for President in the nation's 55 presidential elections between 1789 and 2004, only 11 were cast in an unexpected way. Moreover, among these 11 cases, the unexpected vote of Samuel Miles for Thomas Jefferson in 1796 was the only instance of a true faithless elector (that is, a situation where the elector might have thought, at the time he voted, that his vote might affect the national outcome). Nine of the other 11 cases were simply post-election grand-standing votes cast by publicity-seeking electors who knew, at the time they voted, that their vote definitely would not affect the outcome in the Electoral College. One electoral vote was accidentally and unintentionally cast by a presidential elector who absentmindedly voted for his party's vice-presidential candidate for both President and Vice President.

Second, if anyone perceives faithless electors to be a real problem, the states already have ample authority to remedy the problem by means of state law. For example, Pennsylvania law empowers each presidential nominee to nominate the elector candidates who run under his name in Pennsylvania. North Carolina law declares vacant the position of any contrary-voting elector and empowers the state's remaining electors to immediately replace the contrary-voting elector with a loyal elector. Either the Pennsylvania approach or the North Carolina approach, or a combination of the two, constitutes an effective remedy against the perceived problem of faithless presidential electors. The U.S. Supreme Court has upheld state laws guaranteeing faithful voting by presidential electors (because the states have plenary power over presidential electors).

Third, the National Popular Vote bill is superior to the current system with regard to the virtually non-existent problem of faithless electors because it would further reduce the slim possibility that a faithless presidential elector could affect the outcome of a presidential election. Under the National Popular vote compact, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College in any given presidential election. The reason is that the National Popular Vote bill guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will receive at least 270 electoral votes from the states belonging to the compact. Then, in addition to this bloc of at least 270 electoral votes, the nationwide winning candidate would receive a certain number of additional electoral votes from whichever non-compacting states he or she happened to carry. Because the non-compacting states would likely be divided approximately equally between the candidates, the nationwide winning candidate would generally receive an exaggerated margin (totaling roughly 75%) of the votes in the Electoral College. Thus, it would be virtually impossible for a faithless elector to affect the outcome of the presidential election.

Questions about the possibility of faithless electors often stem from the incorrect assumption that presidential electors are a lofty group of independent-minded people who sit in judgment of the people's choice for President, and then graciously accede to the people's choice. It is true that the Founding Fathers envisioned, in 1789, that the presidential elec-

tors would be outstanding citizens who would meet and debate and exercise independent judgment in choosing the best person to become President. However, that expectation was dashed with the emergence of political parties in the nation's first competitive presidential election in 1796. Since 1796, presidential electors have simply been willing "rubberstamps" for their party's nominee for President.

For additional information about faithless electors, see section 2.12 of this book.

10.4.2 MYTH: It might be difficult to coerce presidential electors to vote for the nationwide winner.

No coercion is required to get presidential electors to vote as intended under either the current system or the National Popular Vote system. Under both systems, each political party nominates strongly opinionated and very loyal party activists for the position of presidential elector. Each party's nominees for the position of presidential elector intend to act as willing "rubberstamps" for their party's nominee. In November, the voters decide which slate of elector candidates (Republican or Democratic) will actually cast the state's electoral votes. Under the winner-take-all rule (currently used in 48 of the 50 states and the District of Columbia), the state's presidential electors are the elector candidates associated with the presidential candidate receiving the most popular votes within each separate state. In two states (Maine and Nebraska), the presidential electors include the elector candidates associated with the presidential candidate who receives the most popular votes in each of the state's congressional districts.

Under the National Popular Vote compact, the state's presidential electors would be the elector candidates associated with the presidential candidate who won the most popular votes in all 50 states and the District of Columbia. This bloc of 270 (or more) presidential electors would reflect the will of the voters nationwide. No one in this bloc of at least 270 presidential electors would be asked to vote contrary to his or her own political inclinations or conscience. Instead, these electors would vote for their own strongly held personal choice, namely the nominee of their own political party. Under the National Popular Vote bill, these 270 (or more) presidential electors would operate as willing "rubberstamps" for the nationwide choice of the voters, just as presidential electors currently act as willing "rubberstamps" for the statewide choice of the voters (or district-wide

choice, in the cases of Maine and Nebraska).

Hypothetical scenarios about the possibility of faithless electors stem from the incorrect assumption that the public favors the current system of awarding all of a state's electoral votes to the presidential candidate who receives the most popular vote in each separate state (the winner-take-all-rule). This incorrect assumption leads to speculation that presidential electors might succumb to pressure from a state's citizens to abandon both their own strongly held convictions and their own party's nominee in favor of the candidate who carried a particular state. However, the reality is that there would be no such pressure in the first place. In polls since 1944, 70% (or more) of the American people have said that they believed that the presidential candidate receiving the most votes throughout the United States should win the Presidency. A mere 20% of the public supports the current state-by-state winner-take-all system (with 10% undecided). That is, the public is not attached to the current system of awarding electoral votes on the basis of the state-by-state count but, instead, strongly opposes it. If (1) 70% of people believe that the presidential candidate receiving the most votes in all 50 states and the District of Columbia should win the Presidency; and (2) if a state legislature responds to the wishes of 70% of the people of their state and enacts a law providing that the presidential candidate receiving the most votes in all 50 states and the District of Columbia should win the Presidency; and (3) if the presidential campaign is conducted with everyone knowing that the National Popular Vote procedure is the law, then when the time comes for this law to deliver its promised results, there would be little inclination for a party activist to vote against his or her own strongly held personal preference, against his own party's presidential nominee, and against his own state's law. The 20% of the public who support the current winner-take-all system would hardly constitute meaningful "pressure."

10.5 MYTH THAT "WRONG WINNER" ELECTIONS ARE RARE

10.5.1 MYTH: "Wrong winner" elections are rare, and therefore not a problem.

There have been four "wrong winner" elections out of the nation's 55 presidential elections. This is a failure rate of 1 in 14. People who want to fly to Chicago wouldn't be very happy if their plane took them to Indianapolis once in 14 trips.

Also, half of American presidential elections are popular-vote landslides (i.e., a margin of greater than 10% between the first- and second-place candidates). Almost any counting system will produce the correct winner in a popular-vote landslide. Thus, among non-landslide elections, the failure rate is actually 1 in 7.

We are currently in an era of non-landslide presidential elections (1988, 1992, 1996, 2000, 2004, and 2008). We should, therefore, not be surprised to have already had one "wrong winner" election in these six elections.

Moreover, a shift of a handful of votes in one or two states would have elected the second-place candidate in five of the last 12 presidential elections (and, of course, did elect the second-place candidate in 2000). In 1976, for example, Jimmy Carter led Gerald Ford by 1,682,970 votes nationwide; however, a shift of 3,687 votes in Hawaii and 5,559 votes in Ohio would have elected Ford. In 2004, President George W. Bush was ahead by about 3,500,000 popular votes nationwide on election night; however, the outcome of the election remained in doubt until Wednesday morning because it was not clear which candidate was going to win Ohio's 20 electoral votes. In the end, Bush received 118,785 more popular votes than Kerry in Ohio, thus winning all of the state's 20 electoral votes and ensuring his re-election. However, if 59,393 voters in Ohio had switched in 2004, Kerry would have become president. This would have nullified Bush's lead of 3,500,000 popular votes nationwide.

10.6 MYTHS ABOUT PROLIFERATION OF CANDIDATES

10.6.1 MYTH: A national popular vote would result in a proliferation of third-party candidates and fragmentation of the vote.

Based on historical evidence, there is far more fragmentation of the vote under the current state-by-state winner-take-all system of electing the President than in elections in which the winner is the candidate who receives the most popular votes in the jurisdiction involved.

Under the current state-by-state system of electing the President (in which the candidate who receives a plurality of the popular vote wins all of the state's electoral votes), minor-party candidates have significantly affected the outcome in 40% (6 out of 15) of the presidential elections in the past 60 years. Specifically, minor-party candidates affected the outcome in the 1948, 1968, 1980, 1992, 1996, and 2000 presidential elections. Segregationists such as Strom Thurmond (1948) or George Wallace (1968)

won electoral votes in numerous Southern states. Candidates such as John Anderson (1980), Ross Perot (1992 and 1996), and Ralph Nader (2000) managed to affect the national outcome by switching electoral votes in numerous individual states. None of these candidates had any reasonable expectation of winning a plurality of the popular votes nationwide. The reason that the current system has encouraged so many minor-party candidacies is that a third-party candidate has 51 separate opportunities to shop around for particular states where he might win outright or where he might shift the state's electoral votes from one major party to another.

In contrast, when the chief executives of state governments are elected by ordinary plurality voting, there is no historical evidence of a proliferation of candidates. Third-party candidates affected the outcome in only 9% of the 905 gubernatorial elections in the same 60-year period (1948–2007). In these gubernatorial elections, the winning candidate received less than 45% of the popular vote in only 2% of the elections and received less than 40% in only 1% of the elections. No winning candidate received less than 35% of the popular vote in any of the 905 gubernatorial elections. In short, there is no evidence of a massive proliferation of third-party candidates in elections in which the winner is simply the candidate receiving the most votes throughout the entire jurisdiction served by the office. Moreover, no massive proliferation of third-party candidates has emerged in elections conducted in congressional districts or state legislative districts. There is no reason to expect the emergence of some unique new political dynamic that would promote multiple candidacies if the President were elected in the same manner as every other elected official in the United States.

Ordinary plurality voting discourages the formation of niche parties by rewarding the formation of broad coalitions in which various groups and interests join together in order to win the most votes. The reason that ordinary plurality voting has this effect is that a vote cast for a splinter candidate generally produces the politically counter-productive effect of helping the major-party candidate whose views are diametrically opposite to those of the voter. For example, votes cast for Bob Barr (the Libertarian Party candidate) in 2008 made it easier for Barack Obama to win North Carolina,[39] and votes cast for Ralph Nader (the Green Party

[39] In North Carolina in 2008, Bob Barr (the Libertarian candidate) received considerably more votes than the margin between Barack Obama (the winner of the state) and John McCain (the second-place candidate).

candidate) in 2000 made it easier for George W. Bush to win certain states.[40] Ordinary plurality voting has this effect in gubernatorial elections as well as elections for U.S. Senate, and other offices.

What can be said about third-party candidacies in presidential elections is that the current system perversely discriminates in favor of regional third-party candidates, while discriminating against third-party candidates who have a broad national base of support. In 1948, Henry Wallace (a leftist candidate for President) and Strom Thurmond (a pro-segregation candidate for President) each received 1.2 million popular votes. However, Strom Thurmond (whose support was concentrated in the South) won 39 electoral votes in 1948, whereas Henry Wallace (whose support was distributed throughout the county) received no electoral votes.

Although Ross Perot's percentage of the national popular vote in 1992 was twice the percentage received in 1968 by George Wallace (a pro-segregation candidate), Perot won no electoral votes, whereas Wallace won 46. Although Perot in 1992 received eight times Strom Thurmond's percentage of the popular vote in 1948, Perot won no electoral votes, while Thurmond won 39. The current state-by-state winner-take-all system does not prevent the proliferation of candidates; however, it does reward certain third-party candidacies while punishing others.

Some argue that third parties are inherently undesirable and that the election system should be skewed so as to strengthen and favor the two-party system. Even if one subscribes to this viewpoint, it is difficult to see what public purpose is served by the fact that the current system discriminates in favor of regionally divisive third parties and against broad-based third parties.

10.6.2 MYTH: Under a national popular vote, the winner might receive only 20% of the vote.

When an office is filled by ordinary plurality voting, candidates do not, in actual practice, win the office with small percentages of the vote (and certainly not low percentages, such as 20%, that have been mentioned by critics of the National Popular Vote bill). In the 905 elections for governor in the past 60 years (1948–2007), no winning candidate received less than 35% of the popular vote. The winning candidate received more than

[40] In Florida and New Hampshire in 2000, Ralph Nader received considerably more votes than the margin between George W. Bush (the winner of these two states) and Al Gore (the second-place candidate).

50% of the vote in 91% of the elections and less than 40% of the vote in only 1% of the elections.[41] Elections for U.S. Senate and other statewide offices show similar patterns. The fact is that ordinary plurality voting discourages the formation of niche parties by rewarding the formation of broad coalitions in which various groups and interests join together in order to win the most votes.

10.6.3 MYTH: The National Popular Vote bill is defective because it does not require the winner to receive an absolute majority of the popular vote.

Under the current system, no state requires that a presidential candidate receive an absolute majority of the popular votes in order to receive all of its electoral votes. Ordinary plurality voting is used throughout the United States in awarding electoral votes. Moreover, there is no requirement, under the current system, that a candidate receive an absolute majority of the popular vote nationwide in order to become President.

Similarly, the National Popular Vote bill employs ordinary plurality voting.

The public seems generally content with ordinary plurality voting. The public does not view ordinary plurality voting as a "flaw" of the current system. There was no outcry from the public, the media, or legislators when Truman (1948), Kennedy (1960), Nixon (1968), or Clinton (1992 and 1996) were elected with less than an absolute majority of the popular votes. If, at some time in the future, the public demands that an absolute majority of the popular votes be required for election to office, that change can be implemented at that time.

10.6.4 MYTH: The National Popular Vote bill is defective because it does not provide for a run-off.

Under the current system, no state requires run-off elections for President. Under the current system, presidential candidates are not required to receive an absolute majority of the popular votes in order to be awarded all of a state's electoral votes.

Moreover, the public does not view the absence of run-offs under the current system as a major problem. If, at some time in the future, the public demands run-offs, that change can be implemented at that time.

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[41] The winning gubernatorial candidate received between 45% and 49.9% of the vote in 7% of the elections, between 40% and 44.9% in 1% of the elections, and between 35% and 39.9% in only 1% of the elections.

Even if the public considered the absence of a requirement to win an absolute majority of the popular votes to be a problem, a run-off election would be a dubious solution. A run-off election would be expensive to administer. It is already difficult to recruit the required mass of citizen volunteers needed to operate elections. Turnout in run-off elections is typically low, so there is no evidence that a run-off would necessarily promote democracy. More importantly, a run-off election would require candidates to raise additional money on short-notice, thereby tilting the playing field in favor of candidates who can easily raise large amounts of additional money on short notice.[42]

10.6.5 MYTH: A national popular vote would diminish moderation in political discourse.

Tara Ross (author of a book[43] defending the current system of electing the President) has asserted:

> "The … thing [people] would notice is the quick disintegration of the two-party system. At first, the wide range of choices on Election Day would be appealing. With so many third-party candidates, every individual may cast his vote exactly as he wishes. Who wouldn't enjoy that? However, multi-party races have rather nasty side effects, including a deeply fractured populace and the possibility that an extremist candidate could win with a small plurality. … The Electoral College … creates incentives for moderation and compromise."[44]

Tellingly, Ross provides no data or other evidence supporting her conjecture about moderation and compromise in political discourse. Indeed, there is no evidence that electing officials on a jurisdiction-wide basis, where every vote is equal within the jurisdiction, diminishes moderation or compromise in political discourse.

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[42] Instant run-off voting combines a run-off into the original election. Instant run-off voting is currently used in about a dozen municipalities. In such elections, voters have the option of indicating their second choice for the office involved (and sometimes additional choices). Information about instant run-off voting is available from www.FairVote.org.

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

[44] *Flash Report*, September 11, 2006.

In almost all states, governors were not elected at the time the U.S. Constitution came into effect in 1789. However, 200 years of actual experience in electing state chief executives has not revealed any widespread lack of moderation in political discourse as a result of the direct popular election of governors. Similarly, almost 100 years of actual experience have not revealed any widespread lack of moderation in electing U.S. Senators. Given this historical record, there is no reason to expect the emergence of some new and currently unknown political dynamic if the President were elected in the same manner as virtually every other public official in the United States.

Moderation is the result of the necessity for a candidate to win the most votes. Candidates attempting to win any election have a strong incentive to capture "the middle" of the electorate. Counting the votes for presidential elector on a nationwide basis (instead of a statewide or district-wide basis) would not make a presidential candidate immoderate.

10.7 MYTHS ABOUT BIG STATES AND BIG CITIES

10.7.1 MYTH: Only the big states would matter under a national popular vote.

Critics of a national popular vote sometimes argue that the smallest 39 states will be ignored in a nationwide vote for President because candidates could win the White House by winning 100% of the popular vote in the 11 largest states (and 0% in the 39 smallest states).

It is true that the 11 most populous states contain 56% of the population of the United States. However, the big states rarely act in concert on any political question. In terms of the 2004 presidential election, five of the 11 largest states voted Republican (Texas, Florida, Ohio, North Carolina, and Georgia) while six voted Democratic (California, New York, Illinois, Pennsylvania, Michigan, and New Jersey).

The notion that any candidate could win 100% of the vote in one group of states and 0% in another group of states is far-fetched. In the 2004 presidential election, the 62% share of the vote that the Republican Party won in Texas was the highest percentage level of popular support among the 11 most populous states. These percentages were (in descending order):

- Texas (62% Republican),
- New York (59% Democratic),

- Georgia (58% Republican),
- North Carolina (56% Republican),
- Illinois (55% Democratic),
- California (55% Democratic),
- New Jersey (53% Democratic),
- Florida (53% Republican),
- Michigan (52% Democratic),
- Pennsylvania (51% Democratic), and
- Ohio (51% Republican).

If anyone is genuinely concerned about the possibility that a candidate could win the Presidency in a nationwide popular vote by winning 100% of the popular vote in the 11 largest states, they should note that the situation is even worse under the current system. Under the current state-by-state winner-take-all system, a candidate could win the Presidency by winning a mere 51% of the popular vote in the 11 largest states. That is, under the current system, it is possible for a candidate to win the Presidency with a mere 26% of the nation's popular votes.

Moreover, the margins generated by any of the nation's largest states are not overwhelming in relation to the 122,000,000 votes cast nationally in 2004. Among the 11 most populous states, the highest margins were generated by the following seven non-battleground states:

- Texas—1,691,267 Republican,
- New York—1,192,436 Democratic,
- Georgia—544,634 Republican,
- North Carolina—426,778 Republican,
- Illinois—513,342 Democratic,
- California—1,023,560 Democratic, and
- New Jersey—211,826 Democratic

To put these numbers in perspective, among the four largest states, the two largest Republican states (Texas and Florida) generated a total margin of 2.1 million votes for George W. Bush in 2004, while the two largest Democratic states generated a total margin of 2.1 million votes for John Kerry.

Moreover, the largest popular vote margins are not necessarily generated by the largest states. For example, Utah (with only 5 electoral votes) generated a margin of 385,000 votes for Bush in 2004—larger than the margin generated for Kerry by New Jersey, the 9th largest state (with 15 electoral votes). Oklahoma (with only 7 electoral votes) alone gener-

ated a margin of 455,000 votes for Bush in 2004—larger than the margin generated by either New Jersey and North Carolina, the 9th and 10th largest states (each with 15 electoral votes).

The most important point is that, under a national popular vote, every vote would be equal. There is nothing special about a vote cast in a big state versus a vote cast anywhere else.

Although Kansas will probably continue to deliver a statewide majority to the Republican presidential candidate in the foreseeable future, a Democratic presidential candidate running under a national popular vote system could not afford to ignore Kansas (as is currently the case). The Democrat would care if he lost Kansas with 37% of the vote, versus 35% or 40%. Similarly, a Republican presidential candidate could no longer ignore Kansas (as is currently the case), because it would matter to him if he won Kansas by 63% or 65% or 60%. Under a national popular vote, a vote gained or lost in Kansas would be just as important as a vote cast anywhere else in the United States.

It is sometimes argued that some states are too small to attract the attention of presidential candidates. However, the reality is that presidential candidates currently go after every vote that matters. For example, even though the 2nd congressional district of Nebraska (the Omaha area) contains less than 1/4% of the nation's population, the Obama campaign operated three separate campaign offices staffed by 16 people in the 2nd district in 2008. Vice-presidential candidate Sarah Palin visited the 2nd district during the post-convention campaign. Both campaigns spent considerable money in the 2nd district. Both campaigns paid attention to the 2nd district because Nebraska awards electoral votes by congressional district, and the 2nd district was closely divided.[45] Needless to say, the Obama and McCain presidential campaigns did not pay the slightest attention to the 1st and 3rd congressional districts of Nebraska because they were not closely divided. They similarly ignored all the congressional districts in the adjacent states of Kansas, Wyoming, and South Dakota.[46] When votes matter (even in an area representing only 1/4% of the

[45] The outcome was that Barack Obama carried the 2nd district by 3,378 votes and won one electoral vote in Nebraska.

[46] In 2004, both presidential candidates visited the 2nd congressional district of Maine (which awards electoral votes by district) when polls briefly suggested that one electoral vote might possibly be in play. Of course, neither campaign paid any attention to nearby Massachusetts, Rhode Island, Vermont, or Connecticut.

nation's population), presidential candidates vigorously solicit those areas for votes. When votes don't matter, they ignore those areas.

Although no one can predict exactly how a presidential campaign would be run if every vote were equal throughout the United States, it is clear that candidates could not ignore voters in any state. The result of a national popular vote would be a 50-state campaign for President. Any candidate ignoring a state would suffer a political penalty there.

10.7.2 MYTH: Only the big cities, such as Los Angeles, would matter under a national popular vote.

The fact is that a candidate cannot even win a statewide election in California by concentrating on Los Angeles. When Ronald Reagan, George Deukmejian, Pete Wilson, and Arnold Schwarzenegger ran for governor, Los Angeles did not receive all the attention, and Los Angeles certainly did not control the election's outcome. Indeed, none of these recent Republican California governors ever carried Los Angeles. There are numerous other examples of Republicans who won races for governor and U.S. Senator in other states that have big cities (e.g., New York, Illinois, Pennsylvania, Michigan, and Massachusetts) without ever carrying the big cities of their respective states. The biggest cities in those states typically voted Democratic, but the suburbs, exurbs, small towns, and rural parts of the states often voted Republican. If big cities controlled the outcome of elections, there would be Democratic governors and U.S. Senators in virtually every state with a big city.

When presidential candidates campaign to win the electoral votes of a closely divided battleground state, the big cities do not receive all the attention, much less control the outcome. Cleveland and Miami certainly did not receive all the attention or control the outcome in Ohio and Florida in 2000 and 2004. The Democrats carried both cities, but the Republicans carried both states.

The fact is that there is nothing special about a vote cast in a big city. When every vote is equal, candidates of both parties know that they must solicit voters throughout the state in order to win the state. A vote cast in a big city is no more (or less) valuable than a vote cast in the suburbs, exurbs, small towns, and rural parts of the state.

It should be noted that the populations of the nation's five biggest cities (New York, Los Angeles, Chicago, Houston, and Philadelphia) together constitute only 6% of the nation's population of approximately

300 million. Even if one makes the far-fetched assumption that a candidate could win 100% of the votes in the nation's top five cities, that candidate would have only 6% of the national popular vote.

The populations of the nation's 25 largest cities together constitute only 12% of the nation's population. To put this group of 25 cities in perspective, Denver is the nation's 25th largest city (with an estimated population of 558,000 in 2005).

The populations of the 50 largest cities together constitute only 19% of the nation's population. Arlington, Texas is the nation's 50th largest city (with an estimated population of 363,000 in 2005).

Further evidence of the way a nationwide presidential campaign would be run comes from the way that national advertisers conduct nationwide sales campaigns. National advertisers seek out customers in small, medium-sized, and large towns of every small, medium-sized, and large state. National advertisers do not advertise only in big cities. Instead, they go after every potential customer, regardless of where the customer is located. National advertisers do not write off a particular state merely because a competitor has an 8% lead in sales. Furthermore, a national advertiser with an 8% edge in a particular state does not stop trying to make additional sales in the state.

10.7.3 MYTH: Candidates would "fly over" most of the country under a national popular vote.

This criticism applies to the current system of electing the President—not a national popular vote.

Under the current system, two-thirds of the states are indeed "fly-over" country. In 2004, the presidential candidates concentrated two-thirds of their campaign visits and money in just five states, 80% in just nine states, and 99% of their money in just 16 states. As early as the spring of 2008, the major political parties acknowledged that there would be only 14 battleground states in 2008.[47] In 2008, candidates concentrated over two-thirds of their campaign events and ad money in just six states, and 98% in just 15 states.[48] Table 10.1 shows the states in which the 2008 presidential and vice-presidential candidates held their 300 post-convention campaign events. The table is organized according to the size of the

[47] "Already, Obama and McCain Map Fail Strategies." *New York Times*, May 11, 2008.

[48] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

Table 10.1 DISTRIBUTION OF CAMPAIGN EVENTS IN 2008 ELECTION

RANK	STATE	ELECTORAL VOTES	CAMPAIGN EVENTS
51	Wyoming	3	
50	District of Columbia	3	1
49	Vermont	3	
48	North Dakota	3	
47	Alaska	3	
46	South Dakota	3	
45	Delaware	3	
44	Montana	3	
43	Rhode Island	4	
42	Hawaii	4	
41	New Hampshire	4	12
40	Maine	4	2
39	Idaho	4	
38	Nebraska	5	
37	West Virginia	5	1
36	New Mexico	5	8
35	Nevada	5	12
34	Utah	5	
33	Kansas	6	
32	Arkansas	6	
31	Mississippi	6	
30	Iowa	7	7
29	Connecticut	7	
28	Oklahoma	7	
27	Oregon	7	

jurisdiction, with the smallest state (Wyoming) shown at the top. Campaign events were held in only six of the 25 smallest jurisdictions (the first half of the table). These events were heavily concentrated in four closely divided battleground states, namely New Hampshire (12 events), New Mexico (8), Nevada (12), and Iowa (7). Campaign events were held in 12 of the largest jurisdictions (the second half of the table). As can be seen, two-thirds of the states were "fly over" country in the 2008 election. The reason that presidential candidates ignore two-thirds of the country under the current system is the state-by-state winner-take-all rule (awarding all of a state's electoral votes to the candidate who receives the most popular votes in each state). Presidential candidates have no reason to poll, visit, advertise in, organize, or pay attention to the concerns of states where they are safely ahead or hopelessly behind. Instead, candi-

Table 10.1 DISTRIBUTION OF CAMPAIGN EVENTS IN 2008 ELECTION (cont.)

RANK	STATE	ELECTORAL VOTES	CAMPAIGN EVENTS
26	Kentucky	8	
25	Louisiana	9	
24	South Carolina	8	
23	Alabama	9	
22	Colorado	9	20
21	Minnesota	10	2
20	Wisconsin	10	8
19	Maryland	10	
18	Missouri	11	21
17	Tennessee	11	1
16	Indiana	11	9
15	Massachusetts	12	
14	Arizona	10	
13	Washington	11	
12	Virginia	13	23
11	New Jersey	15	
10	North Carolina	15	15
9	Georgia	15	
8	Michigan	17	10
7	Ohio	20	62
6	Pennsylvania	21	40
5	Illinois	21	
4	Florida	27	46
3	New York	31	
2	Texas	34	
1	California	55	

dates concentrate their attention on a small handful of closely divided battleground states.

Under the current system, Idaho (with four electoral votes) receives no attention from either party because the Republican candidate has nothing to gain in Idaho, and the Democratic candidate has nothing to lose in Idaho. Although Idaho will continue to deliver a statewide majority to the Republican presidential candidate in the foreseeable future, every vote in Idaho would suddenly matter to both the Democrat and Republican nominee under a national popular vote. It would be folly for the Democratic nominee to write off and ignore Idaho because he would want to narrow his loss there (227,000 votes in 2004) or, failing that, avoid losing Idaho by an even larger margin. Similarly, it would be folly for the Republican nominee to take Idaho for granted because he would want to expand his mar-

gin there or, failing that, maintain his party's historical margin. In short, every vote would matter in Idaho because a vote in Idaho would be as important as a vote anywhere else in the United States.

Under a national popular vote, every vote would be equally important and relevant. There would be nothing special about a vote in a big state or a small state. There would be nothing special about a vote in a big city, suburb, exurb, small town, or rural area.

10.7.4 MYTH: Candidates would only campaign in media markets, while ignoring the rest of the country.

First of all, every person in the United States lives in a media market, including a media market for television, radio, newspapers, magazines, direct mail, billboards, and the Internet. Focusing specifically on television (still the largest single component of spending in presidential campaigns), everyone in the United States has access to television. Thus, no one in the United States will be left out of a presidential campaign because he or she doesn't live in a media market.

People are left out of presidential campaigns, under the current system, because of the state-by-state winner-take-all rule. Candidates have no reason to pay any attention to voters who do not live in closely divided battleground states. Under a national popular vote, every vote would be equal, and every vote would matter.

10.7.5 MYTH: Candidates would concentrate on major metropolitan media markets under a national popular vote.

In *A Critique of the National Popular Vote Plan for Electing the President*, John Samples of the Cato Institute writes:

> "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."[49]

The defect in Sample's argument is that television and radio time are premium-priced in the larger media markets. Television and radio time is

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

far less expensive, on a per-impression basis, in small towns and rural media markets than in larger media markets. It is, for example, considerably more expensive to buy television or radio time to reach Ohio's 11 million people than to buy television or radio time to reach the 11 million people who live in the 12 smallest non-competitive states (i.e., the six "red" states of Alaska, Montana, Idaho, Wyoming, North Dakota, and South Dakota and the six "blue" states of Hawaii, Maine, Vermont, Rhode Island, Delaware, and the District of Columbia).

10.8 MYTH ABOUT THE PUBLIC'S DESIRE FOR "STATE IDENTITY"

10.8.1 MYTH: The public strongly desires to see electoral votes cast on a state-by-state basis because it provides a sense of "state identity."

It is sometimes asserted that "the voters would rebel" if a state's electoral votes were awarded to a candidate who did not carry their own state. This argument is based on the incorrect premise that the voters are devoted and attached to the current system. In fact, the opposite is true. In Gallup polls since 1944, only about 20% of the public have supported the current system of awarding all of a state's electoral votes to the presidential candidate who receives the most votes in each separate state (with about 70% opposed and about 10% undecided). The 2007 *Washington Post*, Kaiser Family Foundation, and Harvard University poll shows 72% support for direct nationwide election of the President. This national result is similar to recent polls in Vermont (75%), Maine (71%), Arkansas (74%), California (70%), Connecticut (73%), Massachusetts (73%), Michigan (73%), Missouri (70%), North Carolina (62%), and Rhode Island (74%), and Washington (77%).[50] Indeed, public support for the current system of electing the President is at the level of Nixon's approval rating just prior to his resignation. In short, most of the public believes that the candidate who receives the most votes should be elected.

When voters watch presidential election returns on election night, they are, first and foremost, interested in finding out which candidate won the Presidency. The question of whether their preferred candidate won their state, county, city, congressional district, or precinct is a sec-

[50] These polls (and many others) are available on National Popular Vote's web site at http://www.nationalpopularvote.com/pages/polls.php#2007WPKHU.

ondary concern. If a voter's preferred candidate loses the White House, it is no consolation that he may have won any particular state.

Certainly, the average voter does not derive any satisfaction, on election night, from knowing that some person from their political party in their area won the essentially ceremonial office of presidential elector. The purpose of a presidential election is to elect someone to serve for four years as the nation's chief executive, not to elect a group of largely unknown loyal party activists who meet for a half hour in the State Capitol in mid-December for the ceremonial purpose of casting electoral votes. Ultimately, the concern that a state's electoral votes might be cast, in some elections, in favor of a candidate who did not carry a particular state is a matter of form over substance.

The essence of a nationwide popular vote for President is that the winner would be determined by the nationwide popular vote, not by the separate state-by-state outcomes. The National Popular Vote law would be an agreement among the states to award their electoral votes to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. It is a method to reform the Electoral College so that it reflects the nationwide will of the people.

There was no voter rebellion in reaction to the enactment by Maine (in 1969) and Nebraska (in 1992) of state laws that permit the awarding of electoral votes in those states to candidate who did not carry the state. There was no voter rebellion in Nebraska after Barack Obama carried the 2nd congressional district (the Omaha area) in the 2008 presidential election. The district system was the choice of the people's elected representatives in Nebraska, and it was the law that governed the conduct of the presidential election in Nebraska for the 2008 election. Nebraska's law operated exactly as advertised by delivering one of the state's electoral votes to the winner of the 2nd district (Obama), despite the fact that another candidate (McCain) carried the state.

More importantly, voters in states that George W. Bush carried in 2000 did not rebel because their state's presidential electors voted for the candidate who did not receive the most votes nationwide. Everyone understood that the state-by-state winner-take-all rule was the law that governed the conduct of the 2000 presidential election. Bush won the Presidency by winning a majority of the electoral votes (one more than the 270 needed) in an election where everyone involved knew the rules of the game.

Similarly, there will not be a voter rebellion if a state legislature responds to the wishes of 70% of its own voters and enacts a law providing that the presidential candidate receiving the most votes in all 50 states and the District of Columbia will win the Presidency. The presidential campaign will be conducted with both candidates and voters knowing that this is the law.

For those concerned about "state identity," official election returns showing the popular vote for President will continue to be published (as required by existing federal law), so the information as to which presidential candidate carried a particular state will be known to all.

The purpose of the National Popular Vote bill is to eliminate the state-by-state awarding of electoral votes and instead award a majority of the nation's electoral votes to the candidate who receives the most votes in all 50 states and the District of Columbia. It is the current state-by-state awarding of electoral votes that permits a second-place candidate to win the White House. It is the current state-by-state system that makes votes unequal in presidential elections. It is the current state-by-state system that makes two-thirds of the states politically irrelevant in presidential elections. Under the winner-take-all rule, candidates have no reason to poll, visit, advertise, organize, or pay attention to the concerns of states where they are comfortably ahead or hopelessly behind. Instead, candidates concentrate their attention on a small handful of closely divided battleground states. This means that voters in two-thirds of the states are ignored in presidential elections. In 2004, candidates concentrated over two-thirds of their money and campaign visits in five states; over 80% in nine states; and over 99% of their money in 16 states. In 2008, candidates concentrated over two-thirds of their campaign events and ad money in just six states, and 98% in just 15 states,[51]

Under the National Popular Vote plan, the focus of the media in the months prior to a presidential election will be on polls of the national popular vote, not on state-by-state polls from a small handful of closely divided battleground states. The concept of "battleground" state will be obsolute because every vote will be equally important throughout the country.

Under the current system, voters in two-thirds of the states are not relevant in presidential elections; a second-place candidate may occupy the White House; and every vote is not equal. Ultimately, the choice is

[51] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

whether it is more important for the winner in a particular state to receive the state's electoral votes or for the winner of the entire country to win the White House.

10.9 MYTHS ABOUT POST-ELECTION CHANGES IN THE RULES

10.9.1 MYTH: A Secretary of State might change a state's method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December.

The following concern has been raised on various blogs concerning the National Popular Vote bill:

> "In 2004 George Bush won a majority of the votes nationwide, but John Kerry came within something like 60,000 votes in Ohio of winning the Electoral College while losing the popular vote. Say Kerry won those 60,000 votes in Ohio, and the NPV program was in place with California a signer. In that entirely plausible scenario, does anyone think California's (Democratic) Secretary of State, representing a state that Kerry won by a 10% margin (54%–44%), would actually certify George Bush's slate of electors and personally put George Bush over the top for re-election, as the NPV agreement would have required?"[52]

The method of awarding electoral votes in each state is controlled by the state's election law—not the personal political preferences of the Secretary of State. A Secretary of State may personally think that electoral votes should be allocated by congressional district, in a proportional manner, by the winner-take-all rule, or by a national popular vote; however, the role of the Secretary of State in certifying the winning slate of presidential electors is entirely ministerial.

The National Popular Vote compact is, first of all, a state law. It is a state law that would govern the manner of choosing presidential electors. A Secretary of State may not ignore or override the National Popular Vote law any more than he or she may ignore or override the winner-take-all rule that is currently the law in 48 states.

In the unlikely and unprecedented event that a Secretary of State were to attempt to certify an election using a method of awarding elec-

[52] *Election Law Blog*, July 31, 2008.

toral votes different from the one specified by state law, a state court would immediately prevent the Secretary of State from violating a law's provisions (by injunction) and compel the Secretary of State to execute the provisions of the law (by mandamus).

There were 10 states[53] that George W. Bush carried in the 2000 presidential election with a Democratic Secretary of State (or chief elections official).[54] The electoral votes of *any one* of these 10 states would have been sufficient to give Al Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes).[55] Seventy percent or more of voters in each of these 10 states (and, indeed, the rest of the country) supported the proposition that the candidate who receives the most popular votes in all 50 states and the District of Columbia should become President. Nonetheless, it can be safely stated that it did not even occur to any of these 10 Democratic Secretaries of State to attempt to ignore and override their states' laws by certifying the election of Democratic presidential electors in their states. Such a post-election change in the rules of the game would not have been supported by the public, would immediately have been nullified by a state court, and almost certainly would have led to the subsequent impeachment of any official attempting it.

Moreover, in any one of nine[56] of these states, awarding electoral votes proportionally would have been sufficient to give Al Gore enough electoral votes to become President. A proportional allocation of electoral votes would have, indisputably, represented the will of the people of each of these nine states more accurately than the state-level winner-take-all rule.

In addition, in any one of three[57] (of these same nine states), awarding electoral votes by congressional districts would have been sufficient to give Al Gore enough electoral votes to become President. A district allocation of electoral votes arguably would have represented the will of

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[53] Al Gore's home state of Tennessee, Alaska, Arkansas, Georgia, Kentucky, Mississippi, Missouri, New Hampshire, North Carolina, and West Virginia.

[54] In Alaska, there is no Secretary of State and the Lieutenant Governor is the state's chief elections official.

[55] George W. Bush received 271 electoral votes in 2000 (including Florida's 25 electoral votes), and 270 electoral votes are required for election.

[56] All of those previously mentioned except Alaska.

[57] Georgia, Missouri, and North Carolina.

the people of each of these three states more closely than the winner-take-all rule.

There has also been speculation that a Secretary of State might be "vilified" by certifying the election of the national popular vote winner. Under the National Popular Vote legislation, a dilemma has been hypothesized as to

> "whether the Secretary of State would really certify the losing panel of electors from the state in question, or find some justification to send the panel actually elected by the voters in the state. That's a very tough call and near-certain political vilification, either way, for the Secretary of State."[58]

Of course, it is not a "tough call" at all. There is no call to make. The Secretary of State is a ministerial official whose actions are directed and controlled by state law. If 70% of the voters in a state prefer that the President be elected by a national popular vote, and if a state legislature enacts the National Popular Vote bill in response to the strong desires of the state's voters, and if the presidential campaign is then conducted with both voters and candidates knowing that the National Popular Vote bill is going to govern the election in that state, then the voters are not going to complain, much less vilify, the Secretary of State who faithfully executes the state's law.

Aside from the legal issues, the hypothesized scenario presupposes that the people heavily support the currently prevailing winner-take-all rule. In fact, public support for the current system of electing the President is at the level of Nixon's approval rating just prior to his resignation.

In short, the hypothesized scenario has no basis in law and certainly no basis in political reality.

10.9.2 MYTH: A state legislature might change a state's method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December.

A state legislature cannot, under either the current system or the National Popular Vote plan, change the state's method of awarding its electoral votes during the five-week period between the day when the people cast their votes for President in early November and the day

[56] *Election Law Blog*, November 13, 2007.

when the Electoral College meets in mid-December. However, if anyone is concerned about this kind of hypothetical post-election maneuver, the National Popular Vote bill offers even more protection against post-election mischief than the current system does.

We first discuss why the hypothesized post-election maneuver is illegal under existing federal law. We later discuss the additional protection that the National Popular Vote bill provides against this hypothetical problem.

In order to implement the hypothesized post-election maneuver, a state legislature would have to

> (1) repeal the state's existing state law for appointing its presidential electors, and then
>
> (2) enact a new state law for appointing the electors.

To make the discussion concrete, consider the 2000 presidential election. North Carolina was one of three states that Republican George W. Bush carried, in which the Democrats controlled the governorship and both houses of the state legislature.[59] Bush carried North Carolina by a 56%–44% margin. Hypothetically, the North Carolina legislature might have convened in mid-November 2000, repealed the state's pre-existing winner-take-all rule (that was poised to award North Carolina's 14 electoral votes to Bush), and then passed a new law awarding the state's electoral votes in any one of three different ways:

- proportionally,
- by congressional district, or
- in accordance with the nationwide popular vote.

Any of these three possible changes would have given Al Gore more than enough electoral votes to win a majority of the Electoral College (even after Bush was awarded all 25 electoral votes from Florida).

In this hypothetical scenario, the legislature might have argued that a proportional or district allocation of electoral votes more accurately reflected the will of the people of North Carolina than the winner-take-all rule. Alternatively, the legislature could have taken a poll and cited the fact that the overwhelming majority of people in North Carolina (and the rest of the country) agreed with the proposition that the candidate who receives the most votes for President on a nationwide basis should win the White House.

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[59] Arkansas and West Virginia were the other two states.

The above hypothetical scenario did not occur, because it would have been illegal under existing law. This existing law applies, with equal force, to both the current system and the National Popular Vote bill.

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."[60] [Spelling as per original]

Based on this authority, Congress enacted a law in 1845 (now section 1 of title 3 of the United States Code) specifying that a state must appoint its presidential electors on *one particular day* in every four-year period:

> "The electors of President and Vice President **shall be appointed, in each State, on the Tuesday next after the first Monday in November,** in every fourth year succeeding every election of a President and Vice President."[61] [Emphasis added]

That is, the Tuesday after the first Monday in November (which most people call "Election Day") is the single day during each four-year period on which it is permissible to appoint presidential electors. Thus, it would not have been legal for the North Carolina legislature to meet after Election Day to repeal the state's existing winner-take-all rule and enact a different way to appoint the state's presidential electors.

In addition, the "safe harbor" section (section 5 of title 3 of the United States Code) treats a state's appointment of presidential electors as "conclusive" only if the appointment is based on

> "laws enacted **prior to the day fixed for the appointment of the electors.**" [Emphasis added]

That is, presidential electors can only be appointed under a law that was in effect prior to Election Day (the Tuesday after the first Monday in November). Thus, it would not have been legal for the North Carolina legislature to meet after Election Day and change the law specifying the manner of appointing presidential electors.

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[60] U.S. Constitution. Article II, section 1, clause 4.

[61] The original law, enacted on January 23, 1845, is now of section 1 of title 3 of the United States Code.

Because of sections 1 and 5, no state legislature may change the rules of the game after Election Day but before the meeting of the Electoral College.

It is true that there have been occasions when this type of post-election maneuver has been discussed in the heat of political battle; however, because of the obvious illegality of the maneuver, no state legislature has actually attempted this maneuver. For example, in 1960, Kennedy won the nationwide popular vote by 114,673 votes. However, his majority in the Electoral College depended on the fact that he had carried Illinois by 4,430 popular votes and South Carolina by 4,732 votes. Some members of the South Carolina legislature suggested that the legislature ignore the popular vote in their state, repeal the state's winner-take-all law for awarding electoral votes, and then appoint non-Kennedy presidential electors. Nothing came of a similar post-election suggestion that the Florida legislature directly appoint the state's presidential electors in 2000 while a recount was being conducted in the state.

However, if anyone is genuinely concerned about the possibility of a state legislature changing the rules of the game after the people vote on Election Day, the National Popular Vote compact offers even more protection than the current system because it is an interstate compact.

Like most interstate compacts, the National Popular Vote compact would permit a state to withdraw from the compact (i.e., repeal the law by which the state joined the compact).[62]

Almost all compacts that permit withdrawal impose a delay on the effective date of any withdrawal. The reason for the delay is that almost all compacts contain obligations that a member state would never have agreed to unless it could rely on the enforceability of the obligations undertaken by the other states that are party to the compact. Each member state must have time (and sometimes other types of compensation) to adjust its behavior if another state desires to withdraw.

Thus, the National Popular Vote compact imposes a delay on the effectiveness of any withdrawal. Clause 2 of article IV of the National Popular Vote compact provides:

> "Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before

[62] Interstate compacts that settle boundary disputes and intended to be permanent and do not contain any provision for withdrawal.

> 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."

That is, no withdrawal from the National Popular Vote compact can become effective between July 20 of a presidential election year and the inauguration on January 20 of the following year. This six-month "blackout" period was chosen because it encompasses six important events relating to presidential elections, namely, the national nominating conventions, 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, the counting of the electoral votes by Congress on January 6, and the inauguration of the President and Vice President for the new term on January 20.

Although it is true that a state legislature may not, by an ordinary statute, bind the hands of a future legislature, an interstate compact does bind future legislatures until such time as the state withdraws from the compact in accordance with the compact's terms. In fact, an interstate compact is among the few ways by which to tie the hands of a future state legislature. The reason is that an interstate compact is a contract. Withdrawal from any contract may only be made in accordance with the contract's own terms. It is settled law that, once passed, an interstate compact takes precedence over all existing *or future* state laws until a state withdraws from the compact under the terms provided in the compact. The reason that the state legislature is bound to the terms of an interstate compact is the Impairments Clause of the U.S. Constitution (article I, section 10, clause 1):

> "No State shall … pass any … Law impairing the Obligation of Contracts."[63]

The Council of State Governments summarizes the nature of interstate compacts as follows:

> "Compacts are agreements between two or more states that bind them to the compacts' provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law

[63] U.S. Constitution. Article I, section 10, clause 3.

> and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).
>
> "That means that compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not), and they take precedence over conflicting state laws, regardless of when those laws are enacted.
>
> "However, unlike treaties, compacts are not dependent solely upon the good will of the parties. Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves. Moreover, Congress and the courts can compel compliance with the terms of interstate compacts."[64]

There has never been a court decision allowing a state to withdraw from an interstate compact without following the procedure for withdrawal specified by the compact. Indeed, courts have consistently 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:*

> "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."[65]

In 1999, the Commonwealth Court of Pennsylvania stated 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 nul-

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

[65] 414 F.Supp. 408 at 409.

> lify, revoke, or amend one of its compacts if the compact does not so provide."[66]

In 1952, the U.S. Supreme Court very succinctly addressed the issue in *Petty v. Tennessee-Missouri Bridge Commission:*

> "A compact is, after all, a contract."[67]

The important point is that an interstate compact is not a mere "handshake" agreement.[68] If a state wants to rely on the goodwill and graciousness of other states to follow certain policies, it can simply enact its own state law and hope that other states decide to act in an identical manner. If a state wants a legally binding and enforceable mechanism by which it agrees to undertake certain specified actions only if other states agree to take other specified actions, it enters into an interstate compact.

Interstate compacts are supported by over two centuries of settled law guaranteeing enforceability. Interstate compacts exist because the states are sovereign. If there were no Compacts Clause in the U.S. Constitution, a state would have no way to enter into a legally binding contract with another state. The Compacts Clause, supported by the Impairments Clause, provides a way for a state to enter into a contract with other states and be assured of the enforceability of the obligations undertaken by its sister states. The enforceability of interstate compacts under the Impairments Clause is precisely the reason why sovereign states enter into interstate compacts. Without the Compacts Clause and the Impairments Clause, any contractual agreement among the states would be, in fact, no more than a handshake.

The above legal constraints are sufficient to prevent the hypothesized change in the rules of the game after the people have cast their votes in early November. However, state constitutional provisions in conjunction with practical politics provide additional constraints.

The hypothesized post-election maneuver would be a partisan maneuver of the most extreme and unprecedented nature. It would be opposed, in the most vigorous fashion, by state legislators and governors belonging to the opposing political party.

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[66] 729 A.2d. 1254 at 1257, note 10.

[67] 395 U.S. 275 at 285

[68] The enforceability of interstate compacts is discussed in chapter 5. As claimed by Douglas Johnson, a Fellow at the Rose Institute of State and Local Government. *Election Law Blog*, July 31, 2008.

Most state legislatures are not in session during November. In most states, the governor must issue a call to convene the state legislature into a special session.[69] Manifestly, a governor belonging to the political party that would be damaged by this hypothesized post-election maneuver would not even consider issuing a call to convene the legislature for this purpose. However, even if a legislature were in session immediately after the November election, there are numerous obstacles that would serve to frustrate action during the brief five-week period between Election Day and the meeting of the Electoral College in mid-December.

First, the hypothesized post-election maneuver could only be contemplated in a state where one party has "three-way" control of the state government (i.e., both houses of the legislature plus the governorship). In states with divided political control, there would be no possibility of passing partisan legislation to change a state's method of awarding its electoral votes. At any given time, three-way control exists in only about 40% to 50% of the states.[70] For example, in 2008, this degree of single-party control existed in only 23 states. Thus, there would be no possibility in any of these 23 states of passing partisan legislation to change the state's method of awarding its electoral votes.

In three states (Texas, Oregon, and Indiana), there is a two-thirds quorum requirement for the legislature. In 2008, no political party controls both houses of the legislature of these states by a two-thirds margin. Thus, there would be no possibility in these states of passing partisan legislation to change the state's method of awarding its electoral votes.

In 13 additional states, state constitutional provisions specify that new state laws do not take effect until 60 days (or more) after being signed by the governor. However, there are only five weeks between the November election and the mid-December meeting of the Electoral College. The only exception to this constitutionally specified delay of 60 (or more) days in these states is if the law is passed as an "emergency bill" by a super-majority (two-thirds, three-quarters, or four-fifths, depending on the state). No political party possesses these lofty super-majorities in any of these states. Thus, there would be no possibility in these states of

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[69] In a few states, the chamber leadership may call the legislature into session. In a few other states, the legislature technically remains in session virtually all year, subject to the call of its leaders.

[70] Dubin, Michael J. 2007. *Party Affiliations in the State Legislatures: A Year By Year Summary, 1796-2006.* Jefferson, NC: McFarland & Company.

passing partisan legislation to change the state's method of awarding its electoral votes.

The above factors (i.e., absence of three-way control, quorums, and delays in the effective date of newly passed legislation) would, at any given moment, prevent about three-quarters of the states from even contemplating the hypothesized post-election maneuver.

The above discussion leaves 14 states where the hypothesized post-election maneuver would be theoretically possible (assuming that federal law and the Impairments Clause of the U.S. Constitution permitted the maneuver in the first place). At the present time, these 14 states are Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Massachusetts, New Hampshire, North Carolina, Rhode Island, South Carolina, West Virginia, and Wyoming.

However, this group of 14 states would be immediately winnowed down by about 75%—that is, to a group of only about four states. The reasons are that the maneuver would be entirely pointless in states where

> (1) the partisan political preference of the state legislature and governor happens to coincide with the choice already made by the voters, or
>
> (2) the National Popular Vote compact has not been enacted in that particular state.

Roughly half of the 14 states would be winnowed out because they belong to the first category, and about half of the remaining states would be winnowed out because they belong to the second category. Therefore, the hypothesized post-election maneuver would be theoretically possible in only about four states.

This small group of roughly four states would be further winnowed down because of the numerous delaying tactics that are available to the minority of a state legislature when it vigorously opposes pending legislation. These delaying tactics including filibusters, advance notice requirements, lay-over requirements,[71] committee quorums, and floor

[71] For example, in some states (e.g., Michigan), the state constitution requires that every legislative bill be printed and "lay over" for five calendar days before the legislature may consider it.

quorums. The minority party would, in this kind of extreme and unprecedented situation, demand strict adherence to procedural rules that are, under normal circumstances, often waived to expedite legislative activity. Thus, in actual practice, the minority party would succeed, in at least some of these four states, in frustrating legislative action during the extremely short five-week interval between the November election and the mid-December meeting of the Electoral College.

Of course, all of the above discussion about state constitutional provisions and legislative procedure is based on the incorrect assumption that federal law and the Impairments Clause of the U.S. Constitution permit the hypothesized withdrawal maneuver in the first place.

Finally, the hypothesized post-election maneuver would be politically improbable in the real world. There would be virtually no public support for changing the "rules of the game" after a presidential campaign had been conducted under pre-existing laws and after the people of the state had cast their votes on Election Day. Over 70% of the American public has held the position, since the 1940s, that the President should be elected by a national popular vote. Tellingly, in 2000, the American people accepted the ascendancy of a second-place candidate to the Presidency, because everyone acknowledged that the state-by-state winner-take-all rule was the law that governed the 2000 presidential election. In 2000, the public supported "playing by the rules" even though 70% of the public disapproved of the rules. The notion that elected governors and legislators would try to change the "rules of the game" to frustrate a national popular vote enacted into law in their own states is a parlor game that is devoid of any connection to political reality.

In summary, the hypothesized post-election maneuver is an inappropriate basis for criticizing the National Popular Vote compact because it handles this theoretical situation in a manner that is superior to the current system. The National Popular Vote compact relies on the Impairments Clause, two existing provisions of federal law, and the state constitutional restraints. The current system relies only on three of these four factors.

For additional information about the details of operation of the National Popular Vote bill and the issue of withdrawal from interstate compacts, see chapters 5, 6, and 8 of this book.

10.10 MYTH ABOUT CAMPAIGN SPENDING

10.10.1 MYTH: Campaign spending would skyrocket if candidates had to campaign throughout the country.

The amount of money that a presidential campaign can spend is determined by the amount of money that is available—not by the virtually unlimited number of places where money might be advantageously spent.

Currently, presidential campaigns try to raise as much money as possible from their sources of funding. They raise money nationally from closely divided battleground states as well as spectator states. After determining the amount of money that is available to be spent, the candidate engages in a resource-allocation process in order to decide how to spend the money most advantageously. The amount of money that is spent is not determined by the virtually unlimited number of spending opportunities, but on the amount of money that is available to be spent.

Under the current system, about two-thirds of the money raised in the 2004 presidential campaign was spent in five closely divided "battleground states." About 80% was spent in just nine states, and 99% was spent in just 16 states. As early as the spring of 2008, major political parties acknowleged that there would be only 14 battleground states in 2008.[72] In 2008, candidates concentrated over two-thirds of the campaign events and ad money in just six states, and 98% in just 15 states.[73] Under the current system, candidates concentrate their spending in the handful of closely divided battleground states because they have no reason to pay any attention to the two-thirds of the states where they are safely ahead or hopelessly behind.

The National Popular Vote plan does not increase the total number of dollars that is available. It does make every vote in all 50 states and the District of Columbia equally valuable. Thus, candidates will spend whatever amount of money that they can raise far differently from the way they do under the current system. It can be safely predicted that money will be allocated more evenly throughout the United States because every vote in every state will matter. As always, the total amount that is spent will be constrained by the total amount of money that is available from the candidate's nationwide network of donors and other sources. An

[72] "Already, Obama and McCain Map Fail Strategies." *New York Times*, May 11, 2008.

[73] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

increased list of geographical places where a candidate might spend money does not, in itself, increase the amount of money that is available.

10.11 MYTH ABOUT FEDERALISM

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

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

John Samples has argued 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."[74]

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."[75]

However, the National Popular Vote bill is not concerned with how much power state governments possess relative to the federal government. The powers of state governments are neither increased nor decreased based on whether presidential electors are selected along the state boundary lines (as is currently the case in 48 states), along district

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

[75] 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.

boundary lines (as is currently the case in Nebraska and Maine), or national lines (as would be the case under the National Popular Vote bill).

When the Founding Fathers from Virginia, Massachusetts, and North Carolina returned from the Constitutional Convention and organized the first presidential election in their respective states in 1789, they certainly did not undermine federalism when they chose to elect their state's presidential electors by district (as opposed to a statewide basis). Similarly, the powers of the Virginia, Massachusetts, and North Carolina state governments were not strengthened relative to the federal government when these states subsequently decided to switch to the winner-take-all rule for awarding their electoral votes.

Surely no one would argue that Nebraska and Maine reduced the powers of the their state governments relative to the federal government when they decided (in 1992 and 1969, respectively) to award electoral votes by congressional district.

There is no connection between the issue of the way power is, or should be, distributed between the state and federal government and the boundary lines used to tally votes for presidential electors.

There may be some truth to the statement that presidential candidates were more attuned to the wishes of state legislators in the distant past when many state legislatures directly appointed presidential electors. However, the last time when presidential electors were chosen by a state legislature was 1876.[76] Since then, the voters have chosen all presidential electors. Thus, whatever boost to federalism that may have occurred historically as a consequence of appointment of presidential electors by state legislatures disappeared after 1876. We know of no one who is today advocating that state legislatures replace the people in voting for President.

[76] Between 1836 and 1860, South Carolina was the only state whose legislature appointed the state's presidential electors. This practice ended in 1860. During Reconstruction, the Florida legislature appointed presidential electors in 1868. When Colorado was admitted to the Union in 1876, the state legislature appointed the state's presidential electors for the 1876 election. The 1876 Colorado Constitution contained a specific provision prohibiting the legislature from appointing electors in the future.

10.12 MYTH ABOUT "A REPUBLIC VERSUS A DEMOCRACY"

10.12.1 MYTH: A national popular vote is inconsistent with the concept that the United States is a republic, not a democracy.

In a republic, the citizens do not rule directly but, instead, elect officeholders to represent them and conduct government business in the period between elections. In the United States, legislation is crafted by officeholders who serve for a term of two years (in the U.S. House of Representatives) or six years (in the U.S. Senate), and the executive branch is run by a 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 elected officeholders.

The division of power between the citizenry and elected officeholders is not affected by the boundaries of the region used to tally popular votes in choosing presidential electors. The United States is neither less nor more a "republic" based on whether presidential electors are selected along state boundary lines (used by 48 states), along district lines (used by Maine and Nebraska), or on a nationwide basis.

The meaning of the word "republic" and the phrase "Republican form of government" can be ascertained by examining the one place in the U.S. Constitution that makes reference to a "Republican form of government."

> "The United States shall guarantee to every State in this Union a Republican Form of Government."[77]

Direct popular election of the chief executive is not prohibited by the phrase "Republican form of government." State governors were selected by state legislatures when the U.S. Constitution was written. Today, the governor of every state is elected by a direct popular vote. No one has ever argued that the states denied their citizens a "Republican form of government" when they switched to direct popular election of their chief executives. No one has ever argued that the federal government should have invoked the Guaranty Clause and intervened (militarily or otherwise) to prevent the states from electing their chief executives by popular vote.

The question of whether the United States is, or is not, a "republic" has no connection with the issue of whether its chief executive is elected under the statewide winner-take-all system (i.e., awarding all of a state's

[77] U.S. Constitution. Article IV, section 4.

electoral votes to the candidate who receives the most popular votes in each separate state), under a district system, or a national popular vote system (in which the winner is the candidate receiving the most popular votes in all 50 states and the District of Columbia).

10.13 MYTHS ABOUT "MOB RULE"

10.13.1 MYTH: A national popular vote would be "mob rule" and a "popularity contest."

Although state legislatures frequently chose presidential electors in the nation's early years, the last time when presidential electors were chosen by a state legislature was the 1876 election. Thus, if anyone thinks it is appropriate to characterize the American electorate as a "mob," it is now a long-settled fact that the "mob" rules in presidential elections. Similarly, if anyone wishes to characterize our nation's elections as a "popularity contest," it is a long-settled fact that presidential elections are "popularity contests."

The National Popular Vote bill is not concerned with the long-settled question of whether the people should be permitted to vote for President. The bill is concerned with whether popular votes are tallied on a state-by-state basis versus a nationwide basis. The currently prevailing winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular vote in a state) makes popular votes unequal from state to state. The National Popular Vote bill is concerned with the relative political importance of popular votes cast in different states for presidential electors. Under the current system, presidential candidates concentrate their attention on voters from a small handful of closely divided battleground states, while ignoring voters in the vast majority of the states. The National Popular Vote bill would address this shortcoming of the current system by making every vote equally important throughout the United States. Thus, the issue presented by the National Popular Vote bill is not whether the "mob" will vote for President, but whether the "mobs" in closely divided battleground states are more equal than others.

10.13.2 MYTH: The Electoral College acts as a buffer and damper against popular passions.

The Founding Fathers intended that the Electoral College would consist of "wise men" who would deliberate on the choice of the President and

select the best candidate. They also thought that the Electoral College would provide a buffer against the will of the people. However, neither of these visions was realized in practice because the Founding Fathers did not anticipate the emergence of political parties and competitive presidential elections.

Political parties emerged as soon as George Washington announced that he would not run for a third term in 1796. The competition for power was between the Federalist party (represented by John Adams) and the anti-Federalist party (represented by Thomas Jefferson). Both the Federalist and anti-Federalist parties nominated their presidential and vice-presidential candidates at a national meeting composed of the party's members of Congress. As soon as there were national nominees, both parties presented the public with candidates for the position of presidential elector. These elector candidates made it known that they intended to act as willing "rubberstamps" for their party's nominees when the Electoral College met. All but one of the presidential electors then dutifully voted as expected when the Electoral College met in 1796. The expectation that presidential electors should "act" and not "think" was thus established in the 1796 election,[78] and this expectation has persisted to this day. Of the 21,915 electoral votes cast for President in the nation's 55 presidential elections, only 11 were cast in an unexpected way.[79]

The fact is that the Electoral College never acted as a buffer or damper against popular passions under the current system.[80] Likewise, the Electoral College will not act as a buffer or damper against popular passions under the National Popular Vote plan. The National Popular Vote bill concerns how popular votes are tallied (statewide versus nationwide). The National Popular Vote bill would operate in the context of a system in which the people vote directly for presidential electors in all

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[78] A Federalist supporter famously complained in the December 15, 1796, issue of *United States Gazette* that Samuel Miles, a Federalist presidential elector, had voted for Thomas Jefferson, instead of John Adams, by saying, "What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, I chufe him to act, not to think."

[79] As explained in greater detail in section 2.12 of this book, the vote of Federalist elector Samuel Miles for Anti-Federalist Thomas Jefferson in 1796 remains the only instance when the elector might have intended, at the time he cast his unexpected vote, that his vote might affect the national outcome.

[80] The Electoral College did not act as a buffer against popular passions in the nation's first two presidential elections (1789 and 1792) because George Washington was the consensus candidate.

the states and the presidential electors cast their votes in accordance with the will of the voters who elected them.

10.14 MYTH ABOUT AN INCOMING PRESIDENT'S "MANDATE"

10.14.1 MYTH: The current winner-take-all system gives the incoming President a "mandate" in the form of an exaggerated lead in the Electoral College.

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."[81]

It is doubtful whether the Congress, the public, the media, or anyone else is more deferential to an incoming President after an election in which he receives a larger electoral-vote margin than his actual popular-vote margin. Clinton did not receive such deference in 1992.

However, if anyone believes that an exaggerated margin increases "confidence" or enhances the "ability to lead," the National Popular Vote plan would do an even better job of creating this kind of exaggerated margin than the current system.

Under the National Popular Vote compact, the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College in any given presidential election. The reason is that the National Popular Vote bill guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will receive at least 270 electoral votes (of 538) from the states belonging to the compact. Then, in addition to this bloc of at least 270 electoral votes, the nationwide winning candidate would generally receive some additional electoral votes from whichever non-compacting states he happened to carry. Because the non-compacting states would likely be divided approximately equally between the candidates,

[81] 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.

the nationwide winning candidate would generally receive an exaggerated margin (roughly 75%) of the votes in the Electoral College.

The current system does not reliably deliver an exaggerated margin to the incoming President. Despite winning by almost two million votes nationwide, Jimmy Carter won the Electoral College by only a 297–240 margin in 1976. Despite winning by over 3.5 million votes in 2004, George W. Bush won the Electoral College by only a 286–252 margin.

Of course, the current system often does more than just exaggerate an incoming President's margin in the Electoral College as compared to his margin in the nationwide popular vote. In four out of the nation's 55 presidential elections, the current system has actually awarded the Presidency to a candidate who did not receive the most popular votes nationwide. This is a failure rate of 1 in 14. Moreover, because about half of American presidential elections are popular-vote landslides (i.e., a margin of greater than 10% between the first- and second-place candidates), the failure rate is actually 1 in 7 among non-landslide elections.

10.15 MYTHS ABOUT INTERSTATE COMPACTS AND CONGRESSIONAL CONSENT

10.15.1 MYTH: Interstate compacts are exotic and "fishy."

The National Popular Vote plan is an interstate compact—a type of state law that is explicitly authorized by the U.S. Constitution to enable otherwise sovereign states to enter into legally enforceable contractual obligations with one another.

There are hundreds of major interstate compacts. Examples of interstate compacts include the Colorado River Compact (allocating water among seven western states), the Multi-State Tax Compact (whose membership includes 23 states and the District of Columbia), the Interstate Oil and Gas Compact, the Interstate Corrections Compact, the Mutual Aid Compact, the Great Lakes Basin Compact, the Port Authority of New York and New Jersey (a two-state compact), and the Multi-State Lottery Compact (which operates the Power Ball lotto game in 21 states). Numerous other compacts are listed in Appendix M of this book. Some compacts include all 50 states and the District of Columbia. Interstate compacts existed under the Articles of Confederation, and the U.S. Constitution explicitly continued compacts that were in existence when the Constitution came into force.

Interstate compacts are legally enforceable on the states because the U.S. Constitution requires a state to honor all commitments that it makes in an interstate compact. The Impairments Clause of the U.S. Constitution provides:

> "No State shall … pass any … Law impairing the Obligation of Contracts."[82]

The Council of State Governments summarizes the nature of interstate compacts as follows:

> "Compacts are agreements between two or more states that bind them to the compacts' provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).
>
> "That means that compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and they take precedence over conflicting state laws, regardless of when those laws are enacted.
>
> "However, unlike treaties, compacts are not dependent solely upon the good will of the parties. Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves. Moreover, Congress and the courts can compel compliance with the terms of interstate compacts."[83]

For additional information about interstate compacts, see chapter 5 of this book.

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[82] U.S. Constitution. Article I, section 10, clause 1.

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

10.15.2 MYTH: The National Popular Vote compact is defective because Congress did not consent to the compact prior to its consideration by state legislatures.

Advance congressional consent is not the norm in the field of interstate compacts. Congress typically considers a compact only after the compact has been approved by the combination of states required to bring the compact into effect. The occasions on which Congress has given advance consent to a compact are relatively rare.[84]

10.15.3 MYTH: The National Popular Vote compact is defective because it fails to specifically mention Congress in its text.

As a matter of practice, most modern-day compacts do not specifically mention congressional consent, regardless of whether the states involved intend to seek it.

There have been compacts (e.g., the Port Authority of New York and New Jersey) where the states involved originally did not intend to seek congressional consent at the time that they entered into the compact, but then later decided to seek it (and received it).

Conversely, there have been compacts where the states involved sought congressional consent, but, when the states discovered that they could not obtain congressional consent, they then implemented the compact without congressional consent. The Multistate Tax Compact, which was upheld by the U.S. Supreme Court in the leading recent case on congressional consent (section 10.15.4 of this book), is an example of such a compact.

10.15.4 MYTH: The National Popular Vote compact requires congressional consent to become effective.

Congressional consent is not required for the National Popular Vote compact under prevailing U.S. Supreme Court rulings. However, because there would undoubtedly be time-consuming litigation about this aspect

[84] In 1910, Congress gave its consent in advance to four states (Illinois, Indiana, Michigan, and Wisconsin) to enter into an agreement with respect to the exercise of jurisdiction "over offenses arising out of the violation of the laws" of these states on the waters of Lake Michigan. In 1934, Congress consented in advance to interstate crime control compacts in the Crime Control Consent Act of 1934.

of the compact, National Popular Vote is working to introduce a bill in Congress for congressional consent.[85]

The U.S. Constitution provides:

> "No state shall, without the consent of Congress,… enter into any agreement or compact with another state…."[86]

Although this language may seem straight forward, the U.S. Supreme Court has ruled, in 1893 and again in 1978, that the Compacts Clause can "not be read literally." In deciding the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*,[87] 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*.[88] His conclusion [was] that the Clause could not be read literally [and this 1893 conclusion has been] approved in subsequent dicta."[89]

Specifically, the Court's 1893 ruling in *Virginia v. Tennessee* stated:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, **it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.**"[90] [Emphasis added]

The state power involved in the National Popular Vote compact is specified in Article II, Section 1, Clause 2 the U.S. Constitution:

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[85] Congressional consent to an interstate compact can be conferred by a majority vote in both the U.S. House and Senate with approval of the President (or enactment by a two-thirds majority if the President vetoes the bill).

[86] U.S. Constitution. Article I, section 10, clause 3.

[87] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. 1978.

[88] *Virginia v. Tennessee.* 148 U.S. 503. 1893.

[89] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459. 1978.

[90] *Virginia v. Tennessee.* 148 U.S. 503 at 519. 1893.

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[91]

In the 1892 case of *McPherson v. Blacker* (146 U.S. 1), the Court wrote:

> "The appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States"[92] [Emphasis added]

The National Popular Vote compact would not "encroach upon or interfere with the just supremacy of the United States" because there is simply no federal power—much less federal supremacy—in the area of awarding of electoral votes in the first place.

In the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*, the compact at issue specified that it would come into force when seven or more states enacted it. The compact was silent as to the role of Congress. The compact was submitted to Congress for its consent. After encountering fierce political opposition from various business interests concerned about the more stringent tax audits anticipated under the compact, the compacting states proceeded with the implementation of the compact without congressional consent. U.S. Steel challenged the states' action. In upholding the constitutionality of the implementation of the compact by the states without congressional consent, the U.S. Supreme Court applied the interpretation of the Compacts Clause from its 1893 holding in *Virginia v. Tennessee*, writing that:

> "the test is whether the Compact enhances state power quaod [with regard to] the National Government."[93]

The Court also noted that the compact did not

> "authorize the member states to exercise any powers they could not exercise in its absence."[94]

Of course, there is always the possibility that the U.S. Supreme Court might change the legal standards concerning congressional consent con-

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

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

[93] *Virginia v. Tennessee.* 148 U.S. 503. 1893.

[94] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 454 at 473. 1978. Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

tained in its 1893 and 1978 rulings. Some have argued, for example, that congressional intervention in what would otherwise be an exclusively state matter might be required if the compacting states exerted some kind of adverse "political" effect on non-compacting states. In a dissenting opinion, U.S. Supreme Court Justice White suggested, in *U.S. Steel v. Multi-State Tax Commission*, that courts could consider the possible adverse effects of a compact on non-compacting states in deciding whether congressional consent is required.

Because each state has independent power to award its electoral votes in the manner it sees fit, it is difficult to see what "adverse effect" might be claimed by one state from the decision of another state to award its electoral votes in a particular way. It is especially unclear what adverse "political" effect might be claimed, given that 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 is, 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 the compact as compared to non-compacting states. 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 certainly would not reduce the voice of voters in non-compacting states relative to the voice of voters in member states.

The electoral votes of non-compacting states would continue to be cast in the manner specified by each state's current law. That means most non-compacting states would probably continue to award their electoral votes based on the winner-take-all rule. The National Popular Vote compact would not invalidate or negate the electoral votes cast by non-compacting states. Nor would it require non-compacting states to cast their electoral votes for the winner of the national popular vote. Non-compacting states could continue to cast their votes for the winner of the statewide popular vote (or district-wide popular vote), even 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.

Of course, it has always been the case that one state (by its choice of method of awarding its electoral votes) can exert a political effect on the value of a vote cast in another state. For example, when a closely divided battleground state, such as Florida, uses the winner-take-all rule, this

choice by Florida diminishes the political value of the votes cast by citizens in the two-thirds of the states that are not battleground states. Because of the use by battleground states of the winner-take-all rule, presidential candidates concentrate their polling, visits, advertising, organizing, and attention on the concerns of battleground states, while ignoring the concerns of the remaining states. In 2004, for example, candidates concentrated over two-thirds of their money and campaign visits in just five states (spending the most in Florida). In 2008, candidates concentrated over two-thirds of their campaign events and ad money in just state, and 98% in just 15 states.[95] The use of the winner-take-all rule by closely divided battleground states marginalizes voters in the non-battleground states. Two-thirds of the states are currently disenfranchised in presidential elections because of the use of the winner-take-all rule by the closely divided battleground states. It is not California's winner-take-all rule or Wyoming's winner-take-all rule that makes votes in these states unimportant in presidential elections. Instead, it is the winner-take-all rule in the closely divided battleground states that diminishes the political value of the votes cast in California and Wyoming.

Florida could, of course, eliminate its current effect on other states by changing its method of awarding its electoral votes. For example, if Florida were to award its electoral votes by congressional district, presidential candidates could then simply ignore all of Florida (except for its competitive 2nd, 10th, 18th, and 22nd districts) and focus their attention on other states. However, under the U.S. Constitution, Florida is clearly under no obligation to make such changes to accommodate other states. Indeed, it is inherent in the Constitution's grant to each state of the independent power to choose the method of appointing its presidential electors that one state's decision may have a political impact on other states.

The U.S. Supreme Court has already 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 1966, Delaware led a group of 12 predominantly low-population states (also 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. The 12 states argued that New

[95] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

York's decision to use the winner-take-all rule effectively disenfranchised voters in the 12 plaintiff states. The pleadings are available online,[96] and New York's (defendant) brief is especially pertinent. Despite the fact that the case was brought under the Court's original jurisdiction, the 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).

The fact that the 1966 case was initiated by predominantly small states reflects the political reality (and recognition by the small states) that each state's bonus of two electoral votes is an illusory benefit to the small states in presidential elections. Only one of the 13 smallest states and only five of the 25 smallest states are battleground states in presidential elections. The political reality is that 12 of the 13 smallest states are almost totally ignored in presidential elections because they are politically non-competitive in presidential elections. Six states (Idaho, Montana, Wyoming, North Dakota, South Dakota, and Alaska) regularly vote Republican, while six others (Rhode Island, Delaware, Hawaii, Vermont, Maine, and the District of Columbia) regularly vote Democratic. These 12 jurisdictions together contain 11 million people. Because of the two-electoral-vote bonus that each state receives, these 12 non-competitive small states have 40 electoral votes. However, Ohio has 11 million people and has "only" 20 electoral votes. The 11 million people in Ohio are the center of attention in presidential campaigns, whereas the 11 million people in the 12 non-competitive small states are irrelevant. In the real world of presidential politics, 20 electoral votes in a battleground state are far more important than 40 electoral votes in spectator states. Nationwide election of the President would make each voter in the 12 smallest states as important as an Ohio voter.

Under the National Popular Vote compact, every voter throughout the United States would be equal. The votes from all 50 states and the District of Columbia would be added together to determine the national popular vote winner. Then, the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia would be guaranteed enough votes in the Electoral College to be elected President by the Electoral College.

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[96] http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php.

The question of congressional consent is discussed in greater detail in chapter 5 of this book.

10.16 MYTH ABOUT THE DISTRICT OF COLUMBIA

10.16.1 MYTH: The National Popular Vote bill would permit the District of Columbia to vote for President, even though it is not a state.

The District of Columbia has had the vote for President since ratification of the 23rd Amendment in 1961.

The 23rd Amendment specifies that presidential electors representing the District of Columbia

> "shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state."

Accordingly, the National Popular Vote bill treats the District of Columbia in the same manner as a state for the purposes of presidential elections.

10.17 MYTHS ABOUT THE 14TH AMENDMENT

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

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

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

The Privileges and Immunities Clause gives each citizen the same protection against abridgments by state governments as each citizen already possessed relative to abridgments by the federal government.

The National Popular Vote bill does not abridge any existing constitutional privilege or immunity. In particular, the people have no federal right to vote for President.[97] The people acquired the vote for President as a result of the enactment by state legislatures of state laws, on a state-by-state basis. In the nation's first presidential election in 1789, only five

[97] Even if there were a federal right to vote for President, the National Popular Vote bill would do nothing to abridge that right.

states permitted the people a vote for presidential electors. Indeed, at the time when the 14th Amendment was ratified (1867), state legislatures still occasionally appointed presidential electors themselves, without a vote by the people (e.g., in 1860, 1868, and then for the last time in 1876). As the U.S. Supreme Court stated in the 1893 case of *McPherson v. Blacker:*

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., what is now called the 'winner-take-all' rule], nor that the majority of those who exercise the elective franchise can alone choose the electors."[98]

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

Section 2 of the 14th Amendment says:

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

Section 2 of the 14th Amendment provides a remedy in the form of reduced congressional representation if any person's right to vote is denied or abridged by any state.

The National Popular Vote bill does not deny or abridge any person's right to vote for any other office. Section 2 manifestly does not preclude a national popular vote for President.

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

Note also that section 2 does not give the voters the right to vote for President. At the time when the 14th Amendment was ratified (1867), some state legislatures were still appointing presidential electors themselves, without a vote by the people (e.g., in 1860 in South Carolina, 1868 in Florida, and 1876 in Colorado). The congressional act providing for Colorado's statehood in 1876 specifically mentioned that the Colorado legislature could appoint the state's presidential electors for the 1876 election. Thus, there were examples of state legislatures appointing presidential electors before, during, and after the time when the 14th Amendment was debated and ratified. As the U.S. Supreme Court stated in the 1893 case of *McPherson v. Blacker:*

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., what is now called the 'winner-take-all' rule], nor that the majority of those who exercise the elective franchise can alone choose the electors."[99]

10.17.3 MYTH: The Due Process Clause of the 14th Amendment precludes the National Popular Vote compact.

The Due Process Clause of the 14th Amendment says:

> "… nor shall any State deprive any person of life, liberty, or property, without due process of law …"

The National Popular Vote bill does not deny any person of life, liberty, or property. Voting for President is not a "liberty" granted by the U.S. Constitution, and it certainly is not "life" or "property."

10.17.4 MYTH: The Equal Protection Clause of the 14th Amendment precludes the National Popular Vote compact.

The Equal Protection Clause of the 14th Amendment says:

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

Some have argued that it is not permissible, under the Equal Protection Clause, for some states to close their polls at 6:00 p.m. while others close at 9:00 p.m; for some states to conduct their election entirely by mail while other states conduct their (non-absentee) voting at the

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

polls; and for some states to permit violent felons to vote while others prohibit it (absent a pardon). However, the U.S. Constitution does not require that the election laws of all 50 states be identical in virtually every respect. In particular, the Equal Protection Clause of the 14th Amendment only restricts a given state in the manner in which it treats persons "within its jurisdiction." The Equal Protection Clause imposes no obligation on a given state concerning a "person" in another state who is not "within its [the first state's] jurisdiction." State election laws are not identical now, nor is there anything in the National Popular Vote compact that would force them to become identical. Indeed, the U.S. Constitution permits diversity of election laws among the states because it explicitly gives the states control over the conduct of presidential elections (article II) as well as congressional elections (article I). The fact is that the Founding Fathers intended, and the U.S. Constitution permits, states to conduct elections in diverse ways.

The National Popular Vote bill does not violate the Equal Protection Clause of the 14th Amendment.

10.18 MYTHS ABOUT THE VOTING RIGHTS ACT

10.18.1 MYTH: Section 2 of the Voting Rights Act precludes the National Popular Vote compact.

The purpose of the Voting Rights Act is to guarantee voting equality throughout the United States (particularly in relation to racial minorities that historically suffered discrimination in certain states or areas). Section 2 of the Act prohibits the denial or abridgment of the right to vote. Section 5 requires certain states (that historically violated the right to vote) to obtain advance approval for proposed changes in their state election laws to ensure that they do not have a discriminatory purpose or effect. The advance approval can be in the form of 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 commonly chosen path).

The National Popular Vote bill manifestly would make every person's vote for President equal throughout the United States in an election to fill a single office (the Presidency). It is entirely consistent with the goal of the Voting Rights Act.

There have been court cases under the Voting Rights Act concerning

contemplated changes in voting methods for various representative legislative bodies (e.g, city councils, county boards). However, these cases do not bear on elections to fill a single office (i.e., the Presidency).

In *Butts v. City of New York*, the United States Court of Appeals for the Second Circuit addressed the question whether the 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."[100]

The court also stated:

> "There is no such thing as a 'share' of a single member office."

The court 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 equality representation and therefore cannot violate the Act."

In *Dillard v. Crenshaw County*, the Eleventh Circuit addressed the question of whether the at-large elected chairperson of the Crenshaw County, Alabama Commission is a single-member office. The office's duties are primarily administrative and executive, but also include presiding over meetings of the commissioners and voting to break a tie. The court stated that it was unsatisfied that

> "The chairperson will be sufficiently uninfluential in the activities initiated and in the decisions made by the commission proper to be evaluated as a single-member office."[101]

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."

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[100] Butts v. City of New York, 779 F.2d 141 at 148 (1985).

[101] Dillard v. Crenshaw County, 831 F.2d 246 at 253 (11th Cir.1987).

In 1989, in *Southern Leadership Conference v. Siegelman*,[103] the U.S. District Court for the Middle District of Alabama distinguished between election of a single judge to a one-judge court and the election of multiple judges to a single Alabama circuit court or judicial court. Preclearance was required when more than one judge was to be elected, but not when one judge was to be elected.

In any event, those who argue that section 2 of the Voting Rights Act precludes the National Popular Vote compact do, however, concede that congressional consent to the National Popular Vote compact would eliminate the basis for any litigation under section 2.

10.18.2 MYTH: Racial minorities would be disadvantaged by a national popular vote.

In fact, the opposite is the case. The current state-by-state winner-take-all system of electing the President (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most popular vote in each separate state) is disadvantageous to racial minorities.

As FairVote's *Presidential Election Inequality* report points out:

> "In the 1976 presidential election, 73% of African Americans were in a classic swing voter position; they lived in highly competitive states (where the partisanship is 47.5%–52.5%) in which African Americans made up at least 5% of the population. By 2000, that percentage of potential swing voters declined to 24%. In 2004, it fell to just 17%."[104]

The current system of electing the President diminishes the political value of every vote in two-thirds of the states. The cause of this diminishment is the state-by-state winner-take-all rule. Presidential candidates have no reason to poll, visit, advertise, organize, or pay attention to the concerns of states where they are safely ahead or hopelessly behind. Candidates concentrate their attention on a small handful of closely divided battleground states. In 2004, candidates concentrated over two-thirds of their money and campaign visits in just five states; over 80% in nine states; and over 99% of their money in just 16 states. As early as the spring of 2008, both major political parties acknowledged that there

[103] Southern Leadership Conference v. Siegelman, 714 F. Supp. 511 at 518 (M.d. Ala.,1989).

[104] Fair Vote. *Presidential Elections Inequality: The Electoral College in the 21st Century.* http://www.fairvote.org/media/perp/presidentialinequality.pdf.

would be only 14 battleground states in 2008 (involving only 166 of the 538 electoral votes).[105] In 2008, candidates concentrated over two-thirds of their campaign events and ad money in just six states, and 98% in just 15 states.[106] In other words, except for fund-raising, two-thirds of the states were ignored under the current system of electing the President in the 2008 election. *Washington Post* columnist David Broder accurately (albeit undiplomatically) referred to the 36 non-battleground states as "unimportant" "throwaway" states.[107]

10.19 MYTHS ABOUT ADMINISTRATIVE OR FISCAL IMPACT

10.19.1 MYTH: The National Popular Vote compact would be costly.

The National Popular Vote bill would not impose any fiscal burden on any state because voting in the presidential election inside each state would be conducted in the same manner as it is today. The only difference is that each state's chief elections officer would use the popular vote total from all 50 states and the District of Columbia (instead of the statewide popular vote total from his or her own state) to ascertain which slate of presidential elector candidates will cast the state's electoral votes.

10.19.2 MYTH: The National Popular Vote compact would complicate the work of local election officials.

The mechanics for counting and tallying votes at the local, county, and state levels would be the same as they are now in presidential elections.

10.19.3 MYTH: The National Popular Vote compact would complicate the work of the state's chief election official.

The National Popular Vote bill would not impose administrative burden on any state because the voting by the people in the presidential election inside the state would be conducted in the same manner as it is now. The only difference is that the statewide official responsible for certifying the election of presidential electors would refer to the popular vote total from all 50 states and the District of Columbia (instead of the statewide popular vote total from his own state) to ascertain which slate of presidential elector candidates will cast the state's electoral votes.

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[105] "Already, Obama and McCain Map Fail Strategies." *New York Times*, May 11, 2008.

[106] http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230.

[107] *Washington Post.* May 7, 2008.

It is important to note that neither the current system nor the National Popular Vote compact permits any state to become involved in judging the election returns of other states. Existing federal law (the "safe harbor" provision in section 5 of title 3 of the United States Code) specifies that a state's "final determination" of its presidential election returns is "conclusive" (if done in a timely manner and in accordance with laws that existed prior to Election Day).

The National Popular Vote compact is patterned directly after the existing federal "safe harbor" provision and would require each state to treat as "conclusive" each other state's "final determination" of its vote for President. No state has any power to examine or judge the presidential election returns of any other state under the National Popular Vote compact.

10.20 MYTHS ABOUT THE MECHANICS OF A NATIONAL POPULAR VOTE

10.20.1 MYTH: There is no official count of the national popular vote.

It is sometimes asserted that there is no official national vote count for President and, therefore, the National Popular Vote bill would be impossible to implement. Contrary to this assertion, existing federal law (section 6 of Title 3 of the United States Code) requires that an official count of the popular vote from each state be certified and sent to various federal officials in the form of a "certificate of ascertainment." Appendices E, F, G, H, and I of this book show the certificates of ascertainment from several states. The certificates of ascertainment from all 50 states and the District of Columbia are available on line for the 2000 and 2004 elections.[108]

10.20.2 MYTH: A single state could frustrate the National Popular Vote compact by making its election returns a state secret.

National Popular Vote has received several e-mails asking a question along the following lines:

> "Couldn't just one small swing state, one that loves the Electoral College and the campaign attention, decide to turn its popular vote totals into a state secret, thereby ruining the pact? What's to stop a state from choosing to count votes behind closed doors?"

[108] For the 2004 presidential election, see http://www.archives.gov/federal-register/electoral-college/2004/certificates_of_ascertainment.html.

Existing federal law (section 6 of Title 3 of the United States Code) requires each state to certify the number of votes cast for each presidential elector prior to the meeting of the Electoral College in mid-December.

> "It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State.…"[109]

Appendices E, F, G, H, and I of this book show the certificates of ascertainment from several states. The certificates of ascertainment from all 50 states and the District of Columbia are available on-line for the 2000 and 2004 elections.[110]

Of course, making election returns secret is not within the realm of the politically possible in the real world. This question assumes that there is a state in the United States whose legislature, governor, and voters would permit making election returns secret because of their strong affection and attachment to the current winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most votes in the state). In fact, a mere 20% of the public supports the current state-by-state winner-take-all system (with 10% undecided). Moreover, there is very little difference in the level of political support for a national popular vote from state to state. Support for a nationwide election for President is 74% in Arkansas, 70% in California, 73% in Connecticut, 71% in Maine, 73% in Massachusetts, 70% in Missouri, 73% in Michigan, 74% in

[109] United States Code. Title 3, chapter 1, section 6.

[110] http://www.archives.gov/federal-register/electoral-college/2004/certificates_of_ascertainment.html.

Rhode Island, 75% in Vermont, and 77% in Washington.[111] More than 70% of the American people have favored a nationwide election for President since the Gallup poll started asking this question in 1944. The 2007 *Washington Post*, Kaiser Family Foundation, and Harvard University poll shows 72% support for direct nationwide election of the President.

10.20.3 MYTH: The Electoral College provides a way to replace a President-Elect who dies, becomes disabled, or is revealed to be manifestly unsuitable after the people vote in November, but before the Electoral College meets in December.

Daniel H. Lowenstein points out that the Electoral College provides a way to replace a President-Elect who dies, becomes disabled, or is revealed to be manifestly unsuitable[112] after the people vote in November, but before the Electoral College meets in December. Lowenstein calls this

> "what might some day turn out to be the Electoral College's greatest benefit."[113]

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

[111] These polls (and many others) are available on National Popular Vote's web site at http://www.nationalpopularvote.com/pages/polls.php#2007WPKHU.

[112] As examples of "unsuitability," Lowenstein hypothesizes the occurrence, *after* Election Day in November, of three scandals that recently occurred just *before* Election Day. The examples include the ethical scandal involving former New Jersey Senator Robert Torricelli in 2002 that occurred shortly before Election Day, the indictment of a Texas congressional nominee in 2006, and a sexual scandal involving a Florida congressional nominee in 2006. The revelation that a President-Elect was the "Manchurian candidate" would be another example.

[113] 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.

> amenable to a party decision, which seems to me the best solution."[114]

The National Popular Vote bill does not abolish the Electoral College. It reforms the method of choosing the presidential electors so that they reflect the choice of all the people of the United States, instead of the choice of the people on a state-by-state basis using the winner-take-all rule. In the hypothesized scenario, the presidential electors would be available to vote for a replacement (presumably the winning party's vice-presidential nominee) under either the National Popular Vote bill or the current system.

10.21 MYTHS ABOUT CONGRESSIONAL OR PROPORTIONAL ALLOCATION OF ELECTORAL VOTES

10.21.1 MYTH: It would be better to allocate electoral votes by congressional district.

Allocating electoral votes by congressional district would increase (not decrease) the number of Americans who are ignored in presidential elections. District allocation would not accurately reflect the nationwide popular vote. District allocation would not make every vote equal. It would make a bad system even worse.

Under the congressional-district approach (as currently used in Maine and Nebraska), the voters elect two presidential electors statewide and one presidential elector for each of a state's congressional districts.

As to competitiveness, in the 2000 presidential election, there were only 55 congressional districts (out of 435 districts) in which the difference between George W. Bush and Al Gore was 4% or less in the district. Similarly, in 2004, there were only 42 congressional districts in which the difference between George W. Bush and John Kerry was 4% or less in the district. That is, only about a tenth of the population of the country lives in a congressional district that is competitive in presidential elections. In contrast, about a third of the country's population currently lives in a state that is competitive in presidential elections. One reason why the congressional-district approach is so much less competitive than the existing statewide winner-take-all approach is that congressional districts

[114] 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

are often gerrymandered in favor of one party or the other in many states. Also, in many states, congressional districts are gerrymandered on a bipartisan basis so that most districts are strongly partisan (thus protecting incumbents of both parties). If electoral votes were allocated by congressional district, state legislatures would have even greater incentives than they now do to gerrymander districts.

As to accurately reflecting the nationwide popular vote, a second-place candidate could easily win the Presidency under the congressional-district approach. If the congressional-district approach had been applied to the results of the 2000 presidential election, then Bush would have received 288 electoral votes (53.3% of the total number of electoral votes), and Gore would have received 250 electoral votes (46.5% of the total). That is, the congressional-district approach would have given Bush a 6.8% lead in electoral votes over Gore in 2000. Nationwide, Gore received 50,992,335 popular votes (50.2% of the two-party popular vote), whereas Bush received 50,455,156 (49.7% of the two-party popular vote). Under the existing system, Bush received 271 electoral votes in 2000 (50.4% of the total number of electoral votes)—a 0.8% lead in electoral votes over Gore. In summary, the congressional-district approach would have been even less accurate than the existing statewide winner-take-all system in terms of reflecting the will of the voters.

In the 2004 presidential election, George W. Bush carried 255 (59%) of the 435 congressional districts, whereas John Kerry carried 180. Bush also carried 31 (61%) of the 51 jurisdictions entitled to appoint presidential electors. If the congressional-district approach had been in place nationwide for the 2004 presidential election, Bush would have won 317 (59%) of the 538 electoral votes in an election in which he received 51.5% of the two-party popular vote.

As to making every vote equal, there is a wide disparity in the number of votes cast in various congressional districts. For example, Wyoming (with a population of 453,588 in 1990) and Montana (with a population of 799,065 in 1990) each had one member in the House of Representatives (and hence three electoral votes). In many states, there is a three-to-one disparity in the number of votes cast in particular districts (due to factors including population changes since the last federal census and the level of turnout).

The congressional-district approach could be implemented in two ways. First, an individual state could decide to allocate its electoral votes

in this manner (as Maine and Nebraska currently do). Second, a federal constitutional amendment could be adopted to implement the system on a nationwide basis. Of course, passing a constitutional amendment requires an enormous head of steam at the beginning of the process (i.e., getting a two-thirds vote in both houses of Congress). There have been only 17 amendments since ratification of the Bill of Rights. The last time that Congress successfully launched a federal constitutional amendment (voting by 18-year-olds) was in 1971.

There is a prohibitive, additional political impediment associated with the adoption of the congressional-district approach on a piecemeal basis by individual states. In 1800, Thomas Jefferson argued that Virginia should switch from its then-existing district system of electing presidential electors to the statewide winner-take-all system because of the political disadvantage suffered by states that divided their electoral votes by districts in a political environment in which other states use the winner-take-all approach:

> "while 10. states chuse either by their legislatures or by a general ticket [winner-take-all], it is folly & worse than folly for the other 6. not to do it."[115] [Spelling and punctuation as per original]

Indeed, the now-prevailing statewide winner-take-all system became entrenched in the political landscape in the 1830s precisely because dividing a state's electoral votes diminishes the state's political influence relative to states employing the statewide winner-take-all approach.

The "folly" of individual states adopting the congressional-district approach on a piecemeal basis is shown by the fact that there were only 55 congressional districts in which the difference between George W. Bush and Al Gore was 4% or less in the 2000 presidential election. Suppose that as many as 48 or 49 states were to allocate electoral votes by district, but that one or two large, closely divided battleground states did not. The one or two state(s) retaining the winner-take-all system would immediately become the only state(s) that would matter in presidential politics. Thus, if states were to start adopting the congressional-

[115] The January 12, 1800 letter is discussed in greater detail and quoted in its entirety in section 2.2.3. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson.* New York: G. P. Putnam's Sons. 9:90.

district approach on a piecemeal basis, each state adopting the approach would increase the influence of the remaining winner-take-all states and thereby decrease the chance that the remaining states would adopt that approach. A state-by-state process of adopting the congressional-district approach would bring itself to a halt.

For more details, see sections 3.3 and 4.2 of this book.

10.21.2 MYTH: It would be better to allocate electoral votes proportionally.

A system in which electoral votes are divided proportionally by state would not accurately reflect the nationwide popular vote and would not make every vote equal.

Every vote would not be equal under the proportional approach. The proportional approach would disadvantage certain states in relation to other states. For example, Montana and Wyoming each have one congressman and three electoral votes. However, Montana has almost three times as many people as Wyoming. The proportional approach would disadvantage fast-growing states because electoral votes are only redistributed among the states after each federal census. The proportional approach would penalize states with high voter turnout (e.g., Oregon).

Moreover, the fractional proportional allocation approach does not ensure election of the winner of the nationwide popular vote. In 2000, for example, it would have resulted in the election of the second-place candidate.

The proportional approach could be implemented in two ways. First, an individual state could decide to allocate its electoral votes in this manner. For example, Colorado voters considered a ballot initiative to do this in 2004 (but rejected it by a 2-to-1 margin). Second, a federal constitutional amendment could be adopted to implement the system on a nationwide basis. There are significant differences between the two approaches.

If a federal constitutional amendment were adopted along the lines of proposals that have been introduced in Congress previously, the electoral votes of each state and the District of Columbia would be divided proportionally according to the percentage of votes (carried out to three decimal places) received in that state by each presidential slate. Such a system would not accurately reflect the nationwide popular vote and would not make every vote equal; however, it would make voters relevant in all 50 states and the District of Columbia.

If, on the other hand, individual states were to adopt the proportional system on a piecemeal basis, the electoral votes would necessarily be rounded off to the nearest whole number. A presidential elector is, after all, a person, and a person's vote cannot be divided into fractions. Absent a constitutional amendment, there is no way for an individual state to introduce fractional voting into the Electoral College. This rounding-off has counter-intuitive effects. In particular, there would be even fewer battleground states under this system than under the current system. This counter-intuitive result comes from the rounding-off to whole numbers. States have an average of only 11 electoral votes (and, in fact, two-thirds of the states have fewer than 11). Thus, one electoral vote would correspond to 9% of the popular vote in a state with 11 electoral votes. One electoral vote would correspond to 33% of the popular vote in a state with three electoral votes. Campaigning is rarely capable of shifting more than 8% of the vote during a typical presidential campaign. Thus, the only battleground states would be those where popular sentiment in the state fortuitously hovers right at the boundary where one electoral vote might be shifted. The vast majority of the states would not be poised anywhere near the boundary point. Thus, presidential campaigns would ignore them. In the states hovering right at the boundary, the only "battle" in these states would be for one electoral vote. That is, the proportional system would be, in effect, a "winner-take-one" system. Among the 50 states and the District of Columbia, California is the only jurisdiction where as many as two electoral votes might be in play under the proportional approach.

The whole-number proportional approach does not accurately reflect the nationwide popular vote and does not ensure election of the winner of the nationwide popular vote. If the whole-number proportional approach had been in use throughout the country in the 2000 presidential election, it would not have awarded the most electoral votes to the candidate receiving the most popular votes nationwide. Instead, the result would have been a tie of 269–269 in the electoral vote, even though Al Gore led by 537,179 popular votes across the nation.

There is a prohibitive, additional political impediment associated with the adoption of the proportional approach on a piecemeal basis by individual states. Any state that enacts the proportional approach on its own would reduce its own influence. This was the most telling argument that caused Colorado voters to agree with Republican Governor Owens

and to reject this proposal in November 2004 by a two-to-one margin. This inherent defect cannot be remedied unless all 50 states simultaneously enact the proportional approach (as would be the case with a constitutional amendment). This inherent defect could not be remedied if, for example, 10, 20, 30, or even 40 states were to enact the proportional system on a piecemeal basis. Suppose that as many as 48 or 49 states were to allocate electoral votes proportionally, but that one or two large, closely divided battleground winner-take-all states did not. The one or two state(s) continuing to use the winner-take-all system would immediately become the only state(s) that would matter in presidential politics. Thus, if states were to start adopting the proportional approach on a piecemeal basis, each additional state adopting the approach would increase the influence of the remaining winner-take-all states and thereby would decrease the chance that the remaining states would adopt the approach. A state-by-state process of adopting the proportional approach would bring itself to a halt.

For more details, see chapter 4 of this book.

10.22 MYTH THAT THE ELECTORAL COLLEGE PRODUCES GOOD PRESIDENTS

10.22.1 MYTH: The Electoral College produces good Presidents.

Daniel H. Lowenstein has argued that there are "11 good reasons"[116] not to change the Electoral College:

> "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."[117]

Although these 11 Presidents were indeed distinguished, Lowenstein does not offer any argument connecting the ascension of these 11 individuals to the Presidency and the winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most votes in the state). Moreover, he does not offer any argument as to why these

[116] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008.

[117] 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.

same talented individuals (or other equally talented individuals) could not have risen to the Presidency without the winner-take-all rule. How, for example, was the winner-take-all rule essential to the emergence of, say, Eisenhower or Reagan?

Lowenstein includes two Presidents on his list who were defeated in the Electoral College by a candidate who received fewer popular votes nationwide, namely Andrew Jackson in 1824 and Grover Cleveland in 1888. Why does Lowenstein credit the Electoral College with success when it elected Jackson in 1828 and Cleveland in 1892, but not acknowledge the failure of the Electoral College when it rejected Jackson in 1824 and Cleveland in 1888?[118]

Moreover, Lowenstein includes three Presidents on his list who were elected before the era when the winner-take-all rule became widespread. Only three states used the winner-take-all rule when George Washington was elected in 1789 and 1792,[119] and only one state used it when Thomas Jefferson was elected in 1800.[120]

Lowenstein also credits the winner-take-all rule for producing Theodore Roosevelt and Harry Truman, even though they each ascended to the Presidency on the death of their predecessor.

Tellingly, Lowenstein's list of 11 Presidents fails to account for the 32 remaining Presidents, including those who were exceedingly corrupt (e.g., Harding, Grant) and those who were mediocre and thoroughly forgettable.

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[118] Lowenstein includes Thomas Jefferson on his list even though the Electoral College defeated Jefferson in 1796.

[119] New Hampshire, Maryland, and Pennsylvania used the winner-take-all rule in the nation's first presidential election (1789) and in the second (1792).

[120] Only Virginia used the winner-take-all rule in the 1800 election. The legislatures of New Hampshire and Pennsylvania directly appointed presidential electors in 1800, and Maryland switched to a district system in 1796.